Federal Court

Cour fédérale

Date: 20110118

Docket: IMM-6579-09

Citation: 2011 FC 49

Ottawa, Ontario, January 18, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BHALRHU, DAVINDER PAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Applicant was aware that he would have to persuade the decision-maker that there were sufficient humanitarian and compassionate (H&C) factors in his case to counter the fact that he was

found inadmissible on the basis of his membership in a terrorist group, a group to which he, himself, admitted he belonged.

[2] Under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), the Applicant is inadmissible for security grounds under subsection 34(1) of the IRPA (by virtue of para 320(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations)).

[3] Although the Applicant, subsequent to his admission, tried to persuade the Visa Officer that he was not a member of a terrorist group, the Visa Officer noted that the authority to relieve the Applicant of his inadmissibility rests specifically on the Minister pursuant to paragraph 34(2) of the IRPA.

[4] In this context, it falls to reason that the Applicant's inadmissibility for security reasons on the basis of his membership in a terrorist group was a determinative factor in the Visa Officer's determination of the H&C application as this engaged public interest considerations involving the safety of the public and the integrity of the immigration system.

II. Introduction

[5] This is an application brought under subsection 72(1) of the IRPA, with respect to a decision of a Visa Officer to refuse the Applicant's application for permanent residence to Canada pursuant to subsection 25(1) of the IRPA which allows considerations based on H&C grounds.

III. Background

[6] The Applicant, Mr. Davinder Pal Singh Bhalrhu, was removed from Canada in 2000 because he was found to be inadmissible on security grounds due to his membership in a terrorist group. The Applicant was not granted ministerial relief under subsection 34 (2) of the IRPA.

[7] Mr. Bhalrhu also failed to persuade the Visa Officer of sufficient countervailing H&C factors, such as his marriage in 1999 to a Canadian permanent resident and that that latter had had a car accident in 2004 in Canada.

[8] No basis for this Court to interfere with the H&C decision.

IV. Analysis

[9] As evident from the Computer Assisted Immigration Processing System (CAIPS) notes, the Visa Officer did review the facts of the case and the arguments put forward by Mr. Bhalrhu:

> File review.
> The applicant was found described under the former Immigration Act under A19(1)(f)(iii)(b) and issued a conditional deportation order in February 1999. The applicant had admitted to being a member of Babbar Khalsa when he initially made his refugee claim in Canada. He was found ineligible to make a refugee claim in January 2000 and detained for removal. His applications for judicial review of his removal and negative eligibility finding were dismissed.
>
> On 21 June 1999 he was married in a civil ceremony in Surrey, BC and a religious ceremony was held on 11 September 2009. After marrying in Canada he made an application for an A9(1) waiver and exemption under A114 of the former Act.
>
> He was deported from Canada on 13 January 2000. His inland applications were subsequently refused on 19 May 2000. His wife submitted an FC1 undertaking and that application was refused in New Delhi in February 2001 under R4(3) of the former Immigration regulations. Although his wife filed an appeal with the IAD and they assumed jurisdiction, the Fed Court allowed the Minister's appeal and dismissed it based on A196 of IRPA. The applicant had not been granted a stay under the former Act and had no right to appeal because of section 64 of IRPA.

> On 18 July 2006 he submitted a FC1 application requesting H & C considerations. On 17 April 2007 the applicant was refused based on his inadmissibility under A34(1)(c) & A34(1)(f) and his H & C request was denied.
>
> As a result of his inadmissibility under A19(1)(f) of the former Act he is inadmissible under A34 of IRPA pursuant to R320(1). This was concurred by the NHQ in their email dated 16 April 2007. Pursuant to A34(2) the applicant therefore must satisfy the Minister that his presence in Canada would not be detrimental to the national interest.
>
> The applicant filed an appeal to the Federal Court and BCL agreed to have the matter returned for determination by a different visa officer.
>
> In December 2007 we wrote to the applicant's counsel and advised him the applicant required relief from the Minister of Public Safety and that the authority to grant the relief resides solely with the Minister. It was suggested that he send new information concerning the applicant (employment education, family situation, evidence the he does not constitute a danger to the public in Canada and details of his involvement with Babbar Khalsa.
>
> After initial review, and given the concerns of the previous officer the applicant was sent for DNA testing to determine if he was the father of his sponsor's children. The test results confirmed that he is the father of Birinder Singh and Divjot Kaur.
>
> Since the applicant's counsel has submitted documents pertaining to sponsor's car accident in 2004, her employment and income situation, a letter f[ro]m the sponsor pleading for PA to be allowed to join her and their children in Canada and a recommendation by B[er]trand[,] Deslaurier[s] [] the applicant's and sponsor's counsel to allow applicant to return to Canada on H & C grounds. (Emphasis added).

(CAIPS notes, Tribunal's Record (TR) at pp 16-17).

[10] The Visa Officer considered the two major grounds advanced by Mr. Bhalrhu. In support of his application for permanent residence on H&C grounds, Mr. Bhalrhu specified: (1) He is married to Mrs. Mandeep Kaur; and that (2) Mrs. Mandeep Kaur had had a car accident in 2004. <u>Although not specifically advanced by Mr. Bhalrhu, the Visa Officer also considered the best interests of the children</u>:

> The sponsor invokes her car accident of 2004 as a reason why she needs the applicant to be allowed to return to [C]anada. However she did n[ot] p[r]esent any

> solid evidence that the accident which occur[r]ed 5 years ago has left traumatic consequences and a need for medical foll[ow] up. There is only one recent letter from Doctor Allan Bohn dated 13 May 2009 which simply states that sponsor suffered head injury and soft tissue injuries to the neck which h[a]ve made it difficult for her to work and manage to look after herself and her 2 young children. I note that the sponsor works part time at a resort since Jan[u]ary 2009 and her income tax returns from 2005 (the year after her accident) and 2008 show that she was gainfully employed.
>
> a. the fact that the applicant and sponsor decide to [] get married in June 1999 just 4 months after the applicant was issued a conditional deportation order after his refugee claim had been rejected indicate that it was a mean to avoid removal as demonstrated by his failed attempt to stave off removal when he submitted an application for an A9(1) waiver and exception made an application for an A9(1) waiver and exemption under A114 of the pre[vious] Immigration Act.
>
> b. Despite 2 FC1 refusals following the applicant's deportation to India one in 2001 and the other in 2006 they decided to have a family with one child born in 2003 and another one in 2007. Whether they hoped that having a family might sway their chances of the applicant being allowed back to Canada on H & C grounds and make them stronger is a possibility. Nevertheless that decision is theirs alone and cannot on its own make a sufficiently strong case for allowing the applicant to be admitted on [h]umanitarian and compassionate reasons. Th[e] sponsor is of Indian origin and has spent most of her life in India where she has an extensive family network and speaks fluently the languages (Punjabi and Hindi). While the best interests of the children have not been requested or highlighted by the consultant I have considered them as they are also central to this application. I have noted that the parents decided to have children, especially the second born knowing full well th[at] the family was separated because of the applicant's inadmissibility and the fact that his successive attempts at gaining PR in Canada through a failed refugee claim and 2 unsuccessful FC-1 applications. I do not believe th[at] the interest of the children would best be served by them being separated from their father but at the same time the applicant and his wife are responsible for this forced separation. The sponsor could very well put an end to it by returni[ng] to India with her children so the family can be reunited. As for the applicant the fact that he is separated from his children is the result of decisions that he made and which he has to assume.

(CAIPS notes, TR at pp 17-18).

[11] The Court defers to the position of the Visa Officer that there were "absolutely no overwhelming" H&C factors in this case:

> Aft[er] considering all the facts and the arguments presented by the sponsor, the applicant and their counsel I see absolutely no overwhelming humanitarian and compassionate factors which would make me seek relief for this case. The applicant is inadmissible under A34 of IRPA pursuant to R320(1)…

(CAIPS notes, TR at p 18).

[12] In his reasons, the Visa Officer also found that Mr. Bhalrhu is inadmissible to Canada for security reasons.

Relevant Legislative Provisions

[13] Section 25 of the IRPA read as follows at the time the decision was made:

Humanitarian and compassionate considerations	Séjour pour motif d'ordre humanitaire
25. (1) The Minister must, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger compte tenu de l'intérêt supérieur de l'enfant directement touché – ou l'intérêt public le justifient.
…	[...]
Provincial criteria	Critères provinciaux

(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national. 2001, c. 27, s. 25; 2008, c. 28, s. 117.	(2) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables. 2001, ch. 27, art. 25; 2008, ch. 28, art. 117.

Legislative Principles

[14] According to section 25 of the IRPA, a foreign national may be exempted from any applicable criteria or obligation of the IRPA if "the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the [person], taking into account the best interests of a child directly affected".

[15] The existence of an H&C review offers an individual **special** and **additional** consideration for an exemption from Canadian immigration laws that are otherwise universally applied. Granting relief under section 25 of the IRPA is an "exceptional remedy" dependent on the Minister's discretion. An applicant is not entitled to a particular outcome, even if there are compelling H&C considerations present.

[16] The Minister has the discretion to balance H&C considerations against public interest reasons that might exist for refusing to grant an exceptional remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FC 358, at paras 14-21).

[17] The purpose of H&C discretion is to allow flexibility to approve deserving cases, not anticipated in the legislation. It cannot be "a back door when the front door has, after all legal remedies have been exhausted, been denied in accordance with Canadian law" (*Legault*, above at paras 21-23; *Rizvi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, [2009] FCJ No 582 (QL/Lexis), at para 17; *Mayburov v Canada (Minister of Citizenship and Immigration)* (2000), 183 FTR 280, 98 ACWS (3d) 885, at para 39).

Standard of Review

[18] The appropriate standard of review for an H&C decision had previously been held to be reasonableness *simpliciter*. Given the discretionary nature of an H&C decision and its factual intensity, the deferential standard of reasonableness is appropriate:

> [18] It is unnecessary to engage in a full standard of review analysis where the appropriate standard of review is already settled by previous jurisprudence (see: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 62). The parties agree that the standard of review to be applied to an H&C decision is reasonableness. This standard is supported by both pre- and post-*Dunsmuir* cases (see: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Thandal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 489; *Gill v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 613, 73 Imm. L.R. (3d) 1). (Emphasis added).

(*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360).

[19] As to what the reasonableness standard entails, the Supreme Court of Canada has expressed in *Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 49, that the move toward a single standard of reasonableness was not an invitation to more intrusive scrutiny by the Court.

[20] Review on the reasonableness standard requires the Court to inquire into the qualities that make a decision reasonable, which include both the process and the outcome. Reasonableness is concerned principally with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law (*Dunsmuir*, above, at para 47).

[21] It is settled law that it is up to the immigration officer to weigh the relevant factors in deciding an H&C application and not to the Court:

Best Interests of Children

[22] This Court in *Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6, 338 FTR 224, made a summary of the applicable legal principles regarding the best interests of children:

> [47] It is settled law that it is up to the immigration officer to weigh the relevant factors in deciding an H&C application. The best interests of the children are a factor that the officer must examine very carefully, and when the officer has clearly referred to and defined that factor, it is up to the immigration officer to determine what weight to assign to it in the circumstances (*Baker*, *supra*; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (C.A.); *Bolanos v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1031, 239 F.T.R. 122 at para. 14; *Hussain*, *supra*; *Pannu*, *supra* at para. 37).
>
> [48] As the Supreme Court clearly explained in *Baker*, *supra* (at para. 75), the fact that the decision-maker should give the children’s best interests substantial weight does not mean that those interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C application even when the children’s interests are taken into account.
>
> [49] In *Canadian Foundation for Children, Youth and the Law*, *supra*, the Supreme Court of Canada reiterated the legal principle stated in *Baker*, *supra*, as follows:

> It follows that the legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests. Society does not always deem it essential that the "best interests of the child" trump all other concerns in the administration of justice. The "best interests of the child", while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice. (Emphasis added.)

…

[53] The reasons for the immigration officer's decision indicate that the decision was made in a manner that was receptive to the interests of the two children and that intervention by the Court is not warranted. The fact that the immigration officer did not arrive at the result Mr. Lalane had hoped for does not mean that he erred.

No Breach of Fairness

[23] On January 6, 2009, before a decision was rendered in this matter, the Canadian High Consulate in Delhi, India, asked for an obtained a number of background documents related to Mr. Bhalrhu's past dealings with immigration authorities:

> As a result of his inadmissibility under A19(1)(f) of the former Act he is inadmissible under A34 of IRPA pursuant to R320(1). This was concurred by the NHQ in their email dated 16 April 2007. Pursuant to A34(2) the applicant therefore must satisfy the Minister that his presence in Canada would not be detrimental to the national interest.
>
> …
>
> In December 2007 we wrote to the applicant's counsel and advised him the applicant required relief from the Minister of Public Safety and that the authority to grant the relief resides solely with the Minister. It was suggested that he send new information concerning the applicant (employment education, family situation, evidence the he does not constitute a danger to the public in Canada and details of his involvement with Babbar Khalsa.
>
> …
>
> Issues

> The applicant requires Minister's relief pursuant to A34(2) and he requires Authority to Return to Canada pursuant to A52(1). I note there is no evidence on file that ARC fees have ever been paid.

(CAIPS notes, TR a p 14).

[24] Mr. Bhalrhu has complained that the Visa Officer asked for and obtained two documents, namely: 1) the transcript of inquiry before the Adjudicator, who concluded the Applicant was inadmissible, and 2) the opinion of the Minister that it would not be in the public interest that the Applicant's refugee claim be heard.

[25] The guiding cases in the matter of the use of extrinsic evidence in administrative decisions related to immigration are *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205, 37 ACWS (3d) 87 (CA) and *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407, 97 ACWS (3d) 1210 (CA).

[26] These cases stand for the proposition that where meaningful facts essential or potentially crucial to the decision had been used to support an administrative decision, an opportunity should be provided to the affected party to respond to or comment upon these facts.

[27] In the circumstances of this case, the fact that the inquiry transcript and the Minister's opinion were obtained do not necessarily trigger a duty on the part of the Visa Officer to confront the Applicant.

[28] The documents in question were background documents, of which the Applicant was already fully aware of. They are referred to in Mr. Bhalrhu's own submissions, dated July 27, 2005, in support of his application for a Temporary Resident Permit, or flow from them.

[29] It is difficult to see how he could be taken by surprise by these materials, especially since the beginning of the process, Mr. Bhalrhu was being advised to present evidence in relation to his inadmissibility.

[30] There is no indication that these materials were relied on by the Visa Officer or had any effect on his decision (*Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193, [2009] FCJ No 1489 (QL/Lexis), at paras 23-26; *Bavili v Canada (Minister of Citizenship and Immigration)*, 2009 FC 945, [2009] FCJ 1259 (QL/Lexis), at para 47).

[31] Mr. Bhalrhu contends that he was treated unfairly because an oral interview was not held.

[32] As it appears from the record, Mr. Bhalrhu was offered the possibility to file specific updated information and documents on several occasions. He was informed precisely of the types of information that were required by the Visa Officer before he rendered his decision.

[33] There is no question that Mr. Bhalrhu knew or should have known precisely what questions were of concern to the officer.

[34] Mr. Bhalrhu does not specifically indicate what other information he would have communicated to the Visa Officer had an oral interview been held.

[35] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 34, the Court held that an oral interview is not essential for the information relevant to an H&C application to be put before an immigration officer, so that the H&C considerations presented may be considered in their entirety and in a fair manner.

[36] As specified by Justice Edmond Blanchard in *Hayama v Canada (Minister of Citizenship and Immigration)*, 2003 CF 1305 126 ACWS (3d) 997:

> [17] I am of the opinion that the applicant's lack of opportunity to have an oral interview with the program manager did not violate his right to procedural fairness. It is generally accepted that there is no duty to hold hearings for applications made under subsection 114(2) of the Act, and that it is within an officer's discretion to hold oral interviews. In the Supreme Court decision of *Baker, supra*, the Court clearly states that interviews are not an indispensable element of the duty of procedural fairness.

(Reference is also made to *Lam v Canada (Minister of Citizenship and Immigration)* (1998), 152 FTR 316, 82 ACWS (3d) 353; *Silva v Canada (Minister of Citizenship and Immigration)*, 2007 CF 733, 159 ACWS (3d) 125, at par 20).

[37] Therefore, Mr. Bhalrhu has not shown that the Visa Officer was under a duty to hold an oral interview in the circumstances of this case.

No Bias

[38] Mr. Bhalrhu argues that the Visa Officer's findings may show bias.

[39] The test for reasonable apprehension of bias is whether or not an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision-maker would unconsciously or consciously decide an issue unfairly (*Committee for Justice and Liberty v National Energy Board*), [1976] 1 SCR 369, 68 DLR (3d) 716).

[40] An allegation of bias is a serious one and it cannot be done lightly. The threshold for a finding of real or perceived bias is high. A real likelihood or probability of bias must be demonstrated; mere suspicion is not enough (*Arthur v Canada (Attorney General)*, 2001 CAF 223, 111 ACWS (3d) 240).

[41] Mr. Bhalrhu was aware that he would have to persuade the decision-maker that there were sufficient H&C factors in his case to counter the fact that he was found inadmissible on the basis of his membership in a terrorist group, a group to which he, himself, admitted he belonged.

[42] The fact that the Visa Officer expressed the view that there were “absolutely no overwhelming” H&C factors in Mr. Bhalrhu’s case cannot alone demonstrate a reasonable apprehension of bias. There is no indication that this was anything other than the decision-maker expressing his opinion on the merits of the case.

Decision Not Unreasonable

[43] All of Mr. Bhalrhu's H&C materials were considered by the officer when making the decision. It was not unreasonable to find that these materials were insufficient to grant his application for permanent residence in Canada.

[44] Mr. Bhalrhu disagrees with the weight given by the Visa Officer to each of the H&C factors he submitted in support of his application. That is not the applicable test on judicial review

[45] Upon entry to Canada in 1999, Mr. Bhalrhu, himself, admitted to an immigration officer that he was part of a terrorist group, the Babbar Khalsa.

[46] An adjudicator determined he was inadmissible on the basis of clause 19(1)(*f*)(iii)(*b*) and paragraph 19(2)(*d*) of the *Immigration Act*, R.S.C. 1985, c. I-2 (former Act).

[47] Under the IRPA, Mr. Bhalrhu is therefore inadmissible for security grounds under subsection 34(1) of the IRPA (by virtue of para 320(1) of the Regulations).

[48] Although Mr. Bhalrhu later tried to persuade the Visa Officer that he was not a member of a terrorist group, the Visa Officer noted that the authority to relieve Mr. Bhalrhu of his inadmissibility rests specifically on the Minister pursuant to paragraph 34(2) of the IRPA.

[49] In this context, it falls to reason that Mr. Bhalrhu's inadmissibility for security reasons on the basis of his membership in a terrorist group was a determinative factor in the Visa Officer's

determination of the H&C application as this engaged public interest considerations involving the safety of the public and the integrity of the immigration system.

[50] Specifically, an important objective of the IRPA, as set out in subsection 3(1)(*h*), is “to protect the health and safety of Canadians and to maintain the security of Canadian society”.

[51] Mr. Bhalrhu tried to demonstrate that his H&C application ought to be allowed, even though he had been found to be a member of a terrorist group. Among others, he submitted statements by third parties to the effect that they did not know him to be a terrorist (Applicant’s Record (AR) at pp 108 and following).

[52] On this score, the Visa Officer gave proper weight to the materials submitted by Mr. Bhalrhu and his decision is reasonable.

[53] In his submissions, Mr. Bhalrhu challenges the finding regarding the car accident.

[54] The Visa Officer properly weighed the fact that Mr. Bhalrhu’s spouse had a car accident on October 18, 2004.

[55] Although the seriousness of the accident in 2004 could not be doubted, it is apparent that the Visa Officer was not convinced that, five years later, the injuries sustained remained as serious, especially given that Mr. Bhalrhu’s spouse had now resumed working.

[56] This was a conclusion which was proper for the Visa Officer to make in view of the fact that the sponsor was working full-time at the Westin Resort & Spa Whistler, on November 26, 2004, on January 2, 2006, on December 18, 2007 and on April 27, 2009 and was working part-time at the Pinnacle Hotel, Whistler on April 28, 2009.

[57] Mr. Bhalrhu cannot now ask the Court to attribute different weight to this element, as this is not part of its role on judicial review.

[58] Mr. Bhalrhu also challenges the finding based on the fact that he was married to the sponsor four months after being given a conditional deportation order.

[59] The Visa Officer gave proper weight to the fact that Mr. Bhalrhu was married to a Canadian permanent resident in 1999.

[60] It is significant to note that Mr. Bhalrhu met his current spouse on June 10, 1999, while he was under threat of removal and after becoming ineligible to claim refugee status, and that they had their civil marriage only 10 days later.

[61] An immigration officer already determined, on February 15, 2001, that Mr. Bhalrhu entered into this marriage for the purposes of gaining admission into Canada and Justice Johanne Gauthier granted the judicial review application against the decision of the Immigration Appeal Division (Decision of February 15, 2001: TR at pp 727-732; *Canada (Minister of Citizenship and*

Immigration) v Bhalrhu, 2004 FC 1236, 133 ACWS (3d) 1038; TR at pp 733 to 748 and Supplement to the TR at pp 52-62).

[62] Mr. Bhalrhu contends that the Visa Officer should have now considered the passage of time, since 2000, as a positive factor favouring the *bona fides* of his marriage.

[63] The fact that some time has elapsed since 2000 does not, in and of itself, mean that the marriage was entered into in good faith. Mr. Bhalrhu and his spouse have been separated for a good part of that period. It stands to reason that, in such circumstances, more concrete indices of a good faith relationship had to be presented and considered.

[64] The Visa Officer did give proper weight to the materials submitted by Mr. Bhalrhu.

[65] In his submissions, Mr. Bhalrhu challenges the finding dealing with the best interest of the children.

[66] Even though this was not specifically highlighted by Mr. Bhalrhu in his various written submissions except to say that the family had been separated since 2000, the Visa Officer did consider the best interests of the children in rendering his decision.

[67] The courts have recognized that the presence of children is not determinative of an H&C application or that the children's best interests always outweigh other considerations. Moreover, it is

not for the Court to re-examine the weight assigned to this factor by the immigration officer (*Baker*, above, at paras 63 and 75; *Legault*, above, at paras 11-13 and 29).

[68] In this case, Mr. Bhalrhu's spouse could put an end to the separation of the family by joining her husband in India along with their children:

> [30] I now turn to the appellants' third argument that the officer limited her consideration of the best interests of the children to hardship, without regard to the other relevant factors. The fact that the officer focused her consideration of the children's best interests on the question of hardship does not necessarily lead to the conclusion that she failed to consider their best interests. In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555, a majority of this Court (Décary J.A., with whom Rothstein J.A. (as he then was) concurred), held at paragraph 5 that an officer did not assess the best interests of children "in a vacuum" (paragraph 5 of the reasons) and that an officer was presumed to know that living in Canada will generally provide children with many opportunities that are not available to them in other countries and that residing with their parents is generally more desirable than being separated from them. (Emphasis added).

(*Kisana*, above).

V. Conclusion

[69] On the facts and evidence before him, the Visa Officer was entitled to conclude that Mr. Bhalrhu did not demonstrate sufficient H&C grounds to overcome the fact that he was found inadmissible for security reasons based on his membership in a terrorist group.

[70] In *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, at paragraph 37, the Supreme Court of Canada clarified its decision in *Baker*, above, by stressing that in H&C applications, it is "the Minister who [is] obliged to give proper weight to relevant factors and none other". In *Legault*, above, at paragraph 11, the Federal Court of Appeal considered

Suresh in the context of an H&C matter and held that "[i]t is not the role of the courts to re-examine the weight given to the different factors by the officers".

[71] The Court concludes that the Officer's decision is upheld and the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's application for judicial review be dismissed with no question for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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