

Federal Court



Cour fédérale

**Date: 20121210**

**Docket: IMM-1886-12**

**Citation: 2012 FC 1453**

**Ottawa, Ontario, December 10, 2012**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**BIBI SHAREZA POKHAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] In 2005, Ms Bibi Shareza Pokhan left Guyana and arrived in Canada with her husband. The couple filed a refugee claim but it was denied.

[2] Ms Pokhan's husband was abusive toward her. He was eventually charged with assault and, in 2010, was deported back to Guyana. In the meantime, the couple divorced and Ms Pokhan was granted sole custody of their Canadian-born child.

[3] Ms Pokhan applied to re-open her refugee claim in order to raise her fear of domestic abuse if she returned to Guyana. In 2010, a panel of the Immigration and Refugee Board dismissed her claim based on the availability of state protection in Guyana.

[4] Ms Pokhan also applied for humanitarian and compassionate relief (H&C) and for a pre-removal risk assessment (PRRA). Both were dismissed.

[5] It is only Ms Pokhan's H&C that is in issue here. Primarily, she contends that the deciding officer erred in his assessment of the best interests of her child. In particular, she contends that the officer asked the wrong question – whether she had shown that the child would not have access to basic amenities in Guyana, or that the child would suffer undue, undeserved or disproportionate hardship if Ms Pokhan were removed from Canada. Instead, Ms Pokhan submits, the officer should have weighed the benefits to her child of her non-removal from Canada against the degree of hardship that the child would endure if she were removed. In turn, this should have formed part of the officer's consideration of all of the relevant factors and the overarching inquiry into the hardship that her removal would cause.

[6] Ms Pokhan submits that the officer's decision should be quashed and that her application should be reconsidered by another officer. I agree that the officer's decision should be overturned and must, therefore, allow this application for judicial review.

[7] Ms Pokhan raised a number of concerns about the officer's decision. In my view, the main issue is whether the officer applied the wrong test relating to the best interests of the child. Her other submissions on that issue – that the officer's decision was unreasonable and that the officer's reasons were inadequate – are connected to the proper test. It is unnecessary for me to deal with them separately. Ms Pokhan also raised other alleged errors in the officer's decision but, based on my conclusion that the officer erred in analyzing the best interests of the child, I need not deal with those other issues, either.

[8] Therefore, the sole issue is whether the officer applied the wrong test for the best interests of the child.

## II. The Officer's Decision

[9] Noting that the child is a Canadian citizen, the officer found that the child, age 3 at the time, could easily remain in Canada with other family members if Ms Pokhan were removed.

[10] The officer then considered the circumstances that would face the child in Guyana. The officer noted that the education and health care resources in Guyana are poor. However, the child

would not be personally affected by those problems because they are experienced by the entire population. Further, the child would not be denied basic amenities.

[11] The officer accepted that the child would face a period of adjustment to life in Guyana, but would likely adapt. Again, the child would not be denied basic amenities and would not face unusual, undeserved or disproportionate hardship.

III. Did the Officer apply the wrong test?

[12] The Minister argues that it was appropriate for the officer to consider the hardship facing the child in Guyana. The question is whether, looking at the decision as a whole, the officer was alert, alive and sensitive to the child's best interests.

[13] I agree with the Minister, to a point. However, it is clearly an error for an officer to indicate that the best interests of a child will only be relevant where basic amenities will be denied: *Sebbe et al v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813, at para 15. Further, the question is not whether the child will face undue, undeserved or disproportionate hardship. The officer must consider the benefit to the child if the parent is allowed to remain in Canada and the hardship the parent's removal would cause: *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, at para 4.

[14] Here, the officer did not consider the benefits to the child that would flow from Ms Pokhan's remaining in Canada. The officer only considered how the child would fare alone in

Canada with extended family members as compared to what would face the child in Guyana. The officer never considered the possibility of Ms Pokhan's remaining in Canada.

[15] Further, the officer clearly erred by requiring evidence of a lack of basic amenities in Guyana, or of circumstances that would amount to undue, undeserved or disproportionate hardship. The term "undeserved" is particularly inapt in a best interests analysis, because no child deserves hardship: *Hawthorne*, above, at para 9.

[16] Therefore, in my view, the officer failed to apply the correct test to the best interests of the child analysis. This error affected the adequacy of the officer's reasons and the reasonableness of the officer's analysis. Accordingly, I must allow this application for judicial review.

#### IV. Conclusion and Disposition

[17] In his analysis of the best interests of the child, the officer appeared to require Ms Pokhan to show that her child would not have access to basic amenities in Guyana, or that the child would experience undue, undeserved or disproportionate hardship there. This was not the proper test. The officer must balance the benefits to the child if his or her parent is allowed to remain in Canada against the hardship that faces the child if the parent is removed. This analysis should then figure into the overall assessment of whether the applicant's removal would cause undue, undeserved or disproportionate hardship. The officer applied the wrong test and I must, therefore, allow this application for judicial review. In the circumstances, no question of general importance arises for certification.

**JUDGMENT**

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

1. The application for judicial review is allowed.
2. No question of general importance is stated.

“James W. O’Reilly”

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Judge

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

**DOCKET:** IMM-1886-12

**STYLE OF CAUSE:** BIBI SHAREZA POKHAN  
v  
MCI

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 26, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** December 10, 2012

**APPEARANCES:**

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