Federal Court  Cour fédérale

Date: 20111107

Docket: IMM-2596-11

Citation: 2011 FC 1269

Ottawa, Ontario, November 7, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SHAFFIRA SHAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Shaffira Shah (the Applicant) applies for judicial review of a decision made by a Pre-Removal Risk Assessment Officer (the Officer), dated March 3, 2011, refusing the Applicant's application for permanent residence from within Canada based on humanitarian and compassionate (H&C) considerations under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] The Applicant is from Trinidad and Tobago. She came to Canada when she was 18, married, and became a permanent resident. The Applicant was abandoned by her spouse in 1979 and left to raise their three daughters on her own. The relationship had been very abusive and, notwithstanding separation, she became involved in a fraudulent scheme initiated by her spouse. In 1994, she was convicted for welfare fraud.

[3] The Applicant lost her permanent resident status after a 1999 Immigration Appeals Division (IAD) decision because of her criminal conviction. However she was granted a stay of removal because of her personal circumstances. She was subsequently convicted for numerous shoplifting offences and her stay of removal was dismissed because of continuing criminality after a 2006 IAD hearing. Following the 2006 IAD decision, the Applicant was diagnosed with mental health problems. She began attending counselling for shoplifting with the Elizabeth Fry Society. She was also awarded disability benefits because she was found unfit to work due to her mental health problems.

[4] In 2006 the Applicant made an H&C application for permanent residence on compassionate grounds. As well, she requested a temporary resident permit (TRP) in hopes of becoming eligible for a pardon for her shoplifting offences. The reviewing Officer refused the H&C application and did not consider the TRP request.

[5] For reasons that follow, I am granting the request for judicial review.

Background

[6] The Applicant was born in Trinidad and Tobago on May 11, 1955. As a child, she was beaten and abused by her alcoholic father. She escaped to Canada in 1973, at the age of 18, where she met Ahmed Shah and married him in 1975. They had three children together: Sandy, Charlene, and Sabrina, born in 1974, 1977, and 1979 respectively.

[7] The Applicant lives with her daughters helping to care for her grandchildren, Aidan who is eleven and Tristan who is two and a half years old. She has no family in Trinidad and has returned to the country only once in 38 years to attend her father's funeral. Her mother, three brothers, and two sisters live in the United States while another sister lives in Brampton, Ontario.

[8] The Applicant was sponsored by her husband and obtained permanent residence in Canada in 1978. Sadly, her husband, like her father, was an alcoholic who beat her severely. At one point, he held a knife to her throat in front of her children. He left the family relationship in 1979 but maintained contact with the Applicant. In 1994 he returned to Trinidad. She never heard from her husband again. She never received financial support after his departure or, for that matter, during their separation prior to it.

[9] After separating from her husband in 1979, the Applicant began to collect social assistance to support herself and her three children. During the separation, her husband bought two properties and placed her name on the title. He collected rent money from the properties but he did not share it with her. Although she did not receive any money, she was complicit and was convicted in 1994 of

fraud for receipt of welfare while income was derived from the properties. She received a sentence of eighteen months.

[10] Because the Applicant received a term of imprisonment of more than six months, a deportation order was issued against her in 1998. On appeal to the IAD however, the IAD agreed with a joint recommendation of the Minister and the Applicant for a stay of deportation order.

[11] The Applicant has been convicted of theft under and possession of stolen property offences stemming from shoplifting. In July of 2003, despite having been convicted of three criminal convictions since having been put on stay in 1999, the stay of removal was extended for another three years. By May of 2006, the Applicant had been convicted of another four theft under offences and one trespass to property offence in violation of the conditions of the stay.

[12] Due to the continuing criminal behaviour and violations of the stay conditions, the IAD dismissed the stay in May 2006. The IAD found the Applicant to be a habitual shoplifter that had not rehabilitated herself or taken any constructive action to do so during the previous six years of the stay of removal.

[13] Following the 2006 IAD decision, the Applicant was diagnosed with severe depression and panic disorder for which she began receiving treatment. She also began attending the Shop Lifting and Fraud Program and the Healing from Abuse Group Program at the Elizabeth Fry Society of Canada. In November of 2008, the Ontario Social Benefits Tribunal also determined the Applicant had a substantial mental impairment, namely major depression and anxiety disorder, and concluded

she was unable to work because of her mental health problems. The Applicant was awarded and began receiving disability benefits.

[14] In February 2009, the Applicant filed an application for permanent residence on H&C grounds. That same month, the Canada Border Services Agency (CBSA) issued her a direction to report for removal in March, 2009. Following several proceedings over nearly two years, on November 9, 2010, the Respondent granted a ministerial stay of removal until the outstanding H&C application could be determined. Further submissions to this application were filed on November 17, 2010, and the application was finally considered on March 2, 2011.

[15] The Officer refused the Applicant's application. This decision was communicated to her on April 5, 2011. She filed an application for leave and judicial review on April 19, 2011 and the request for leave was granted by Justice Gauthier on August 3, 2011.

Decision under Review

[16] The Officer began by setting out the appropriate test in an H&C application: the applicant bears the onus of demonstrating that her personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside Canada in the normal manner would be:

> i) unusual ("a hardship not anticipated by the Act or Regulations") and undeserved (the result of circumstances beyond the applicant's control) or
>
> ii) disproportionate (where the hardship would have a disproportionate impact on the applicant due to their personal circumstances).

[17] The Officer identified the Applicant's H&C grounds as being based on the following factors: degree of establishment in Canada; personal relationships/ties in Trinidad/Canada; and risk of returning to Trinidad/Medical concerns. The officer then weighed these factors against the Applicant's criminal inadmissibility.

Establishment in Canada

[18] The Officer noted the Applicant was a housewife from 1974 to 1997, worked from 1997 to 2001, then assisted in raising her grandson until September 2008, before receiving government funded assistance through the Ontario Disability Support Program in November of 2008. The Officer found no evidence of community involvement or upgrading of skills since arriving in 1973 and while there were numerous letters from friends, none demonstrated close interdependent relationships that would suffer hardship if severed.

Personal relationships/ties in Trinidad/Canada

[19] After reviewing the letters from the Applicant's three daughters and the sister in Brampton, the Officer concluded that while the Applicant is largely dependent on her children, she has built strong relationships with both her children and grandchildren, and it would be in the best interests of her grandchildren to have their grandmother physically in their lives, these factors did not outweigh the Applicant's numerous criminal convictions over a substantial time frame of approximately thirty years.

[20] The Officer found that should the Applicant need to re-establish herself in Trinidad, it would be reasonable to assume that she would have the financial and emotional support and assistance of her family in Canada, and be able to apply her skills and work experiences acquired in Canada to assist her in obtaining employment and finding a place to live.

[21] The Officer found there were reasonable grounds to believe the Applicant could continue her relationship with her family, albeit long-distance, and that the best interests of her grandsons were not sufficient to outweigh the negative factors associated with her criminal inadmissibility. Thus the Officer concluded that the elements covered in this assessment factor would not contribute to a hardship that is unusual and underserved, or disproportionate.

Risk of returning to Trinidad/Medical concerns

[22] The Officer noted the Applicant's counsel's statement: "Ms. Shah's issues of hardship, primarily centered around the severe isolation she will face in Trinidad, the effect on her mental health possibly leading to a suicide and the risk posed by both the local criminal elements and her ex-husband, are serious enough to have warranted a stay of removal in the Federal Court until the H&C is decided".

[23] The Officer noted that the Applicant's ex-husband was deceased and would no longer pose a risk (having passed away after the application for H&C consideration was filed). The Officer noted that there was insufficient evidence the Applicant would be personally targeted by criminal

elements upon her return and that the general risk faced by all individuals in the country does not amount to hardship that is unusual and undeserved, or disproportionate.

[24] On the issue of isolation, the Officer found it reasonable to assume that at least some of the acquaintances and family the Applicant had in the area she grew up in would continue to reside there. The Officer acknowledged the Applicant had no home, immediate family, employment or anything to go back to, but found it reasonable to presume her daughters would assist her in the relocation process, that the Applicant would not be returning to an unfamiliar place, culture or language that would render reintegration unfeasible, and that there was insufficient evidence that the Applicant would be unable to secure housing.

[25] The Officer acknowledged the Applicant's diagnosis of anxiety and major depression, the concerns expressed by the Applicant's family and medical practitioners over the Applicant being removed from Canada and no longer receiving the counselling and medical care she has been receiving here, as well as their concerns she would be unable to obtain the same type of care in Trinidad. The Officer concluded, however, that no objective evidence was provided to substantiate that the same type of counselling and medication would not be available or inaccessible in Trinidad and that her current physicians are not experts as to the medical services available in Trinidad.

Criminal Inadmissibility

[26] The Officer began by reiterating the Applicant's criminal record, including her conviction for fraud which led to the issuance of her deportation order, and the numerous subsequent

convictions for theft under which rendered her criminally inadmissible. The Officer then acknowledged the Applicant's remorse and attempts to change her ways through counselling and by seeking medical attention.

[27] The Officer noted that the Applicant committed criminal offences even while under counselling, the latest charges for theft having been laid on May 24 and October 1, 2009, and concluded that despite having a familial support network, counselling, and medication, the Applicant has continued to commit offences of theft. The Officer concluded that the Applicant had submitted insufficient evidence to indicate she would suffer unusual and undeserved, or disproportionate hardship to such a degree that the hardship would outweigh her criminal inadmissibility.

Conclusion

[28] The Officer concluded that the Applicant's submissions failed to show personal circumstances such that the requirement of having to obtain a permanent resident visa from outside Canada constituted unusual and undeserved, or disproportionate hardship and that as a result, there were insufficient H&C grounds to approve the application.

Relevant Legislation

[29] The *Immigration and Refugee Protection Act*, SC 2001, c 27 provides:

11. (1) A foreign national must, before entering Canada, apply	11. (1) L'étranger doit, préalablement à son entrée au

to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

…

…

24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

24. (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

…

…

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly

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, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il 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 le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

affected.

[30] *The Federal Courts Act*, RSC 1985, c F-7:

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
…	…
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

Issues

[31] In my view, the issues are:

1. Did the Officer fail to provide adequate reasons as to why the H&C factors did not outweigh the Applicant's criminal inadmissibility?

2. In light of the evidence submitted by the Applicant, was the Officer's decision to refuse the Applicant's H&C application reasonable?

3. Did the Officer err by applying the criteria for PRRA applications, as set out in sections 96 and 97 of *IRPA*, to the Applicant's H&C application?

4. Did the Officer err in failing to consider the Applicant's request for a TRP?

Standard of Review

[32] The Supreme Court of Canada has held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. The Supreme Court has also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated.

[33] The appropriate standard of review of an officer's decision to refuse an applicant's H&C application is reasonableness: *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817, 174 DLR (4th) 193 at paras 57-62.

[34] The adequacy of reasons is a question of procedural fairness, which is reviewable on the standard of correctness: *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2008 FC 989, 74 Imm LR (3d) 181 at para 17 [*Siddiqui*].

[35] Applying the incorrect analysis to an H&C application is an error of law and warrants judicial review: *Sha'er v Canada (Minister of Citizenship and Immigration*), 2007 FC 231, 60 Imm LR (3d) 189 at para 15, [*Sha'er*].

[36] Finally, the failure to consider the Applicant's request for a TRP has been treated in previous case law as an error in law or an error in due process, both reviewable on a standard of correctness: *Dhandal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 865, 82 Imm

LR (3d) 214 paras at 11-17[*Dhandal*]; *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461, 60 Imm LR (3d) 62 at para 18 [*Lee*].

Analysis

1. Did the Officer fail to provide adequate reasons as to why the H&C factors did not outweigh the Applicant's criminal inadmissibility?

[37] The Applicant argues the Officer simply concluded the H&C factors did not outweigh the negative factors associated with her criminal inadmissibility without providing any reasons or analysis to support this conclusion. She argues that she is left in the position of not knowing why her application was refused and that this amounts to a violation of her right to procedural fairness.

[38] For its part, the Respondent submits that the reasons show the Officer's conclusion is due to the serious and continuing nature of the Applicant's criminality, with no basis for any belief the Applicant will stop.

[39] After reviewing S*iddiqui* and *Kandhai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 656, 81 Imm LR (3d) 144 [*Kandhai*], cited by the Applicant in support of her position, I find these decisions to be distinguishable from the case at hand.

[40] In *Siddiqui*, the officer's reasons only considered positive H&C factors before concluding they did not amount to undue and undeserved, or disproportionate hardship. Similarly in *Kandhai*, the officer recited the applicants' submissions regarding militating factors and then simply concluded that these factors were not sufficient to justify the granting of an exemption, without any

explanation as to why that was. Here, the officer examined the militating factors and, for the most part, raised concerns and reasons why they were not sufficient to cause the necessary hardship required to justify an exemption.

[41] I say for the most part because there is one aspect of the Applicant's criminal conduct which the Officer did not consider. The Elizabeth Fry Society is an agency that provides counselling in the Shoplifting and Fraud Group Program and in the Healing from Abuse Group Program. It is a credible and well regarded agency as evidenced by the nature of the services it provides dealing with curtailing criminal conduct and helping heal victims of trauma arising from abuse.

[42] The Applicant has been attending counselling and the Elizabeth Fry Society provided three letters on August 1, 2007, December 4, 2008 and December 7, 2009, which are relevant to the Officer's assessment of the Applicant's mental health and criminal conduct.

[43] In an overly brief summary, the letters explain that the Applicant's shoplifting behaviour is consistent with what is referred to as 'kleptomania' which is defined as a mental illness resulting from physical and emotional violence and trauma.

[44] Shoplifting, in the writer's view, must be understood as an illness which needs be addressed though trauma counselling which provides coping strategies for shoplifting behaviour. The writer, the Applicant's counsellor, indicates that shoplifting behaviour tends to increase during stressful periods and that the Applicant's involvement with shoplifting decreases with counselling. The writer indicates the Applicant will need counselling for trauma over several years.

[45] Finally, the writer inquired of the Trinidadian Consulate in Canada as well as the Social Services Ministry in Trinidad. Neither agency was able to provide evidence of the availability of such counselling in Trinidad.

[46] I do not consider this aspect to be so much as relating to the assessment of H&C factors in the context of criminal behaviour since the Applicant must be responsible for law-abiding conduct, but I do consider it a necessary consideration when addressing the question of the Applicant's mental health issues.

[47] The Officer does, in regards to her personal relationships and ties to Trinidad and Canada, find that it would be reasonable to assume the Applicant would have the financial and emotional support, and assistance of her family in Canada, to assist her in obtaining employment and finding a place to live. The officer also concluded there were reasonable grounds to believe the Applicant could continue her relationship with her children and grandchildren, albeit a long-distance one. Also, in considering the risk of returning to Trinidad and the associated medical concerns, the Officer examined the specific issues raised by the applicant: the danger posed by her ex-husband and local criminal elements; the Applicant's possible isolation; and the Applicant's medical condition.

[48] The Officer addressed each issue and provided reasons why these constituted insufficient hardship. Finally, the Officer weighed the positive militating factors against the Applicant's criminal record and inability to stop her behaviour, despite seeking treatment and therapy.

[49] In *Siddiqui*, Justice Mactavish cautioned that "[t]his Court must be careful not to read a decision such as this microscopically, or to take a word or sentence out of context, in an effort to identify an error on the part of the officer": *Siddiqui*, *supra*, at para 12.

[50] I conclude the Officer's decision informs the Applicant why her application was refused.

2. In light of the evidence submitted by the Applicant, was the Officer's decision to refuse the Applicant's H&C application reasonable?

[51] The Applicant submits that the Officer ignored medical evidence indicating that a removal from Canada increased the likelihood that the Applicant would commit suicide. The Applicant refers here to three reports from her psychiatrist and a letter from her treating physician, included in her H&C application, which all reported on her condition and the impact of a removal.

[52] The Respondent maintains that the medical evidence was considered appropriately, that the issue of whether a risk of suicide existed independently of any issues of access to medical treatment in Trinidad is not reflected in the record, and accuses the Applicant of attempting to change the focus of the submissions in the face of the Officer's reasons.

[53] The Respondent submits that the Officer was entitled to find that, with no evidence showing the Applicant could not access medical treatment, there was no basis for finding that there was undue hardship. The Respondent further contends that the Applicant has not shown any serious issue that would put in doubt the reasonability of the Officer's decision and that evidence in the form of letters from family members do not require the Officer to approve the application.

[54] The Applicant's psychiatrist strongly recommended that removal not take place "as this would have a quite detrimental effect on [the Applicant] and would only lead to further deterioration and suffering", that "the treatment that [the Applicant] has been receiving here would be interrupted drastically and therefore [the] patient is at much higher risk to act out or resort to attempting suicide", and "that return to Trinidad where she will not have as much support by family as she does here and after so many years living in Canada, would be detrimental to her mental health being and be causing deterioration of her symptoms and increasing the risk of suicidal behaviour". The Applicant's treating physician also indicated "that if she were to be forced to return to Trinidad, her psychiatric condition would worsen, due to the stress and trauma precipitated by the deportation".

[55] The Officer's reasons show that the risk of suicide was raised. The Officer noted Applicant's counsel's submission that issues of hardship, including "the effect on [the Applicant's] mental health possibly leading to a suicide," were serious enough to have warranted a stay of removal in the Federal Court until the H&C was decided. When addressing this particular issue of hardship, the Officer acknowledged the Applicant's diagnosis for anxiety and major depression and mentioned the concerns expressed by the Applicant, her family, and medical practitioners as to her removal, given that it would prevent her from continuing the counselling and medical care she had been receiving here.

[56] The Officer's very brief subsequent analysis, however, is that there is no evidence to substantiate the same counselling and medication would not be available to her in Trinidad or that she could not access it. The Officer concluded that her medical practitioners are not experts "in terms of the nature/quality and type of medical services available in Trinidad". Nowhere does the

Officer consider the risk of suicide from the removal itself and from the Applicant's physical separation from her family.

[57] In similar circumstances in *P.M.D. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 97, [2011] FCJ no 114 [*P.M.D.*], the Court found it was not sufficient for the officer to simply look at the availability of mental health care in the target country. The officer was still required to determine whether putting the applicant through removal and its impact amounted to undue, undeserved or disproportionate hardship. Failing to do so rendered the decision unreasonable.

[58] I find that in these circumstances where the Officer was faced with evidence of a risk of suicide resulting from the removal itself, it was not sufficient for the Officer to simply examine the availability of medical services in the destination country. The Officer was also required to determine whether putting the Applicant through removal and its potential for possibly leading to suicide amounted to undue, undeserved or disproportionate hardship. I adopt the Court's reasoning in *P.M.D.* and find that the Officer's failure to do so renders the decision unreasonable.

[59] In generally considering the Applicant's mental health issues, the Officer said she was not provided with any evidence that the same type of counselling and medication would not be available or was inaccessible in Trinidad and that her current physicians are not experts as to the medical services available in Trinidad.

[60] Contrary to the Officer's assertion, she had before her the letters of the Elizabeth Fry Society advising that the Society had inquired and neither the Trinidadian Consulate nor the Social Services Ministry could advise that the same counselling would not be available for the Applicant in Trinidad.

[61] The Applicant also argues against the Officer's finding that the Applicant would be able to apply her skills and work experiences acquired in Canada to obtain employment in Trinidad. The Applicant asserts that in light of the Ontario Social Benefits Tribunal's finding that the Applicant was a person with substantial mental impairment and disability, the Officer's finding is unreasonable.

[62] I agree that it was unreasonable for the Officer to state that the Applicant would "be able to apply her skills and work experiences acquired in Canada to obtain employment and find housing in Trinidad". In terms of skills and work experiences, the Officer is presumably referring to the one year the Applicant spent working at Sunshine Carpet and the four years she spent as a painter for a manufacturer and distributor of industrial safety products. Meanwhile, the Officer ignored clear evidence demonstrating that the Applicant's disability severely limited her ability to work, including the following findings from the Ontario Social Benefits Tribunal:

> [The Applicant's] ability to function in the workplace is substantially restricted by [her] substantial impairments: She is afraid to walk outside for fear of falling, she is constantly feeling tired, and helpless. She has tried working, but her employer let her go as she was told she works too slowly. She has no computer knowledge and has not been able to learn to use a computer because of her cognitive impairments. She has difficulty reading, and cannot sit for more than

> half an hour before she has to move around. She is subject to frequent crying spells.

The Ontario Social Benefits Tribunal found the Applicant was a person with substantial impairment such that she was unfit to work and awarded her disability benefits.

[63] The Applicant's treating physician also noted that "due to her medical conditions, I don't believe she would be able to find work in Trinidad". Yet somehow this evidence was also completely ignored by the Officer.

[64] Finally, the Applicant contests the finding that "it would be reasonable to assume that at least some of the acquaintances that [the Applicant] had and some of the families in the area she grew up in would continue to reside in that area of Trinidad". The Applicant refers to two letters from her daughters, evidence before the Officer, which clearly indicated the Applicant had no family or friends left in Trinidad.

[65] There is no evidence for the Officer's finding when addressing the Applicant's potential isolation in Trinidad. It must be remembered that she left Trinidad at the age of 18, some 38 years ago. What neighbourhood or area did the Applicant grow up in? Is the neighbourhood still there? Do the same families or friends live in that area? If so, would they be in a position or willing to help? There simply is no evidence. In coming to this dubious conclusion, the Officer ignored unequivocal testimony from the two daughters that the Applicant had no family or friends left in Trinidad.

[66] Considering the above, I find the Officer's decision with respect to availability of counselling and isolation to be unreasonable.

3. Did the Officer err by applying the criteria for PRRA applications, as set out in sections 96 and 97 of IRPA, to the applicant's H&C application?

[67] The Applicant submits the Officer applied the wrong legal criteria, that of sections 97 and 122 of *IRPA*, which it states has been deemed a reviewable error by this Court.

[68] The Respondent is of the view the Officer's analysis was appropriate and did not employ the precise language of the PRRA process, but was simply characterizing the nature of the hardship the Applicant claimed she would face. The Respondent submits the Officer correctly considered evidence of risk so as to determine whether the Applicant would suffer hardship in Trinidad and merely noted that the Applicant had not claimed she was at risk of any specific criminal elements and only expressed concerns about general country conditions.

[69] The law surrounding this issue is set out by Justice Pinard in *Rebaï v Canada (Minister of Citizenship and Immigration)*, 2008 FC 24, 67 Imm LR (3d) 191 at paragraph 7, [*Rebaï*]:

> When performing a PRRA analysis, the question to be answered is whether the applicant would personally be subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment (*Sahota v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 651, [2007] F.C.J. No. 882 (F.C.)). On an H&C application, the underlying question is whether the requirement that the applicant apply for permanent residence from outside of Canada would cause the applicant unusual and undeserved or disproportionate hardship (*Sha'er v Canada (Minister of Citizenship & Immigration)* (2007), 60 Imm. L.R. (3d) 189, [2007] F.C.J. No.

> 297 (F.C.)). The risk to the applicant must be assessed as one factor in that determination (*Sahota*, supra). While the officer can adopt the factual findings from the PRRA analysis, the officer must consider these factors in light of the lower threshold of risk applicable to H&C decisions, of "whether the risk factors amount to unusual, undeserved or disproportionate hardship" (*Gallardo v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 554, [2007] F.C.J. No. 749 (F.C.)).

[70] The question at hand is whether the Officer applied the correct analysis to the Applicant's concerns over crime rates in Trinidad, specifically in Port of Spain. On this point, the Officer undertook the following analysis:

> The applicant has submitted concerns over the rising crime rate in Trinidad; however she has provided insufficient objective evidence that she would be personally targeted by the criminal elements upon her return to Trinidad. I acknowledge that there are problems of crime in Trinidad, however, in this regard I find the situation and hardship the applicant fears is faced generally by other individuals in the country.
>
> …
>
> The applicant has not resided in Trinidad for thirty-seven years and has provided insufficient evidence that she would be personally threatened or targeted by criminal elements upon her return to Trinidad. Although the applicant's removal to Trinidad would subject her personally to some hardship and while I acknowledge country conditions are not always favourable, I do not find that this would amount to a hardship that is unusual and undeserved, or disproportionate. I find that the applicant has provided insufficient evidence to indicate that returning to Trinidad would subject her to a risk that would amount to unusual and undeserved, or disproportionate hardship [emphasis added].

[71] It is clear the Officer's final conclusion applied the appropriate test. However, the Officer's analysis leading up to this conclusion is problematic and focused on the personal risk faced by the Applicant. The analysis begins by immediately noting the Applicant provided insufficient objective evidence that she would be personally targeted. It then recognized problems with crime in Trinidad, but found that this hardship is faced generally by other individuals in the country. After citing a country report, the Officer again stated the Applicant had provided insufficient evidence that she would be personally threatened or targeted. This is the only analysis conducted before the Officer stated her final conclusion.

[72] The Officer set aside all of the country conditions and dismissed relevant facts indicative of hardship by incorrectly applying a standard which required the Applicant to show that she would be personally targeted or threatened. This Court has determined such an approach to be incorrect and reviewable: see *Sahota v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 651, [2007] FCJ 882 [*Sahota*]; *Sha'er, supra*.

[73] I find the Officer applied a higher standard than appropriate for H&C decisions by incorrectly requiring the Applicant to establish a personal risk beyond that faced by other individuals in Trinidad. The test of risk causing unusual, undeserved or disproportionate hardship is not limited to personal risks to an Applicant's life or safety, and the Officer failed to properly consider whether the overall problem of criminality constituted unusual and undeserved, or disproportionate hardship in the circumstances. This constitutes a reviewable error: *Aboudaia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1169 at para 17, *Rebaï*, *supra*; *Sahota*, *supra*; *Sha'er*, *supra*.

4. Did the Officer err in failing to consider the Applicant's request for a TRP?

[74] The Applicant submits that a TRP may be appropriate where an H&C application has been refused, but an officer feels the applicant should be allowed to remain in Canada temporarily, for example, so as to apply for a pardon for a criminal conviction as noted in CIC Inland Processing Manual #5 at section 5.22. The Applicant notes she requested a TRP and would have been eligible for a pardon within the maximum three year time period of a TRP.

[75] The Respondent contends that there was no basis for the issuance of a TRP as the Applicant did not receive first stage approval of her H&C application.

[76] However, the CIC Inland Processing Manual #5 indicates that the issuance of a TRP may still be appropriate in situations where an H&C application has been refused, for example in cases where an officer "does not believe that there are sufficient grounds to grant an exemption under H&C but feels the applicant should be allowed to remain in Canada temporarily, perhaps to apply for a pardon for a criminal conviction".

[77] This Court has established that where an applicant makes a TRP request, it must be considered and that a failure to do so is a reviewable error. In *Japson v Canada (Minister of Citizenship and Immigration*), 2004 FC 520 [*Japson*], the Court dealt with an officer's failure to render a TRP decision following a rejection of an H&C application. Even if there is no basis for the issuance of a TRP, the officer should indicate the request was given consideration: *Japson* at para 25; *Lee*, *supra*, at paras 16 and 18; *Dhandal*, *supra*, at para 17.

[78] The Applicant requested a TRP in her initial H&C application, in a letter to CIC dated December 23, 2009, and in her updated H&C submissions dated November 17, 2010. The Officer did not consider the request.

[79] The Officer's failure to consider the request for a TRP is a reviewable error.

Conclusion

[80] For the above reasons, the matter must be remitted to a different immigration officer for reconsideration, who must, in addition to considering the H&C application, assess the Applicant's TRP application.

[81] The Application for judicial review is granted.

[82] No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted.

2. The matter is remitted to a different immigration officer for reconsideration, who must, in addition to considering the H&C application, assess the Applicant's temporary resident permit application.

3. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2596-11
STYLE OF CAUSE:	SHAFFIRA SHAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 1, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	NOVEMBER 7, 2011

APPEARANCES:

Katherine Ramsay	FOR THE APPLICANT
Lorne McClenaghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Katherine Ramsay Barrister and Solicitor Toronto, ON	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT