

Federal Court



Cour fédérale

**Date: 20180529**

**Docket: IMM-4154-17**

**Citation: 2018 FC 555**

**Ottawa, Ontario, May 29, 2018**

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

**BETWEEN:**

**ERIC KHOKHAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review of the decision of a Senior Immigration Officer [the Officer] dated September 15, 2017 [the Decision], refusing the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is dismissed, because the Applicant's arguments do not demonstrate that the Officer applied an incorrect test in arriving at the Decision or that the Decision is unreasonable.

## II. **Background**

[3] The Applicant, Eric Khokhar, is a 45-year-old man who is a citizen of Pakistan and a Christian. His wife is also originally from Pakistan but is now a Canadian citizen. The couple have three Canadian-born daughters who are 11, 10, and 7 years old. Mr. Khokhar lived in Pakistan until February 1989, when he moved to the United States under another name. He was arrested on a number of charges varying from disorderly conduct to aggravated assault and was ultimately deported after pleading guilty to aggravated discharge of a firearm in 1998.

[4] Mr. Khokhar states that he was very involved in church activities upon his return to Pakistan and that this brought him to the attention of Muslim fundamentalist groups, who began to target him in 2001. He decided to flee the country in 2002 and, after first returning briefly to the United States, came to Canada and claimed refugee protection in 2003. Mr. Khokhar did not disclose the full extent of his immigration history in the United States, that he had a criminal record there, or that he had previously used another name. His refugee claim was granted in 2003 and he obtained permanent resident status in 2005. His wife joined him in Canada in 2006.

[5] In 2009, the couple had a domestic dispute. Mr. Khokhar was arrested and pleaded guilty to assault with a weapon. He received a 2-year suspended sentence after his wife gave a statement that she did not fear for her safety and wanted her husband to return home. The full

extent of Mr. Khokhar's immigration history in the United States came to the attention of the police as a result of these events and, in 2012, the Minister of Citizenship and Immigration [the Minister] applied to have his refugee status vacated due to misrepresentation. That application was allowed, and removal and deportation orders were issued against him in 2012 and 2013 respectively. Mr. Khokhar then filed H&C and Pre-Removal Risk Assessment applications in 2014, both of which were denied. His second H&C application, filed in 2016, was refused in the Decision that is now the subject of this judicial review.

### III. **Issues**

[6] The Applicant submits the following issues for the Court's consideration:

- A. What is the standard of review?
- B. Did the Officer err in failing to consider the best interests of the Applicant's three children?
- C. Did the Officer err in failing to consider the hardship that the Applicant and his family would face if separated from each other and in applying an incorrect test in considering hardship to the Applicant upon return to Pakistan?
- D. Did the Officer breach procedural fairness in relying upon documentary evidence from the National Documentation Package for Pakistan, which was not provided by or disclosed to the Applicant, in considering hardship to the Applicant upon return to Pakistan?

E. Did the Officer err in failing to consider the Applicant's establishment in Canada?

[7] I note that the fourth issue identified above, related to procedural fairness, was raised for the first time by Mr. Khokhar's counsel at the hearing of this application. As a result, the Minister takes the position that the Court should not consider this issue.

IV. **Analysis**

A. *What is the standard of review?*

[8] The standard of correctness is applicable to the procedural fairness issue described above. Otherwise, Mr. Khokhar takes the position that both the standard of reasonableness and the standard of correctness are engaged by the arguments he raises in relation to the substance of the Decision. While he submits that the Decision is unreasonable and raises various arguments in support of that position, he also argues that there are aspects of the Decision in which the Officer employed the wrong legal test, to which arguments he takes the position the standard of correctness applies.

[9] The Minister takes the position that the Decision is reviewable on a standard of reasonableness and that this standard should be applied to all the arguments raised by Mr. Khokhar.

[10] I agree with Mr. Khokhar on this issue. While an H&C decision is generally reviewable on a standard of reasonableness, I accept that the standard of correctness applies to an officer's selection of the test to be employed in arriving at the decision (see, e.g. *Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894 at para 27). I will therefore apply the correctness standard to Mr. Khokhar's arguments that the Officer applied the wrong legal test and will otherwise review the Decision on a standard of reasonableness.

B. *Did the Officer err in failing to consider the best interests of the Applicant's three children?*

[11] Mr. Khokhar submits that the Officer's analysis of the best interests of the children [BIOC] is one of the areas in which the Officer applied the wrong test. When asked at the hearing of this application to identify the incorrect test that Mr. Khokhar argues was applied, his counsel submitted that the Officer conducted the BIOC analysis starting from a presumption that Mr. Khokhar was going to be removed from Canada. Mr. Khokhar relies on several authorities of this Court to support his position that it is an error to conduct a BIOC analysis in this manner (see *Ondras v Canada (Citizenship and Immigration)*, 2017 FC 303 at para 11; *Yuan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 578 at para 29; *Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 [*Kobita*] at para 52; *Jimenez v Canada (Citizenship and Immigration)*, 2015 FC 527 at para 27; *Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 [*Ndlovu*] at para 20).

[12] I read these authorities as examples of cases in which an officer conducted a unreasonable BIOC analysis by failing to consider all possibilities as to whether an applicant would be removed from Canada or permitted to stay in Canada, whether children affected by the decision would leave Canada or remain in Canada as a result, and the resulting effect upon the children and their best interests. I do not read these authorities as prescribing a particular legal test to be applied or avoided in conducting a BIOC analysis. They provide no support for Mr. Khokhar's position that the Officer applied an incorrect test in the case at hand. I also find no other basis to conclude that the Officer applied an incorrect legal test in conducting the BIOC analysis.

[13] Nor do the authorities cited above support a conclusion that the Officer's BIOC analysis was unreasonable. The Officer noted Mr. Khokhar's position that his wife and children would remain in Canada if he were to return to Pakistan and proceeded to consider how his return would affect the children. This is precisely the effect that the Officer was being asked to consider and does not demonstrate the Officer having adopted a presumption that the result of the H&C application would be removal from Canada.

[14] I have also considered Mr. Khokhar's other arguments surrounding the BIOC analysis to assess whether they undermine the reasonableness of the Decision. He submits that the Officer was not alive, alert, and sensitive to the children's best interests, notes that the BIOC analysis takes up just a few paragraphs out of the six page decision, and argues that the detailed affidavits submitted by him and his wife and other evidence about the closeness of the family and their

economic dependence upon him were ignored. He also takes the position that the Decision fails to demonstrate the compassion which is intended to underlie an H&C decision.

[15] The Officer concluded that there was insufficient evidence to support Mr. Khokhar's argument that the children's health or safety would be compromised by his absence. However, the Officer acknowledged that Mr. Khokhar is actively involved in the children's lives and that their best interests could be negatively impacted by his absence. The Officer therefore stated that the BIOC factor would be given considerable weight. While I appreciate that the BIOC portion of the Decision consisted of only four paragraphs, there is no basis to conclude that the evidence provided by Mr. Khokhar was overlooked or ignored. Rather, the Officer accepted that the children would be negatively affected by Mr. Khokhar returning to Pakistan and indeed afforded considerable weight in Mr. Khokhar's favour to that factor. This demonstrates the Officer being alert, alive, and sensitive to the best interests of the children as required by the jurisprudence.

[16] Ultimately, after considering this and other factors (which will be addressed below), the Officer gave more weight to what the Decision describes as Mr. Khokhar's "criminal convictions and demonstrated dishonesty and disrespect with respect to the immigration laws of Canada" and therefore concluded that the requested exemption was not justified by H&C considerations. This result does not mean that the Officer failed to consider the application through the required lens of compassion but rather that it was the Officer's conclusion that the compassionate considerations in this case did not outweigh the relevant negative factors. This weighing of factors relevant to an H&C application is the purview of the Officer, and it is not the Court's role to intervene therein.

[17] In summary, I find nothing in the manner in which the Officer conducted the BIOC analysis which undermines the reasonableness of the Decision.

*C. Did the Officer err in failing to consider the hardship that the Applicant and his family would face if separated from each other and in applying an incorrect test in considering hardship to the Applicant upon return to Pakistan?*

[18] The Officer considered the hardship Mr. Khokhar would face if he returned to Pakistan based on his religious beliefs as a Christian. The Officer noted that Christians in general are permitted to practice their faith in Pakistan, that the state is taking measures to protect Christians, and that they have recourse to effective legal remedies. The Officer also noted that it is those involved in proselytising activities, and converts to Christianity, who are most at risk of persecution and that those who are from disadvantaged socio-economic backgrounds are most likely to experience discrimination. The Officer did not consider Mr. Khokhar to belong to these groups, as he was born a Christian, received formal schooling, and comes from a reputable family. The Officer considered Mr. Khokhar's allegations of past persecution to be vague and unsubstantiated by his supporting evidence, which was found to be brief, speculative, or otherwise inadequate. The Officer considered the information to be insufficient to show a risk of hardship to Mr. Khokhar based on his religious beliefs.

[19] While Mr. Khokhar again submits that the Officer applied an incorrect test, this time in considering hardship that would be suffered by him and his family if he were to return to



Pakistan, I find no basis for such a conclusion. Rather, Mr. Khokhar's arguments go to the reasonableness of the decision. He submits in particular that, in considering the hardship he would face in returning to Pakistan, the Officer assessed only the discrimination or persecution he would encounter as a Christian and not the effect of him being separated from his family and career and returning to a country with which he now has little connection.

[20] Mr. Khokhar is correct that that the Decision's analysis of hardship he would face focuses upon conditions for Christians in Pakistan. However, a review of the submissions to the Officer in support of the H&C application demonstrates that this is what the Officer was asked to consider. These submissions describe the relevant H&C factors as the best interests of the Applicant's three Canadian children, the Applicant's establishment in Canada, and undue, undeserved, and disproportionate hardship in Pakistan due to the Applicant's and his family's religious beliefs. The submissions in support of such hardship refer to Mr. Khokhar's personal experiences as a Christian in Pakistan and cite documentary evidence of discrimination and persecution of Christians. It was therefore not unreasonable for the Decision to assess Mr. Khokhar's hardship based on such evidence and submissions.

[21] Not do I find the Officer's assessment of that evidence unreasonable. While his counsel did not emphasize these arguments in oral submissions, Mr. Khokhar's written submissions take issue with the Officer's treatment of the evidence. However, the Officer's analysis and conclusions fall within the range of acceptable outcomes with which the reasonableness standard is concerned.

*D. Did the Officer breach procedural fairness in relying upon documentary evidence from the National Documentation Package for Pakistan, which was not provided by or disclosed to the Applicant, in considering hardship to the Applicant upon return to Pakistan?*

[22] At the hearing of this application for judicial review, Mr. Khokhar's counsel raised a new issue related to the hardship assessment that had not been identified in the prehearing written submissions. Mr. Khokhar's counsel noted that, in the Decision, the Officer relied on documentary evidence from the National Documentation Package [NDP] for Pakistan which had not been submitted by Mr. Khokhar and was not disclosed to him prior to his receipt of the Certified Tribunal Record in the course of this application. He argues that this represents a breach of procedural fairness.

[23] The Minister's counsel took the position at the hearing that the Court should not consider this issue, because it had not previously been raised, but that she was prepared to speak to it if the Court wished. I reserved my decision on the question whether I would consider this issue but asked both counsel to provide me with their submissions.

[24] While I agree with the Minister's position that Mr. Khokhar should have raised this issue through his written filings in advance of the hearing, the Minister's counsel was nevertheless able to address the issue substantively at the hearing, and I prefer to address the issue on its merits. My conclusion is that it is not a breach of procedural fairness for the Officer to have relied on material in the publicly available NDP for Pakistan in considering the arguments

raised by Mr. Khokhar surrounded hardship or persecution experienced by Christians in that country (see *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 257 at para 28-30; *Kamps v Canada (National Defence)*, 2018 FC 430 at para 31).

E. *Did the Officer err in failing to consider the Applicant's establishment in Canada?*

[25] With respect to Mr. Khokhar's establishment in Canada, the Decision notes that he has been residing in Canada for almost 14 years, has maintained stable employment, and has been entirely self-supporting, which the Officer found to be a positive factor. However, the Officer found the family's financial circumstances and the diploma program undertaken by the Applicant since 2015 to indicate only minimal economic establishment and integration into Canadian society. With respect to his community involvement, the Officer considered the supporting letters attesting to the fact that Mr. Khokhar attends church regularly and is of good character. However, the Officer found the letters lacking in detail on the nature and extent of his activities and concluded that they demonstrated only a modest level of community involvement. In subsequently weighing the factors considered in the Decision, the Officer again referred to the evidence reflecting a modest level of establishment and gave this factor low weight.

[26] Mr. Khokhar's counsel initially argued that the Officer applied the wrong test in considering the effect of his establishment in Canada upon his H&C application. When I asked his counsel to identify the test that she was arguing had been wrongly applied, she responded that the Officer was obliged to consider all the evidence and provide a reasoned analysis flowing from that evidence. Mr. Khokhar's counsel then conceded that these arguments represent a

challenge to the reasonableness of the decision rather than that the correctness of the test that was applied. I agree with this characterization of the arguments and have therefore applied the standard of reasonableness to them.

[27] Relying on the decisions of this Court in *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 80, and *Ndlovu* at para 14, Mr. Khokar argues that it was unreasonable for the Officer to require, without more explanation, an extraordinary level of establishment. He also refers to my decision in *Chakanyuka v Canada (Citizenship and Immigration)*, 2017 FC 313, in which the Court allowed judicial review of an H&C decision in part because the officer identified several positive factors but then concluded that there were insufficient H&C considerations to grant the application, without any analysis of why the positive factors were not sufficient to support relief.

[28] I am unable to conclude that the Officer has erred in the manner described in these authorities. The Decision does not reflect an expectation that an extraordinary level of establishment would be required in order to grant H&C relief. Rather, the Officer concluded the level of establishment to be modest, explaining this conclusion in terms of the family's financial circumstances, the relatively recent efforts by Mr. Khokar to upgrade his skills, and the fact that little information had been provided to substantiate the nature and extent of the family's community participation. Further, the analysis as to why the positive factors identified by the Officer were not sufficient to grant relief is evident from the following paragraph at the end of the Decision:

With respect to establishment, I find the evidence is reflect of a modest level accordingly I give this factor low weight. I accept that

the applicant is the sole breadwinner and further accept that his wife could be subject to numerous challenges which are experienced by other women who raising children as sole parents, including but not restricted to emotional and financially related issues. I also accept that the applicant is actively involved in day-to-day lives of his 3 daughters and in this regard find his absence could have some adverse effects on their best interests. However, I give more weight to the applicant's criminal convictions and demonstrated dishonesty and disrespect with respect to the immigration laws of Canada.

[29] It is apparent from this paragraph that, although there were positive factors which operated in Mr. Khokar's favour, the Officer found that these factors did not outweigh his criminality and misrepresentation.

[30] Mr. Khokar submits that an H&C analysis under s 25 of IRPA cannot be conducted in a manner which defeats the purpose of the legislation, which is to provide for the possibility of relief against inadmissibility. I agree with his submission and note his reliance on Justice Kane's emphasis of this point in *Kobita*. Justice Kane explains at paragraphs 29 to 31 that, although the jurisprudence establishes that misrepresentations should be considered in an H&C analysis, and while the role of the Court is not to reweigh the evidence the officer considered, it is appropriate to explore whether an applicant's misrepresentation was determinative to the exclusion of other factors.

[31] However, I cannot conclude that the Decision demonstrates the sort of concerns raised in *Kobita*. The Officer's analysis does not exclude consideration of the other factors raised by Mr. Khokar in support of his H&C application. Those factors were considered and weighed against the criminality and misrepresentation.

[32] Mr. Khokar also argues that it was unreasonable for the Officer to focus upon his criminal history without considering aspects of that history which mitigated its severity, such as remorsefulness, rehabilitation, the unlikelihood of recidivism, and the fact that no custodial sentence was imposed for the offence committed in Canada.

[33] In the Decision, the Officer provides a list of Mr. Khokar's inadmissibilities, including having been found to have engaged in misrepresentation, having been convicted of aggravated discharge of a firearm in the United States with a sentence of imprisonment of four years, and having been convicted in Canada in November 2009 of assault with a weapon resulting in a suspended sentence, 32 days pre-sentence custody, 2 years concurrent probation, and a 19-year order of prohibition. In considering Mr. Khokar's submissions, the Officer states as follows:

Counsel states that the applicant's criminal convictions in the USA occurred over 20 years ago and he is remorseful for misrepresenting his life in the USA and in failing to tell the truth about his convictions. Counsel further notes that the applicant's only other conviction was as a result of a domestic dispute with his wife in 2009 and he pled guilty to a number of domestic assault charges arising out of a single altercation with his wife. I sympathize with the applicant with his remorsefulness and also acknowledge counsel's reference to many couples having their "ups and downs". However, I find that such factors cannot excuse the applicant of responsibility for his offending and further note the gravity of the offences. I observe that as a result of the crimes incarceration sentences were imposed, namely a four year imprisonment in the USA which reflects the severity of the crimes.

[34] These portions of the Decision demonstrate an understanding of Mr. Khokar's arguments surrounding remorse and rehabilitation, as well as the custodial and non-custodial sentences that were imposed, respectively, in the United States and Canada. I find no basis to conclude that the

Officer treated Mr. Khokar's criminal history and misrepresentation unreasonably in arriving at the decision to refuse the H&C application.

V. **Conclusion**

[35] In summary, Mr. Khokar has not convinced me that the Officer applied an incorrect test in arriving at the Decision or that the Decision is unreasonable. As such, this application for judicial review must be dismissed. Neither of the parties proposed any question for certification for appeal, and none is stated.

**JUDGMENT IN IMM-4154-17**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

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Judge



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

**DOCKET:** IMM-4154-17

**STYLE OF CAUSE:** ERIC KHOKHAR v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 22, 2018

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SOUTHCOTT J.

**DATED:** MAY 29, 2018

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