

Federal Court



Cour fédérale

Date: 20250506

Docket: IMM-3731-23

Citation: 2025 FC 819

Ottawa, Ontario, May 6, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

TETYANA KIVER

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Tetyana Kiver, seeks judicial review of the decision refusing her application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The Applicant is a 68-year-old widow and a citizen of Ukraine who used to live in the Donetsk region of that country. She worked as a cardiologist and remained in Donetsk after the

Russian occupation of that region in 2014. The Applicant has one daughter, who moved to Canada after the Russian invasion and has now obtained Canadian citizenship. The daughter has a son (the Applicant's grandson) who she is raising as a single parent. The Applicant's husband died of cancer in 2019, leaving her with no immediate relatives in Ukraine.

[3] The Applicant came to Canada in April 2022 on a Super Visa, and she received an open work permit which is valid until September 2025. In October 2022, the Applicant applied for permanent residence on H&C grounds, but her application was denied on March 9, 2023. The Applicant seeks judicial review of this decision.

[4] The only issue is whether the H&C refusal is reasonable. This is assessed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], and confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[5] In summary, under the *Vavilov* framework, a reviewing court is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints (*Vavilov* at para 85). The onus is on the Applicants to demonstrate that “any shortcomings or flaws ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100). Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker (*Vavilov* at para 125).

[6] At the outset of the hearing, the Applicant raised a new issue. She submitted that the Officer's decision was unreasonable because it failed to consider the Administrative Deferral of Removal (ADR) that Canada put in place for the Ukraine. This was not raised in the Applicant's application for leave and judicial review, or in her written submissions. The Respondent vigorously objected, arguing that the Court should not exercise its discretion to consider a new issue raised for the first time at the hearing. Both parties made written submissions on this question after the hearing.

[7] For the reasons explained below, I will not consider the ADR question. The Applicant was fully aware of the ADR at the time she sought leave, and her counsel could have mentioned it in the materials as another ground to find the decision unreasonable. The ADR in place for Ukraine had been discussed in decisions issued before the hearing in this case: *Dziubenko v Canada (Citizenship and Immigration)*, 2024 FC 1282 (issued August 16, 2024). Based on this, the Applicant could have put the Respondent and the Court on notice of her intention to rely on this ground even though it was not raised in her written submissions. She did not do that. I agree with the Respondent that it is both unfair and inappropriate to raise it for the first time at the hearing, with no prior notice: *Tehranimotamed v Canada (Citizenship and Immigration)*, 2024 FC 548 at para 12. I will therefore not consider the ADR issue as a basis to find the decision to be unreasonable.

[8] With that, I turn to consider the substance of the parties' arguments. At the outset, it is important to recall that the Applicant filed her H&C application pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This provision allows

individuals to apply for permanent residence from within Canada in some circumstances. This is an exception to the general rule that people must submit their request before coming to Canada: s 11 of IRPA.

[9] The exceptional nature of H&C relief has, at times, led decision-makers astray. In my view, the proper approach is set out by Justice Zinn in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482:

[23] There is a significant difference between observing that this exceptional relief is provided for because the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available only to those who demonstrate the existence of misfortunes or other circumstances that are exceptional relative to others. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there [emphasis in original].

[10] The framework for analyzing a request for H&C relief was clarified in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61. Justice Norris provided the following helpful summary of the law in *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [Bawazir]:

[9] In *Kanthasamy*, the Supreme Court of Canada endorsed an approach to section 25(1) that is grounded in its equitable underlying purpose. The discretion enacted in the provision is meant to provide flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Justice Abella, writing for the majority, approved of the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, where it was held that H&C considerations refer to “those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes ‘warrant the granting of special relief’ from

the effect of the provisions of the *Immigration Act*” (Kanthasamy at para 13).

[11] Turning to the present case, the Applicant’s H&C request rested on several core elements:

- the best interests of her grandson (BIOC), considering the bond she had developed with him during her time in Canada, and the assistance she was able to provide to her daughter who is raising the child as a single parent;
- the extreme hardship and deprivation she would face upon a return to the Donetsk region of Ukraine, which had now been annexed by Russian occupying forces;
- her inability to obtain medical care in Ukraine, in particular the absence of any treatment for her severe depression, which had been diagnosed by a Canadian doctor and for which she was receiving ongoing treatment and monitoring here;
- the fact that her only immediate family is in Canada.

[12] The Officer assessed some of these elements, but a strong theme that runs through the decision is that the positive factors were given less weight because the Applicant did not face an immediate risk of having to return to Ukraine, owing to her Super Visa and work permit (valid until September 2025). Therefore, the Applicant did not face the immediate prospect of returning to the Ukraine if her H&C application was denied. For example, the Officer placed positive

weight on the Applicant's family ties in Canada but found that she could continue to visit using her Super Visa even if her daughter decided to sponsor her in the future.

[13] While the Officer acknowledged that the Applicant had been unable to obtain health care in Ukraine, this was given little positive weight because "there is little evidence submitted to suggest [the Applicant] plans to return to Ukraine immediately, therefore she can continue to access our Canadian healthcare system until 2025." In a similar vein, in assessing the BIOC factor, the Officer found it to be "neutral" largely because the Applicant was authorized to remain in Canada until September 2025.

[14] Moreover, the Officer also noted that the Applicant previously worked in Ukraine as a cardiologist, and that she owned a home worth about \$80,000 CAD. However, despite the Applicant's submissions, the Officer appears to have failed to appreciate the fact that the home is located in the Donetsk region now under Russian occupation, which diminished its value and made it practically impossible for the Applicant to sell it to recoup her money.

[15] The Officer's reasoning is captured in the following passage, set out in the Conclusion:

I acknowledge that [the Applicant] does not wish to leave Canada. It is understandable that she does not want to return to a country that is currently at war. I note it is unclear how the situation in Ukraine will turn out and it is speculative to guess what would happen in 2025. Fortunately, she is authorized to live and work in Canada until at least 2025-09-26. Canada has provided the temporary stability for her to continue on with her life. I note the temporary residence status should greatly mitigate her worries about being forced to return to Ukraine. In addition, CBSA has an administrative deferral of removals (ADR) in place for Ukraine, and therefore, it further ensures Tetyana will not be forced to

leave. There is little corroborative evidence submitted to explain why temporary residence status is inadequate for her current needs.

[16] In my view, this analysis is simply wrong-headed. It fails to apply the proper test. The following comment by Justice Norris in *Bawazir* at para 17 applies with equal force to the present case:

In my view, a reasonable and fair-minded person would judge the requirement that [the Applicant] leave Canada and go to a war zone where a dire humanitarian crisis prevails so that [she] could apply for permanent residence as a misfortune potentially deserving of amelioration.”

[17] Denying the Applicant’s H&C application on the basis that the harms and risks she alleged would not immediately befall her fails to apply the proper approach to the analysis. It bears repeating that the Applicant faced the prospect of having to return to Ukraine, with no certain prospect of ever being able to return to Canada. The Officer mentions the situation in Ukraine but fails to grasp the Applicant’s submissions and evidence on the practical realities of life there during the war.

[18] It may be that the Officer thought that the Applicant’s H&C request should be denied because she could file a subsequent one, on the eve of the end of her Super Visa and work permit. If that was the basis for the Officer’s analysis, it is unreasonable because it fails to grapple with the key question of whether the Applicant’s situation – at the time of her application – cried out for relief from the usual exigencies of the law.

[19] For the reasons set out above, the decision is unreasonable and will be quashed and set aside. The Applicant’s H&C application will be remitted for reconsideration by a different

decision-maker. In view of the passage of time, the Applicant shall be permitted to provide updated evidence and fresh submissions, if she wishes to do so.

[20] There is no question of general importance for certification.

JUDGMENT in IMM-3731-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision refusing the Applicant's application for permanent residence on humanitarian and compassionate grounds is quashed and set aside.
3. The matter is remitted back for reconsideration by a different decision-maker.
4. The Applicant shall be granted the opportunity to submit updated evidence and fresh submissions, if she wishes to do so.
5. There is no question of general importance for certification.

"William F. Pentney"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3731-23

STYLE OF CAUSE: TETYANA KIVER v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: OCTOBER 8, 2024

JUDGMENT AND REASONS: PENTNEY J.

DATED: MAY 6, 2025

APPEARANCES:

Aleksei Grachev	FOR THE APPLICANT
Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT