

Federal Court



Cour fédérale

Date: 20121210

Docket: IMM-2600-12

Citation: 2012 FC 1457

Ottawa, Ontario, December 10, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ALEXEY AVERIN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2007, Mr Alexey Averin arrived in Canada from Ukraine as a visitor. He applied unsuccessfully for refugee status.

[2] After his refugee claim was turned down, Mr Averin experienced a series of unfortunate events. He was involved in two car accidents leaving him with physical limitations and mental

health issues. His physicians have diagnosed him with major depression, post-traumatic stress disorder, and a severe phobia of being in a car. He requires many different medications. He relies on social assistance and his family members in Canada.

[3] In November 2011 Mr Averin attempted to hang himself. His neighbours saved him. While in hospital, with his mother's help, Mr Averin applied for a pre-removal risk assessment (PRRA). He alleged that he would not be able to obtain or afford proper medical treatment in Ukraine, and that there was a "grave situation regarding the treatment of mentally ill patients" there. With his application, he filed his medical records and documentary evidence about the availability of mental health care in Ukraine.

[4] The PRRA officer regarded Mr Averin's application as based solely on a concern about receiving adequate health care in Ukraine, which is not a proper basis for a PRRA application. Subparagraph 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] specifically states that a person can receive protection in Canada against a risk of cruel and unusual treatment or punishment, but not where that risk is "caused by the inability of that country to provide adequate health or medical care" (see Annex). Accordingly, the officer dismissed Mr Averin's application.

[5] Mr Averin argues that the officer failed to appreciate that his application was not based only on the inadequacy of medical care for mentally ill patients in Ukraine. He also expressed concern about the treatment of persons experiencing mental health challenges more generally. Mr Averin contends that the officer's decision was unreasonable because it failed to address that concern and to

consider the documentary evidence supporting it. He asks me to quash the officer's decision and order another officer to reconsider his application.

[6] I agree that the officer's decision was unreasonable and must, therefore, allow this application for judicial review. Given my conclusion on that issue, I need not deal with Mr Averin's argument that the officer erred in other respects.

II. The Legal Framework

[7] As mentioned, a PRRA application cannot be based on a claim that the applicant's country of origin is unable to provide adequate medical care. The Federal Court of Appeal has described this as a broad limitation: *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, at para 31. However, it also recognized that some claims of cruel and unusual treatment or punishment based on the availability of medical care may fall within s 97. Where an applicant can show on the balance of probabilities that "there is an illegitimate reason for denying [health or medical] care, such as prosecutorial reasons, that may suffice to avoid the operation of this exclusion" (at para 41). For example, where a state refuses to provide medical care to persons with HIV/AIDS, an applicant may have a valid claim for protection (at para 39). However, these cases will be "rare" (at para 31).

[8] It is clear that applicants who argue that they simply cannot afford to access medical care in their countries of origin will fail. Applicants must show that their application falls within the narrow range of medically-based claims that fall outside the broad exclusionary clause in s 97(1)(b)(iv).

III. Was the officer's decision unreasonable?

[9] Mr Averin clearly raised the issue whether he would be able to afford to buy medication and access mental health treatment in Ukraine. It is equally clear that his PRRA application could not succeed on that basis.

[10] However, that is not the only issue he put forward. He expressed concern about the harsh treatment of the mentally ill in Ukraine. He backed up that concern with documentary evidence showing that inhumane treatment of the mentally ill in psychiatric hospitals is common. Patients are frequently abused. While the officer observed that Ukraine has laws prohibiting discrimination against people with mental disabilities, he failed to note that those laws are not enforced.

[11] In my view, Mr Averin's submissions and supporting documents provided a sufficient basis for considering whether his was one of those rare cases where an applicant could succeed on a PRRA application notwithstanding that it was based on a concern about medical care. Obviously, discriminatory treatment and abusive conduct cannot be considered legitimate reasons for Ukraine's inability to provide adequate medical care to the mentally ill. The officer simply did not consider the evidence on that issue.

[12] Given that failure, I must conclude that the officer's decision was unreasonable. It did not represent a defensible outcome based on the documentary evidence before the officer that supported Mr Averin's application and the state of the law on s 97(1)(b)(iv).

IV. Conclusion and Disposition

[13] The officer failed to consider whether Mr Averin's PRRA application fell within s 97, notwithstanding that it was based on a concern about the treatment of the mentally ill in Ukraine. Therefore, his decision that Mr Averin's application fell within the exclusionary rule in 97(1)(b)(iv) was unreasonable. I must allow this application for judicial review and order another officer to reconsider Mr Averin's application.

[14] The parties requested an opportunity to provide submissions regarding a certified question of general importance. I will consider any submissions filed within 10 days of the issuance of this judgment.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is referred back to another officer for reconsideration.
2. The Court will consider any submissions regarding a certified question that are filed within ten (10) days of the issuance of these reasons.

“James W. O’Reilly”

Judge

Annex

***Immigration and Refugee Protection Act SC
2001, c 27***

***Loi sur l'immigration et la protection des
réfugiés, LC 2001, ch 27***

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

...

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

...

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

[...]

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

[...]

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2600-12

STYLE OF CAUSE: ALEXEY AVERIN
v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 19, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: December 10, 2012

APPEARANCES:

Geraldine MacDonald FOR THE APPLICANT

Nadine Silverman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Geraldine MacDonald FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario