Federal Court  Cour fédérale

Date: 20231208

Docket: IMM-8797-21

Citation: 2023 FC 1655

Toronto, Ontario, December 8, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

YURII SHARANYCH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of Ukraine. In this judicial review proceeding, he asks the Court to set aside a decision by a Senior Immigration Officer declining to reconsider a decision not to grant him permanent residence 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] Both the reconsideration and the original H&C decision were rendered prior to the commencement of the current hostilities in Ukraine.

[3] For the reasons that follow, I conclude that the reconsideration decision was unreasonable and must be set aside.

I. Events Leading to this Application

[4] The applicant is a citizen of Ukraine. He is divorced and his children live in the Czech Republic. His brother is his only remaining family in Ukraine.

[5] The applicant arrived in Canada to attend a conference in July 2013. He made a refugee claim based on his Roma ethnicity, which was refused in June 2014. The RPD found that the applicant was not Roma.

[6] In 2016, the applicant was diagnosed with end stage kidney disease. He has required dialysis three times a week since his diagnosis. Medical evidence in the H&C application included a letter from the applicant's physician advising that he needed dialysis immediately upon his diagnosis and needs to continue dialysis and all his medications "in order to stay alive".

[7] In April 2017, the applicant applied for permanent residence with an exemption on H&C grounds under *IRPA* subsection 25(1). He relied upon his establishment in Canada and his medical condition. He submitted that he would not be able to obtain treatment in Ukraine, and

would suffer discrimination as a Roma person in attempting to do so. He submitted new evidence to show that in fact he is Roma.

[8] By decision dated December 18, 2020, an officer dismissed the H&C application (the "H&C Decision").

[9] The H&C Decision acknowledged the diagnosis of the applicant's medical condition. Based on an email dated July 31, 2018, the reasons identified two "governmental clinics" in Kyiv at which dialysis treatments "should be provided free of charge". The H&C Decision concluded that the applicant "will be able to avail himself of dialysis facilities in Ukraine". While the officer accepted that the applicant may have to travel to access the services, there was "little information to indicate why the applicant could not relocate closer to such facilities once he returns to Ukraine." The H&C Decision also stated:

> Counsel has also made reference to documentary evidence indicating that sometimes patients are required to pay for medications required for the procedure. In this regard I note the onus is on the applicant to provide the following:
>
> > • Documentary evidence from the applicant's doctor(s) confirming the applicant has been diagnosed with the condition, the appropriate treatment, and that treatment for the condition is vital to the applicant's physical or mental wellbeing; and
> >
> > • Confirmation from the relevant health authorities in the country of origin attesting to the fact that an acceptable treatment is unavailable in the applicant's country of origin.
>
> The onus remains on the applicant to provide the foregoing information and provide a linkage to the H&C factors advanced in this application. I acknowledge the evidence indicating the applicant's medical diagnosis in Canada and I also accept the

> country documentation which speaks of the various challenges in accessing health care in Ukraine. I find a scarcity of information to indicate any formal applications or inquiries which are connected to the applicant's personal health considerations in the context of accessing treatment in Ukraine. In this regard I find the applicant has not discharged the onus.

[10] The H&C Decision did not immediately reach the applicant or his counsel. After it did in May 2021, I understand that the applicant filed an application for leave and judicial review of the H&C Decision, but ultimately did not perfect the application by filing an application record.

[11] Meantime, by letter dated June 14, 2021, the applicant requested that the officer reconsider the H&C Decision.

[12] The request for reconsideration advised that the officer had jurisdiction to do so and quoted the following paragraph from *Xu v. Canada (Citizenship and Immigration)*, 2018 FC 9, at paragraph 9:

> A decision denying an application for permanent residence may be reconsidered in appropriate circumstances (*i.e.*, the doctrine of functus officio does not apply) but, except in circumstances of bad faith, there is no obligation to so reconsider*: Malik v Canada (Citizenship and Immigration)*, 2009 FC 1283 at para 44. Upon receiving a request to reconsider such a decision, the immigration officer's obligation is to consider, taking into account all relevant circumstances, whether to exercise the discretion to do so: *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 5.
>
> [Original emphasis.]

[13] The applicant's reconsideration request relied on new evidence, including information about the availability of medical treatment including dialysis in Ukraine. The applicant filed a

new letter from a Roma friend from Ukraine whom he had known since the 1990s. The applicant's position for reconsideration was that the letter contradicted the RPD's conclusion on his Roma ethnicity and supported the conclusion that the applicant was extremely unlikely to receive the necessary medical care in Ukraine, due to unavailability and unaffordability which was exacerbated by his Roma identity.

[14] By decision dated November 12, 2021 (the "Reconsideration Decision"), the officer denied his request for reconsideration. On his alleged Roma ethnicity, the decision considered a letter from the Roma Community Centre and a letter from an organization of Ukrainian communities. It did not acknowledge or assess the newly-filed letter from the Roma friend. The Reconsideration Decision found that after reviewing the documents mentioned, there was insufficient evidence to overcome the RPD's conclusion that the applicant was not Roma.

[15] On the evidence related to the applicant's medical condition, the Reconsideration Decision stated:

> Counsel has made reference to the fact that there is no possibility for the applicant to receive adequate care if returned to Ukraine. It is submitted that the dialysis services are far from the applicant's home and require lengthy travel 3 times a week. I note these factors were considered in the H&C decision.
>
> Counsel submits that there is evidence that patients need to pay for services. I accept the submissions which indicate that patients have to pay for some medical services in Ukraine. I find the information is general in nature and does not speak to the applicant's specific circumstances. There is little evidence to indicate what steps if any the applicant has pursued to inquire about accessing dialysis treatment for himself in Ukraine, including but not restricted to the two hospitals in Kyiv, and any possible associated costs.

> Based on the foregoing, the initial decision to refuse the H&C application remains unchanged.

II. Analysis

A. *Legal Principles – Reasonableness Review*

[16] The central question on this application is whether the Reconsideration Decision was reasonable: *Katumbus v. Canada (Citizenship and Immigration),* 2022 FC 428, at para 10; *A.B. v. Canada (Citizenship and Immigration),* 2021 FC 1206, at para 18; *Hussein v. Canada (Citizenship and Immigration),* 2018 FC 44, at para 32.

[17] 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; *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21, at paras 8, 63. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov,* esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61; *Mason,* at paras 8, 59-61, 66.

B. ***Legal Principles – Reconsideration Decisions***

[18] An officer who has made a decision, including an H&C decision, has jurisdiction to reconsider the decision on the basis of new evidence or further submissions: *Katumbus*, at para 11; *Jang v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 996, at para 15; *Canada (Citizenship and Immigration) v. Kurukkal*, 2010 FCA 230, at para 5. The principle of *functus officio* does not apply: *Kurukkal*, at para 5.

[19] There is no general obligation to reconsider a decision upon receipt of new information: *A.B.*, at para 22; *Ghaddar v. Canada (Citizenship and Immigration)*, 2014 FC 727 at para 19.

[20] Upon receiving a request for reconsideration, an H&C officer must consider whether, taking all of the relevant circumstances into account, he or she should exercise the discretion to reconsider an earlier H&C decision: *Jang*, at para 15; *Kurukkal*, at para 5.

[21] The process involves two stages: first, the officer must decide whether to "open the door to a reconsideration"; and, if the officer decides to re-open the case, the second stage involves an actual reconsideration of the original decision on its merits: *A.B.*, at para 21; *Hussein*, at para 55.

[22] The applicant has the onus to show that reconsideration is warranted. The existing case law has found that the circumstances that warrant the exercise of discretion include that it is in the "interests of justice" or because of the unusual circumstances of the case: *Katumbus*, at para 11; *Hussein*, at paras 57, 59; *Ghaddar*, at paras 19, 21.

C. ***Application of Legal Principles***

(1) The first stage decision: whether or not to reconsider the H&C Decision

[23] At the outset of the Reconsideration Decision, the officer referred expressly to *Kurukkal* and purported to quote the Federal Court of Appeal in that case as follows:

> Reconsideration requests are intended to point decision-makers to something that may have been missed during the original assessment. Reconsideration requests are not a mechanism for the applicant to re-argue his case in an attempt to address shortcomings identified in his original refusal.

[24] This passage does not appear in *Kurukkal*. In addition, the first sentence misstated the scope of the officer's jurisdiction. The Federal Court of Appeal in *Kurukkal* did not limit an officer's decision to matters that were "missed" in the original assessment. While such matters may well fall within the scope of an officer's jurisdiction as a basis to re-open a prior decision, missed matters are not coextensive with matters that warrant reconsideration "in the interests of justice" or due to "unusual circumstances". The latter concepts are broader. In addition, matters that were "missed" in the original assessment but are inconsequential presumably do not warrant the exercise of an officer's jurisdiction to reconsider.

[25] The Reconsideration Decision therefore analyzed the reconsideration request using a legal test that was at least partly erroneous. It is not necessary to comment on the second sentence from the purported *Kurukkal* quotation to reach a conclusion in this case.

[26] As noted, at stage one, a reconsideration decision must take “all of the relevant circumstances into account” in deciding whether to re-open the prior decision. This point was put to the officer in the quotation from *Xu.* I agree with the applicant that the Reconsideration Decision did not identify or assess the letter from his Roma friend in Canada who knew him in Ukraine. It was relevant to his claim of Roma ethnicity, as it confirmed that they had participated in Roma events and celebrations together in Ukraine. I also agree in part with the applicant’s submission that the officer did not address his submission that the officer had ignored his argument that there was no universal health care in Ukraine. The applicant submitted that he would have to pay for his dialysis treatments and he could not afford to do so. On this issue, the officer did address, briefly, his submission and some of the evidence he filed relating to patients having to pay for care in Ukraine. The officer concluded that this information was “general in nature and [did] not speak to the applicant’s specific circumstances”. It is not clear from the expressed reasons whether the officer considered the evidence related to the availability of dialysis.

[27] In my view, the salient question is whether the Reconsideration Decision only considered whether to re-open the prior H&C Decision at stage one, or in fact ventured into the merits of the H&C application. As in *Katumbus,* it appears that the officer attempted to focus on stage one by not finding that a reconsideration was warranted and concluding that the initial decision to refuse the H&C application remained unchanged (which was the stage one language mentioned in *Tanyanyiwa v. Canada (Citizenship and Immigration),* 2023 FC 559, at para 21). However, the Reconsideration Decision did revisit and weigh some of the evidence on the applicant’s Roma ethnicity. The officer found insufficient evidence to overcome the RPD’s finding that the

applicant was not Roma – without recognizing the existence of the new evidence of the friend's letter on this issue. In addition, the Reconsideration Decision engaged with some of the medical and objective evidence about patients having to pay for care in Ukraine, and drew a conclusion about it.

[28] While the matter is not free from doubt, I am persuaded that the Reconsideration Decision did enter into the stage two analysis for reconsideration: see *Katumbus*, at paras 17, 19; *A.B.*, at para 31.

(2) The reasonableness of the Reconsideration Decision

[29] Having engaged with the merits of the H&C application, the Reconsideration Decision had to conduct an H&C assessment that was reasonable under *Vavilov* and the applicable case law including *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909.

[30] The following points lead me to conclude that the Reconsideration Decision should be set aside and returned for redetermination.

[31] First, the Reconsideration Decision considered the request for reconsideration through the lens of the mistaken quotation from *Kurukkal*, and specifically whether anything had been missed in the prior H&C Decision. That was not the proper approach at stage two of a reconsideration decision. The officer should instead have conducted a full reconsideration of the H&C application with all of the evidence, analyzed together: *Katumbus*, at para 19; *A.B.*, at para

30; *Shakes v. Canada (Immigration, Refugees and Citizenship),* 2022 FC 102, at paras 34-37**.** Doing so is consistent with the requirements of H&C applications, as confirmed in *Kanthasamy,* at paragraph 25.

[32] Second, to challenge the reasonableness of the Reconsideration Decision, the applicant submitted that the Reconsideration Decision contained several reviewable errors, including:

a) Like the H&C Decision, the Reconsideration Decision failed to consider the applicant's medical circumstances not only as a matter of hardship but also as a compassionate factor, as required by *Kanthasamy*.

b) The Reconsideration Decision found insufficient evidence to overcome the RPD's finding that he was not Roma, but ignored and failed to assess the friend's letter, which the applicant characterized as the "most compelling corroborative evidence" that supported the applicant's Roma ethnicity.

c) The officer erred in finding that the objective evidence about the availability of medical treatment in Ukraine was "general in nature" and did not speak to his specific circumstances. The applicant pointed to specific information about the availability and affordability of dialysis treatments in the record before the officer on reconsideration, including information that only one in four (or in another source, only 10-15%) of individuals who need dialysis treatments were able to get them in Ukraine. The applicant submitted that the officer did not fully engage with the evidence about the realities of obtaining medical care in Ukraine (including the real costs, which included bribes to get services). The applicant's position was that he could not afford to pay for treatments in Ukraine.

[33] While I do not adopt all of the applicant's submissions on these three issues, I am persuaded that the merits of these arguments cumulatively undermine my confidence in the reasonableness of the Reconsideration Decision. Given what I have already stated about the applicant's evidence and submissions, I do not propose to analyze each of these arguments in detail.

[34] I will emphasize, as the applicant noted, that the H&C Decision did not dispute the applicant's medical diagnosis or the necessity of his weekly treatment regimen: see *Kanthasamy*, at paras 46, 48. The applicant's position, supported by evidence from his physician, was that he would die without those treatments. The seriousness of the applicant's situation, and the relevance of his arguments to hardship and as a compassionate factor on his H&C application, were plain: *Vavilov,* at para 133; *Mason,* at para 81. The obligation to provide responsive justification on the reconsideration was prominent in the present circumstances.

[35] Rather than engaging directly with the applicant's argument and the related evidence about the scarcity of dialysis treatment in Ukraine, the Reconsideration Decision simply "accept[ed] the submissions which indicate that patients have to pay for some medical services in Ukraine", found without elaboration that the evidence was "general in nature", and reiterated the prior focus on the two specific proposed clinics at which treatments "should" be provided free of charge. The officer presumably expected that the applicant would show that he could not actually obtain treatment at the two dialysis facilities at the children's and military hospitals in Kyiv. (It also appears that the applicant had an opportunity to do so, as a procedural fairness letter provided him with the information about the clinics in Kyiv prior to the H&C Decision.

Unfortunately, the record in this proceeding does not appear to include the full record leading to the H&C Decision so it is not clear how the applicant responded.)

[36] The applicant's reconsideration request emphasized that the H&C Decision ignored an important hardship argument. The anticipated hardship arose from the unavailability or unaffordability of the life-sustaining dialysis treatments he required three times each week when only a small proportion of individuals requiring dialysis were actually receiving it in Ukraine. In the face of that position, it is reasonable to expect either responsive reasoning on the merits, or confirmation that the argument and evidence had already been considered (as should appear in the reasoning in the previous decision). In my view, more was required in the present circumstances to be adequately responsive, lest the applicant, and the Court, infer that the officer ignored the same point twice. Reading the reasons on reconsideration, it is fair to ask how the officer remained satisfied that the mere existence of these two clinics, which "should" provide dialysis treatments "free of charge", addressed the applicant's concerns about the hardship he expected to experience in Ukraine.

[37] How to weigh the evidence in the circumstances, and whether the applicant's H&C application should succeed or not, will be matters for redetermination.

III. Conclusion

[38] For these reasons, I conclude that the Reconsideration Decision was unreasonable and must be set aside. The matter will be returned to another officer for redetermination of the reconsideration request.

[39] Neither party identified a question to certify for appeal and none arises.

JUDGMENT IN IMM-8797-21

THIS COURT ORDERS THAT:

1. The application is allowed. The reconsideration decision dated November 12, 2021, is set aside. The request for reconsideration is returned for determination by another officer.
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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