Federal Court  Cour fédérale

Date: 20240816

Docket: IMM-10987-23

Citation: 2024 FC 1282

Ottawa, Ontario, August 16, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

YEVHEN DZIUBENKO, TETIANA FREILIK, IVANNA DZIUBENKO OLEKSII DZIUBENKO AND MAIIA DZIUBENKO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, a husband, wife and two minor children, are Ukrainian citizens who came to Canada fleeing the Russian invasion of Ukraine. They are currently in Canada with valid temporary status until 2025. They seek judicial review of a decision dated August 15, 2023, made by a Senior Immigration Officer [Officer] at Immigration, Refugees and Citizenship Canada, refusing their application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [*IRPA*]. In support of their application, the Applicants relied on their establishment in Canada, the Russian invasion of Ukraine, the psychological trauma resulting from their personal experiences during the invasion and the best interests of the minor children.

[2] 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 H&C considerations. An H&C determination under subsection 25(1) of the *IRPA* is a global one, where all the relevant considerations are weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 28; *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 at para 10].

[3] The sole issue for determination by this Court is whether the Officer's decision was reasonable.

[4] The parties agree, and I concur, that the applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy, supra* at para 44]. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 8, 59]. 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 [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adeniji-Adele v Canada (Citizenship and Immigration)*, 2020 FC 418 at para 11, citing *Vavilov, supra* at para 100].

[5] While the Applicants assert that the Officer's decision is unreasonable on a number of grounds, I find that the determinative issue is the Officer's unreasonable consideration of the administrative deferral of removal [ADR] in place for Ukraine vis-à-vis their best interests of the children [BIOC] analysis and overall weighing of the various factors.

[6] The existence of an ADR does not automatically result in a positive H&C application [see *Ndikumana v Canada (Citizenship and Immigration)*, 2017 FC 328 at para 18; *Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 at para 40; *Elshafi v Canada (Citizenship and Immigration)*, 2023 FC 266 at para 27]. However, the existence of an ADR cannot be used to deny or side-step humanitarian relief on the basis that an applicant is not facing immediate involuntary removal from Canada [see *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 at paras 16-17; *Al-Abayechi v Canada (Citizenship and Immigration)*, 2022 FC 873 at para 15; *Elshafi, supra* at para 17].

[7] In the hardship analysis section of their reasons for decision, the Officer gave positive weight to the Russian invasion, which was reasonable and appropriate given that the ADR demonstrates Canada's view that current conditions in Ukraine pose a generalized risk to the entire civilian population [see *Dulne v Canada (Citizenship and Immigration)*, 2023 FC 1736 at para 18].

[8] However, the Officer went on to find in their BIOC analysis that while it is "definitely contrary to the children's best interests" to return to Ukraine during the invasion, a negative H&C decision would not mean an immediate return to Ukraine due to the Applicants' temporary status in Canada. The Officer found that there was "little evidence" to suggest that staying in Canada as temporary residents would be contrary to the children's best interests and ultimately gave the BIOC consideration neutral weight. I find that the Officer erred in their BIOC analysis by focusing on the children's temporary immigration status in Canada when weighing the BIOC factor, rather than on what was actually in the children's best interests (which the Officer had found was definitely not to return to Ukraine) [see *Elshafi, supra* at para 35].

[9] Further, the Officer stated in the conclusion section of their reasons that "**I must emphasize the ADR is not viewed as a negative factor** in this application, it is only seen as a mitigating factor to the considerations [the Applicants] raised" [Emphasis in original]. Contrary to that statement however, the temporary status of the children in Canada (both through their existing temporary status and the ADR) was clearly used by the Officer to downgrade an otherwise positive weight BIOC determination to a neutral weight BIOC determination, which certainly had a negative impact on the application.

[10] Moreover, I find that the Officer's use of the ADR as a mitigating factor, and their focus on whether the temporary relief of the ADR was insufficient for their current needs, reveals a logical fallacy which this Court has previously found to be problematic [see *Al-Abayechi, supra* at paras 13-14; *Bawazir, supra* at para 17]. As noted by Justice O'Reilly in *Al-Abayechi*, the result of the Officer's approach is that while the Applicants face a real risk in Ukraine (due to the war as acknowledged by the issuance of the ADR), they should nevertheless return to Ukraine to apply for permanent residence. Put differently, while the Applicants do not have to leave Canada while the ADR is in place, they must do so if they wish to obtain permanent resident status in Canada. These reasons do not reflect that the Officer considered the consequences of their decision on the Applicants, which is an error. Further, I agree with the comment made by Justice Norris in *Bawazir* that "a reasonable and fair-minded person would judge the requirement that [they] leave Canada to go to a war zone where a dire humanitarian crisis prevails so that [they] could apply for permanent residence as a misfortune potentially deserving of amelioration" [see *Bawazir, supra* at para 17].

[11] I simply cannot find as reasonable a decision that uses the existence of an ADR to mitigate the strength of the Applicants' H&C application. Accordingly, the application for judicial review is allowed, the decision is set aside and the matter is remitted to a different officer for redetermination. Prior to the redetermination, the Applicants shall be given an opportunity to provide updated submissions and documentation in support of their application.

[12] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-10987-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated August 15, 2023, refusing the Applicants' application for permanent residence based on humanitarian and compassionate grounds is set aside and the matter is remitted back to a different officer for redetermination. Prior to the redetermination, the Applicants shall be given an opportunity to provide updated submissions and documentation in support of their application.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Arthur Yallen	FOR THE APPLICANTS
Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Yallen Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT