Federal Court Cour fédérale

Ottawa, Ontario
K1V 0H9

January 22, 2015

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**RE:** DMITRI TRUS
ANASTASIA TRUS v.
MINISTER OF CITIZENSHIP AND IMMIGRATION
Court File No: IMM-7006-13

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Attached please find Judgment of the Court (Manson, J) filed 21-JAN-2015.

Yours truly,

Jennifer Jones
Registry Officer

c.c.

Federal Court Cour fédérale

**Date: 20150121**

**Docket: IMM-7006-13**

**Ottawa, Ontario, January 21, 2015**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**DMITRI TRUS**
**ANASTASIA TRUS**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT

**UPON** an application for judicial review of the decision of a Senior Immigration Officer [the Officer] with the Canada Border Services Agency [the CBSA] refusing the Applicants' application for an exemption to the permanent residence requirements based on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA];

**AND UPON** reading the material before the Court and hearing the oral submissions of the parties;

**AND UPON** determining that this application is allowed for the following reasons.

I. Facts

[1] The Applicants were both born in Ukraine, are citizens of Moldova, and are in their mid to late eighties.

[2] The Applicants (Dmitri and Anastasia Trus) arrived in Canada on November 19, 2004. Since arriving they have resided with their son Louri Trus. There has been some recent confusion surrounding residence for their son as he and his wife have separated. The Applicants' son and his wife have provided at least some financial support since their arrival in 2004.

[3] They made claims for refugee protection on December 15, 2004, which were rejected by the Immigration and Refugee Board [IRB] on March 8, 2006. They then made an application for review of the IRB decision which was dismissed on January 31, 2007.

[4] The Applicants applied for a pre-removal risk assessment [PRRA] in June of 2007, which was rejected August 20, 2007.

[5] The Applicants made their H&C application in October of 2007. The notice of refusal was dated August 16, 2012, and communicated to the Applicants October 23, 2012.

[6] The Officer refused the Applicants' application on the basis that they did not sufficiently evidence undue, undeserved or disproportionate hardship in their application materials.

Specifically, the Officer took issue with a lack of documentation regarding the medical care they would receive in Moldova and why their needs would not be accommodated in the same way as their care in Canada.

## II. Issues

A. Were the Officer's decision and findings of fact reasonable?

B. Did the Officer show a reasonable apprehension of bias?

C. Did the Officer err in law by failing to consider the effect of a two year moratorium on parental permanent residence applications?

## III. Standard of Review

[7] The appropriate standards of review are reasonableness for the first issue and correctness for the second and third issues (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 50; *Bhattal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 989 at para 3; *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131 at paras 40, 42).

## IV. Analysis

### A. *Were the Officer's decision and findings of fact reasonable?*

[8] The primary focus of the Applicants' H&C application was on their deteriorating health, which has resulted in significant mobility restrictions. The CBSA recognized and accommodated those restrictions by administratively deferring their removal since 2007.

[9] The Respondent emphasizes a H&C approval is "an exceptional ameliorative provision that examines whether it would cause unusual and undeserved, or disproportionate hardship to comply with legislative requirements" on the part of an applicant (*Kawtharani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 162 at para 15).

[10] It is the Respondent's position that the Officer's findings of fact were open to him on the record. The five doctors' letters submitted did not persuade the Officer that "having to leave Canada will necessarily result in the interruption of" the Applicants' treatments. The letters further did not explain how returning to Moldova would interrupt treatment and why the Applicants would be unable to receive appropriate medical care there.

[11] Moreover, the Respondent takes the position that the Applicants' arguments isolate portions of the Officer's decision and reasons, when it is well established that the decision must be "approached as an organic whole, not as a line-by-line treasure hunt for error" (*Communications, Energy and Paperworks Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54 [*Communications, Energy*]).

[12] I do not believe that the Officer's decision and findings of fact were reasonable in light of the medical evidence put before him. The five letters submitted on behalf of both Applicants, from two different doctors, show sufficient evidence to answer the Officer's concerns regarding details about the Applicants' present and possible conditions and treatment, begging the question of upon what basis the Officer decided that the Applicants did not sufficiently evidence their conditions.

[13] The letters provide evidence that the female Applicant has:

a. Parkinson's disease;

b. advanced coronary artery disease (that cannot be surgically corrected);

c. hypertension, dislipidemia, arthritis, and degenerative disc disease;

d. inability to walk more than ten metres;

e. chronic pericardial effusion and shortness of breath;

f. angina;

g. high blood pressure;

h. vericose veins

[14] The following treatments were suggested for her from 2005 to present:

a. Multiple medications;

i. lipid lowering agents;

ii. blood thinners;

iii. B-blockers (plavix and aspirin);

iv. "very aggressive therapy" under cardiologist Dr. Drobac's care;

v. long-acting nitroglycerin patches;

vi. constant care;

vii. medications for Parkinson's disease;

viii. neurology consults in the future

[15] The male Applicant is shown on the evidence to have:

a. advance hypertension;

b. congestive heart failure;

c. partial deafness;

d. severe degenerative disc disease;

e. arthritis syncopal episodes;

f. vertigo;

g. coronary artery disease.

[16] The following treatments were suggested for him:

a. constant medical treatment involving medications for blood pressure and cholesterol;

b. further evaluation from specialists for his vertigo.

[17] In the case of both Applicants, the doctors warn that interruptions in care, as well as travel will result in serious risk and consequences. It is clear in each letter that stress, travel and any interruption in their care would be dangerous.

[18] While I agree with the Respondent that the record must be viewed and evaluated as a whole, the record here does not appear to support the Officer's findings (*Communications, Energy*, at para 54).

[19] It is true that the CBSA does have provisions for dealing with health concerns in carrying out deportation orders, but that does not preclude consideration of undue hardship in the context of the Applicants' medical conditions. While the stress of facing a deportation order is not a stand-alone valid reason for allowing a H&C application, it is clear from the record that there is sufficient evidence of undue hardship that would be caused by deportation outside what can be

isolated as the stress of deportation itself (*Oberlander v Canada (Attorney General of Canada)*, 2002 FCT 771 at para 21).

[20] I find the Officer's conclusions on this front were unreasonable.

B. *Did the Officer show a reasonable apprehension of bias?*

[21] I do not believe that the Applicants have presented sufficient cogent evidence to show a reasonable apprehension of bias on the part of the Officer. The relevant test in *Zhu et al v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1139 at paras 1-2, sets a high threshold to meet in making such allegations.

C. *Did the Officer err in law by failing to consider the effect of a two year moratorium on parental permanent residence applications?*

[22] On November 5, 2011, the government of Canada imposed a two year moratorium on parent sponsorship applications for permanent residency. The Officer knew or should have known of it as it was still in effect on August 16, 2012, when he made his determination on the Applicants' file. That being said, the Applicants do not appear to have raised the issue of undue hardship caused by the moratorium before the decision maker.

[23] The facts here are similar to *Kosolapova* where Justice Anne Mactavish held that the impact of the moratorium need not be considered by an Officer in the absence of any submissions relating to it. Despite the Applicants' application pre-dating the moratorium, their

further submissions could have raised the issue of potential hardship caused by it, but did not (*Kosolapova v Canada (Minister of Citizenship and Immigration)*, 2014 FC 458 at paras 3, 6-7).

[24] The Officer should not be faulted for not considering factors that were not presented to him. It is the Applicants' responsibility to present the undue hardship that the moratorium might cause them (*Sarissky v Canada (Minister of Citizenship and Immigration)*, 2013 FC 186 at para 5; *Suppaiah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 429 at para 41).

**THIS COURT'S JUDGMENT is that**:

1. The Application is allowed and the matter is referred back to a different office for reconsideration;

2. No question is certified.

"Michael D. Manson"

Judge