

Federal Court



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Date: 20190131

Docket: IMM-1821-17

Citation: 2019 FC 136

Ottawa, Ontario, January 31, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

NADIYA MELNYKOVA

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Nadiya Melnykova [Ms. Melnykova] seeks judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of an April 24, 2017 decision by a Canada Border Services Agency [CBSA] Enforcement Officer [the Officer] refusing to defer her removal to Ukraine [the Decision].

[2] Ms. Melnykova sought the deferral on grounds that included her medical condition, risks to her in Ukraine, and Humanitarian and Compassionate [H&C] considerations including that she has a pending H&C spousal application.

[3] For the reasons that follow, this application is dismissed.

II. **Background Facts**

A. *Chronology of Events*

[4] Ms. Melnykova is a 64 year old citizen of Ukraine who came to Canada as a visitor in July 2004. She stated that she was fleeing the domestic abuse of her former husband. In June 2007 Ms. Melnykova made a claim for refugee protection which was refused on May 12, 2009 because the Refugee Protection Division [RPD] did not find her story credible. Leave for judicial review was not granted.

[5] Ms. Melnykova then received a Pre-Removal Risk Assessment [PRRA], dated November 3, 2010, that found that she would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Ukraine. The PRRA Officer considered Ms. Melnykova's allegations of domestic violence and her mental health. After reviewing the evidence and considering the country condition documents submitted with the application, the Officer concluded that Ms. Melnykova had not presented any new evidence of the risk that had already been determined by the RPD.

[6] Ms. Melnykova applied for an inland H&C application that was refused on February 12, 2014. It appears from the record that another H&C application was applied for on June 2, 2015 and was refused on September 25, 2015.

[7] On July 12, 2014 Ms. Melnykova married a Canadian permanent resident, Mykhaylo Yakymiv. She met Mr. Yakymiv in 2012 and they began living together in 2013. Mr. Yakymiv, like Ms. Melnykova, was born in Ukraine. She also has three adult children who live in Ukraine.

[8] Ms. Melnykova allegedly submitted a spousal sponsored H&C application in May 2016; however, Immigration, Refugees and Citizenship Canada [IRCC], formerly Citizenship and Immigration Canada [CIC], has no record of that application. For this reason Ms. Melnykova submitted her spousal sponsored H&C application again at some time in 2017. This application was still pending at the time of the Decision. Nothing in this review turns on the exact date of that H&C application.

[9] By letter from the Minister dated November 22, 2016, Ms. Melnykova was asked to attend a removal interview on December 13, 2016. Ms. Melnykova was then requested at the end of December and beginning of January, continuing into February, to provide updated medical and travel documents as well as to attend an interview at the Ukrainian Consulate.

[10] On March 13, 2017 Ms. Melnykova was sent a call-in notice to report on April 6, 2017 at 8:15 a.m. for an interview. As she had indicated that she wanted to voluntarily comply with the removal order, she was also advised to book her own ticket and travel on or before April 28, 2017.

[11] On April 5, 2017 counsel for Ms. Melnykova faxed a request, which was originally dated March 24, 2017, in which she sought a three month deferral of removal because she had not heard anything with respect to the May 2016 spousal application.

[12] On April 6, 2017 Ms. Melnykova was given a direction to report for removal on April 26, 2017 at 7:00 p.m. for flights pre-arranged by the Minister.

B. *Medical and Psychotherapist Reports*

[13] With her deferral request Ms. Melnykova provided three medical reports and the report of a psychotherapist to outline and support her various health issues. The reports indicate that Ms. Melnykova has been prescribed a variety of medications. Details of the reports are outlined below.

(1) The Psychotherapist's Report

[14] The April 7, 2016 report of Natalie Riback, Ms. Melnykova's psychotherapist, stated that after living in Canada for so many years, if Ms. Melnykova was forced to return to Ukraine, especially given the danger and re-traumatization that awaits her there, her mental and physical stress symptoms would increase considerably, causing her psychological and emotional state to deteriorate. She stated that this could be detrimental to Ms. Melnykova's mental health, especially considering her age and significant thoughts of self-harm.

(2) Report from Dr. Sherman at the Toronto General Hospital Liver Clinic

[15] Dr. Sherman, a gastroenterologist at the Toronto General Hospital Liver Clinic wrote in a letter on November 23, 2016 to Ms. Melnykova's family physician, Dr. Tamari, that

Ms. Melnykova “continues to be well”, despite having cirrhosis of the liver based on non-alcoholic fatty liver disease. He added that unless she loses a substantial amount of weight Ms. Melnykova will run into trouble with her liver either from liver failure or hepatocellular carcinoma. He recommended a gastroscopy and indicated that Ms. Melnykova needed screening for hepatocellular carcinoma by ultrasound every six months.

(3) The Family Physician’s Report

[16] Dr. Tamari’s report of January 23, 2017 stated that he had treated Ms. Melnykova for one year and that she has multiple medical problems, including mental health issues. He lists non-alcoholic cirrhosis of the liver, hypertension, osteoarthritis, obesity and diabetes mellitus (which is not controlled) as well as several other medical problems for which she is regularly assessed. He concluded that due to her complex medical history, she should not be travelling.

[17] Dr. Tamari also concluded that the stress of the deportation order had caused a relapse of Ms. Melnykova’s depression and she was taking anti-depressant medication again.

(4) The St. Joseph’s Gastroenterologist Report

[18] The gastroscopy recommended by Dr. Sherman was performed on February 15, 2017 by Dr. Bookman at St. Joseph’s Health Centre. He determined that it showed Ms. Melnykova had mild gastritis. He concluded another gastroscopy was not required until 2019. Dr. Bookman recommended medication twice daily for four weeks and an annual follow up at his clinic.

(5) The Medical Assessment for Removal Report

[19] After receiving the three medical letters, the Minister sent them to Dr. Dimitri Louvish so that he could perform a Medical Assessment for Removal.

[20] Upon summarizing the three medical reports, Dr. Louvish found that Ms. Melnykova was medically fit to travel. He noted that people with liver disease, diabetes, hypertension and cardiovascular/cardiopulmonary conditions fly every day and the overwhelming majority have no complications.

[21] Dr. Louvish stated that in the absence of any objective medical evidence indicating any ongoing acute physical or psychological pathology, Ms. Melnykova's symptoms and medical history would not preclude her from air travel.

(6) No Response from Ms. Melnykova

[22] The medical assessment report of Dr. Louvish was sent to counsel for Ms. Melnykova on April 21, 2017. Ms. Melnykova was provided with the opportunity to respond to it by April 24, 2017. No response was submitted and no request was made for additional time to respond.

[23] On April 26, 2017 Madam Justice McDonald granted a stay of removal.

III. **The Decision under Review**

[24] On April 24, 2017 the Enforcement Officer rendered the Decision, refusing the deferral of removal.

[25] The Officer first outlined that the reasons for the deferral request including the pending H&C application, H&C factors, medical issues, and risk.

[26] The Officer then noted that they are required under s. 48(2) of *IRPA* to enforce removal “as soon as possible” and as such they have little discretion to defer removal. The Officer stated that although performing an adjunct H&C evaluation is beyond their role, they would still consider the matters raised by Ms. Melnykova.

[27] The Officer found that an administrative deferral of removal in Ms. Melnykova’s case was not available as she has been removal ready since her pre-removal interview in 2010.

[28] Concerning the medical issues, the Officer noted that medical deferrals were granted in the past to allow Ms. Melnykova’s condition to stabilize. The medical evidence provided with her deferral request was given to Dr. Louvish who determined that Ms. Melnykova was “medically fit for air travel to be repatriated to her country of origin.”

[29] The Officer went on to discuss the report of the psychotherapist dated April 7, 2016 and found it provided insufficient objective evidence that Ms. Melnykova suffers from a diagnosed medical condition which would require her removal to be deferred or that she would be unable to receive counselling for her psychological and emotional needs in Ukraine.

[30] The Officer also reviewed a medical report about the health of Ms. Melnykova’s husband, her establishment in Canada and the articles and reports submitted to show both her risk and hardship on return to Ukraine. In each case the Officer found the evidence submitted was insufficient to warrant a deferral.

[31] The Officer noted that the risk factor of potential harm from Ms. Melnykova's ex-husband was dealt with in the PRRA, the process reviewing her refugee claim and in an H&C application.

[32] The Officer concluded that after considering all the evidence of risk and hardship, the articles and reports about Ukraine, as well as counsel's statement that Ms. Melnykova's children say that her former husband threatened her, she had not submitted sufficient compelling new evidence that she would face risk to life, torture or unusual treatment if returned to Ukraine and a deferral was not warranted.

IV. **The Issue**

[33] The sole issue in this matter is whether the Decision is reasonable.

[34] Ms. Melnykova submits that the Officer fettered their discretion by failing to consider some of the risks she put forward. This argument is really that the Officer failed to consider and discuss relevant evidence, which is not a question of fettering but rather a challenge to the reasonableness of the Decision.

V. **The Standard of Review**

[35] Ms. Melnykova submits that the standard of review for factual findings is reasonableness and that the standard of review for questions of mixed fact and law and questions of law is correctness with no deference owed. In support of this latter proposition, counsel for Ms. Melnykova relied upon several cases all of which predate, by a decade or more, *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

[36] Although the Minister does not directly address the question, I am satisfied that the standard of review of an Officer's decision not to defer removal is reasonableness because it involves either the exercise of discretion, or the application to the facts of the words of s.48 of the *IRPA: Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 43; (*Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 27.

[37] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir* at para 47.

[38] If the reasons, when read as a whole, “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[39] The Officer, acting as an administrative tribunal, is not required to consider and comment in their reasons upon every issue raised by the parties. The issue for the reviewing court is whether, when viewed as a whole in the context of the record, the decision is reasonable: *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at para 3.

VI. Analysis

A. *The Officer's Discretion when Considering a Deferral Request*

[40] The discretion of an enforcement officer to defer removal requires an applicant to show that a failure to grant the requested deferral will expose that applicant to the risk of death, extreme sanction or inhumane treatment. It has also been held that, absent special circumstances, a pending humanitarian and compassionate application will not justify deferral unless there is a threat to the personal safety of the applicant: *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51.

[41] If an enforcement officer receives evidence of a new—post PRRA—risk to an applicant, then the officer is required to consider whether that evidence warrants deferral: *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at para 14. In this case the Officer did not receive such evidence but nonetheless considered the risks put forward by Ms. Melnykova.

[42] Overall, an enforcement officer has very limited discretion. It is restricted to when a removal order will be executed. To that end, a removal officer may consider various factors. These include illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system: *Simoes v Canada (Minister of Citizenship and Immigration)* (2000) 7 Imm LR (3d) 141 [*Simoes*] at para 12.

B. *Ms. Melnykova's submissions to the Officer*

[43] The submissions made to the Officer gave the following reasons for deferring the removal of Ms. Melnykova:

- her pending spousal sponsorship application on H&C grounds; and
- her medical condition.

(1) The H&C Application Grounds

[44] The argument that the pending H&C application was not properly and reasonably addressed by the Officer is without merit.

[45] To support the H&C grounds, the Officer received proof of a spousal sponsorship application having been filed by Ms. Melnykova in May, 2016 and March, 2017. The Officer noted that the March 2017 application was returned to counsel as a lot of information was missing.

[46] The Officer identified that under s.50 of the *IRPA* an H&C application is not an impediment to removal and no evidence had been submitted that a spousal sponsorship application could not be submitted from outside Canada. The Officer found that given the date the application was submitted and considering the likely processing time, a decision on the application was not imminent.

[47] There was no evidence of backlogs in the system of processing H&C applications. The Officer reasonably found that the pending H&C application did not warrant deferring Ms. Melnykova's removal. That conclusion is in accordance with *Simoes*.

[48] The only evidence to discuss in detail is the medical evidence and other documents submitted in support thereof.

(2) The Medical Grounds

[49] Supporting the medical condition grounds were the medical notes from the three doctors. Although counsel stated that there were two notes from Dr. Tamari, one of those notes was from Dr. Sherman to Dr. Tamari. The third note in the Certified Tribunal Record was from Dr. Bookman replying to Dr. Sherman about a gastroscopy. The Officer forwarded the three medical notes to Dr. Louvish for assessment concerning Ms. Melnykova.

[50] In addition to the medical notes, the Officer received the psychotherapist's report and copies of various prescriptions issued to Ms. Melnykova.

[51] Ms. Melnykova and her spouse each submitted affidavits together with four online news articles discussing health care in Ukraine, two of which discussed health care for older women.

C. *Did the Officer reasonably consider Ms. Melnykova's risk?*

(1) The Reports of Dr. Louvish and Dr. Tamari

[52] The main issue raised by Ms. Melnykova is that the Officer had an obligation to consider her generalized risk and failed to do so. She alleges that the Officer has discretion to defer removal in exceptional circumstances, including the health of the person being removed. In other words, the assessment is to encompass more than just travel. She says that by relying on the report from Dr. Louvish, the Officer erred as it only assessed her ability to travel.

[53] Contrary to that position, the Decision clearly indicates that the Officer considered and relied upon much more than the report of Dr. Louvish in assessing the risk to Ms. Melnykova both generally and regarding health care available to her. The Decision discusses the psychotherapist's report, the country condition documents on mental health specifically and healthcare generally in Ukraine.

[54] The Officer concluded that some of those articles were out of date and others referred to the situation in eastern Ukraine whereas Ms. Melnykova comes from western Ukraine. Most importantly the Officer determined that Ms. Melnykova had not submitted sufficient evidence to show that medical care would not be available to her in Ukraine.

[55] Dr. Louvish reviewed and commented upon all the medical reports submitted to him as part of his task to perform a medical assessment of Ms. Melnykova for removal. He did not limit his review to the ability of Ms. Melnykova to travel. That was but one facet of his report.

[56] The penultimate paragraph of Dr. Tamari's report of January 23, 2017 stated that "[d]ue to her complex history, and the risk for further medical complications [Ms. Melnykova] should not be travelling and should remain in Canada to receive the appropriate health care she requires" [emphasis added]. This wording is not a definitive statement regarding the fragility or ability of Ms. Melnykova to travel; it is essentially a statement of a preference for the Canadian health care system.

[57] It was incumbent upon Dr. Louvish to consider Dr. Tamari's statement as part of his own medical review and assessment. After reviewing it and the other medical reports, Dr. Louvish determined that Ms. Melnykova was fit for travel.

[58] That conclusion was not made in a vacuum. Dr. Louvish set out the main points of each medical report and observed that there was no objective medical information such as physical examination findings, diagnostic imaging or blood test results that would show that Ms. Melnykova had developed any acute clinically significant complications that would prevent her from travelling. In his report, Dr. Louvish provided examples of several such possible complications that were not present in the reports submitted to him.

[59] Dr. Louvish observed with respect to Ms. Melnykova's liver disease that Dr. Sherman had noted she "continues to be well." In terms of her mental health, Dr. Louvish observed that there was no recent objective medical evidence such as a mental health examination report documenting that Ms. Melnykova needs to be admitted and treated in an in-patient psychiatric unit in the hospital due to her posing a danger to herself.

[60] Dr. Louvish though was not the decision-maker nor did he have before him any of the other evidence, including the psychotherapist's report. He articulated in his report that acute and/or advanced and clinically unstable medical conditions are the ones that are considered to present a risk of complication arising from air travel. The Officer then independently considered the various medical reports and the psychotherapist's report in the context of the imminent removal of Ms. Melnykova by air to Ukraine.

[61] Had Dr. Louvish ascertained that there was an imminent risk of danger to Ms. Melnykova if she was removed by air and the Officer ignored that finding, it would be correct to say that the Officer had failed to consider her health. Once the Officer received, reviewed and accepted the report from Dr. Louvish, Ms. Melnykova's health was fully considered by the Officer from the

medical viewpoint as he had also received and reviewed the medical reports upon which Dr. Louvish commented.

(2) Ms. Riback's Psychotherapy Report

[62] The Officer considered Ms. Riback's report, which appears not to have been sent to Dr. Louvish. The Officer reviewed the psychotherapy report and noted that Ms. Riback was not a "Regulated Health Professional" as defined by the *Regulated Health Professions Act 1991*, SO 1991, c 18 [the *RHPA*]. This is likely why her report was not sent to Dr. Louvish as his task was to consider the medical reports and come to a medical opinion as to Ms Melnykova's ability to travel by air.

[63] Counsel submits that the Officer erred in saying Ms. Riback was not a "Regulated Health Professional" as she was regulated under both the *RHPA* and the *Psychotherapy Act, 2007*, SO 2007, c 10, Sch R. However at the time of Ms. Riback's report in 2016 and the time of the Decision in April, 2017 the Officer's statement was correct: the legislation was not amended to regulate psychotherapists under the *RHPA* until December 30, 2017, when a two-year transition period ended.

[64] The Officer reasonably found that at the time of her report, Ms. Riback was not a Regulated Health Professional and was not licenced to provide a medical diagnosis.

[65] This left the Officer with the competing medical viewpoints of Dr. Tamari and Dr. Louvish.

(3) The Officer reasonably assessed Ms Melnykova's risk

[66] Dr. Tamari's note of January 23, 2017 mentions that the stress of pending deportation had caused a relapse of depression and Ms. Melnykova had started to take anti-depressant medication again. His report, however, does not refer to any current suicidal ideation. It only suggests Ms. Melnykova "should not be travelling and should remain in Canada to receive the appropriate health care she requires." This is not an opinion that Ms. Melnykova cannot, or must not, travel due to her conditions. Nor is it a statement that Ms. Melnykova is unable to receive treatment in Ukraine.

[67] Dr. Louvish's report of March 1, 2017 notes the chronic (long-term) nature of Ms. Melnykova's conditions and finds there was a lack of acute (short-term or sudden) complications that would prevent air travel. As previously mentioned, Dr. Louvish also noted Dr. Tamari's statements about Ms. Melnykova's depression and found that there were no medical reports evidencing the need for admission and in-patient psychiatric treatment due to risk to herself or others.

[68] Given these two competing medical opinions from professionals qualified to convey a diagnosis, it was within the range of possible, acceptable outcomes for the Officer to prefer the report of Dr. Louvish.

[69] To support her concerns about health care in Ukraine, Ms. Melnykova submitted three articles to the Officer. The first article was two years old and centered on the issues of internally displaced older persons in eastern Ukraine. Sloviansk's Director of Social Services in eastern Ukraine stated they need more drugs to cope with the conditions of diabetes and hypertension (in

relation to the influx of internally displaced persons). The Director also states that they “were offering people free railway tickets to travel west to relieve the pressure on services.” After reviewing this article, I find that it was reasonable for the Officer to have discounted it since it was dated and pertained to solely eastern Ukraine.

[70] The second article was also two years old and focuses mainly on the economics of Ukraine’s medical system. Qimiao Fan, World Bank Country Director for Belarus, Moldova and Ukraine, comments that Ukrainians have a shorter lifespan than other Europeans with about 80% of these additional deaths being those in the 15-60 age group, and that about 85% of the deaths in 2012 in Ukraine were tied to cardiovascular disease, cancer and external causes. The article goes on to state that it is not a problem of physical accessibility, as Ukraine has approximately 40% more hospital beds than the EU average. Instead, it is inefficiencies in resource allocation and use, as well as the lack of investment and rampant corruption that is the problem. The article then concentrates on economic, regulatory and management changes that the author argues should occur and outlines that the World Bank has provided a loan of \$215 million [USD] to help Ukraine improve their health care sector.

[71] Having reviewed this article, I find that it was reasonable for the Officer to conclude that it provided insufficient proof that Ms. Melnykova would be unable to receive care and medication in Ukraine for her conditions.

[72] The remaining article is undated and provides an overview of the Ukrainian health care system for those considering travelling to Europe. Although this article seems to view the Ukrainian health care system as being “in an extremely poor state” when compared to western

medical regimes, it provides no sources of information for how it has reached this conclusion. It also does mention that there is state funded health care and that those who are “unemployed, old age pensioners and people on long-term sickness benefit” are able to pay reduced contributions to the plan when compared to those who are employed.

[73] Given the content of the article and its lack of any secondary sources, it was reasonable for the Officer to have found that it was insufficient evidence that Ms. Melnykova would be unable to receive treatment in Ukraine.

[74] Remembering that discretion of an enforcement officer under s.48 of the *IRPA* is very limited, it is clear from the Decision and my review of the underlying record that the finding by the Officer that a deferral of the execution of the removal order was not warranted was reasonable.

[75] For these reasons the application is denied.

[76] There is no question of serious importance for certification.

JUDGMENT in IMM-1821-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no question of serious importance for certification on these facts.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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