

Federal Court



Cour fédérale

**Date: 20150420**

**Docket: IMM-6584-13**

**Citation: 2015 FC 497**

**Ottawa, Ontario, April 20, 2015**

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

**BETWEEN:**

**IVICA KOVAC  
DRAGANA KOVAC  
TOBIAS KOVAC**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review by Ivica Kovac, Dragana Kovac and Tobias Kovac [the Applicants] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by an immigration officer [the Officer], dated September 13, 2013, wherein the Officer refused the unrepresented Applicants' application for permanent

residence from within Canada on humanitarian and compassionate [H&C] grounds. For the reasons that follow, the application is allowed.

[2] Ivica Kovac was born on June 18, 1965 and is a Croat citizen of Croatia. His wife, Dragana Kovac, was also born on June 18, 1965 and is a Serbian citizen of Croatia. Their son, Tobias Kovac, was born on April 26, 2000 and is a Serbian citizen of Croatia. The Applicants came to Canada from Croatia on December 1, 2010 and sought refugee protection based on the wife and son's Serbian nationality. Their claim was rejected by the Immigration and Refugee Board, Refugee Protection Division [RPD] on January 5, 2012. They sought leave to commence judicial review of their denied refugee protection claim on January 30, 2012 but the leave application was denied on April 10, 2012. The Applicants applied for a Pre-removal risk assessment [PRRA] in May, 2012, which was denied on September 13, 2013. The Applicants made an application seeking permanent residence from within Canada on H&C grounds on June 28, 2012. Their H&C application was refused on September 13, 2013, by the same officer who rejected their PRRA on the same day. The Applicants applied for leave and judicial review of the refusal of their H&C application on October 11, 2013 but on February 12, 2014 they received a Removal Order requiring them to leave Canada for Croatia. On February 14, 2014, this Court stayed the removal order having found the son "would suffer permanent harm", *inter alia*, and leave was subsequently granted to judicially review the refusal of their H&C application. The Applicants were not represented on their application before the Officer, who decided their PRRA the same day. They were represented on the judicial review hearing, which, in my view, was very appropriate.

[3] At issue is the duty of the Officer to assess and consider evidence, not of matters covered by sections 96 and 97 of the IRPA but rather to consider evidence of discrimination and hardships. This assessment is required not only by subsection 25(1.3) of the IRPA, but by the Federal Court of Appeal which in *Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113, held that matters of well-founded fear of persecution, risk to life and risk of cruel and unusual treatment or punishment, (factors under sections 96 and 97 of the IRPA) may not be considered under subsection 25(1) by virtue of subsection 25(1.3), but the facts underlying those factors may nevertheless be relevant as they relate to whether the applicant is directly and personally experiencing “unusual and undeserved or disproportionate hardship”.

[4] I accept the law regarding an H&C officer’s duty to assess discrimination as set out in the Respondent’s Inland Process Manual 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds [IP Manual 5] (at least as it was at the time) as follows:

#### 5.17 Assessment of discrimination

Applicants may claim to be victims of “discrimination” in their home country and that return would result in events or circumstances that would result in hardship. They may claim that the discrimination is systematic and that neither the state nor the society at large offer meaningful redress.

Discrimination that does not constitute persecution, is a relevant factor in the assessment of hardship in an H&C application. Nevertheless, discrimination alone would not necessarily be sufficient to warrant a positive H&C decision, in the absence of other positive considerations in the applicant’s favour. The focus should continue to be on a global assessment, including factors such as establishment in Canada, best interests of the child, ties to Canada, etc. Officers must consider both Canadian and international information in relation to the various forms of discrimination and should do so both in terms of the law and social organizations. Officers should determine if the term and the degree

of the alleged discrimination is equivalent to discrimination in Canada, and to see how redress is handled in this country. [Court's emphasis]

[5] Overall the applicable standard of review on judicial review is reasonableness, as both parties agreed. I turn now to review the case and its analysis.

[6] In addition to a bare bone four line submission in their H&C application, the self-represented Applicants filed undated newspaper articles to the effect that Serbs are not welcomed when they return to Croatia. Since the end of the conflict, it would appear that many hundreds of thousands of Serbs have left Croatia, in what is likely one of the largest mass migrations in history. However, the Officer made no mention of these articles. While officers are not obliged to address all the evidence filed, this was relevant evidence and in my view it could have been specifically assessed in terms of discrimination as required by IP Manual 5. That said, I am prepared to follow the presumption that these articles were considered by the Officer, although lack of mention raises a concern.

[7] On the refugee determination, the RPD specifically addressed discrimination and found “on a balance of probabilities that the claimants may experience discrimination in Croatia because of their mixed Serbo-Croatian ethnicity”. The Officer made no reference to this document in his decision. Given that the Officer may have had the RPD decision before him when he conducted the PRRA, and while it may appear to be artificial to “pretend” he did not, I am not prepared to rule that the Officer erred by not referring to the discrimination finding made by the RPD.

[8] The self-represented Applicants also filed with the Officer a short but somewhat detailed letter from the Independent Democratic Serbian Party [IDSP letter]. It outlined persecution as well as discrimination. It referred to “harassment” of the Applicants. I accept that discrimination is a variant of harassment. The IDSP letter also outlines actual discrimination facing the Serb minority in Croatia, including general difficulties in obtaining employment and integration into society. The Officer refused to consider this letter because it outlined risks that “could have been assessed in the applicants’ refugee claim and Pre-Removal Risk Assessment. Consequently, they will not be addressed in this application.” In this finding the Officer erred because, in addition to containing evidence of persecution, the IDSP letter contained evidence of discrimination. Both the case law and IP Manual 5 require an H&C officer to assess discrimination. This failure requires that the decision be set aside because I am not able to speculate on the result and cannot say that the decision would have been the same.

[9] The Applicants alleged there was a failure to address the best interests of the child [BIOC]. I do not criticize the Officer on BIOC grounds in this case for two reasons. First, the unrepresented Applicants failed to mention BIOC in their H&C. Secondly, the Officer quite properly proceeded to conduct a BIOC assessment even though none was requested.

[10] The material the Applicants filed in this Court on their previous successful stay application included medical information concerning the son. This information was not filed on this judicial review, nor did the self-represented Applicants file it in their H&C application. However the parties and this Court may take notice of judicial determinations, including the reasons given on the stay ordered by this Court concerning these same parties. The courts have

long been assiduous to safeguard the interests of children. This Court has already found in a judicial proceeding concerning the same parties that the best interests of the child would be “permanently harmed” if the boy is returned to Croatia. That specific finding was made by my colleague Justice O’Reilly who stayed deportation last year. I take judicial notice of this Court’s decision, and I hold Justice O’Reilly’s finding to be relevant on this application. In my view, the stay decision is binding on all parties and the parents should have filed it with their H&C application.

[11] While the Applicants have the duty to prove their case, and are at peril if they do not, given this Court’s grant of a stay to protect this very same child, and its stated reasons for doing so, together with the failure to assess the evidence of discrimination, judicial review must be granted and the H&C decision set aside. In granting judicial review and to protect against a failure of justice, it will be ordered that the Applicants may file new material. I will not place a restriction on the new material because there must be a fresh decision in any event.

[12] Neither party proposed a question to certify, and none arises.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** judicial review is granted, the decision of the Officer is set aside, the H&C application shall be re-determined by a different H&C officer, on said re-determination the Applicants may file additional material, no question is certified, and there is no order as to costs.

"Henry S. Brown"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6584-13

**STYLE OF CAUSE:** IVICA KOVAC DRAGANA KOVAC TOBIAS KOVAC  
v THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 15, 2015

**JUDGMENT AND REASONS:** BROWN J.

**DATED:** APRIL 20, 2015

**APPEARANCES:**

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Hillary Adams FOR THE RESPONDENT

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