Federal Court  Cour fédérale

Date: 20130719

Docket: IMM-7326-12

Citation: 2013 FC 802

Ottawa, Ontario, July 19, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JEYAKANNAN KANTHASAMY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr Kanthasamy is a now 20-year-old Tamil from the northern region of Sri Lanka who arrived in Canada in 2010 and claimed refugee protection. In February 2011, the Immigration and Refugee Board (the Board) refused his application, finding that Sri Lankan authorities had taken measures to improve the situation of Tamils, and that the applicant did not have a profile that would put him at risk upon his return to Sri Lanka. Leave for judicial review of the Board's decision was denied.

[2] The applicant then made an application for a Pre-removal Risk Assessment [PRRA] and an application on Humanitarian and Compassionate [H&C] grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) to permit him to apply for permanent resident status from within Canada. Both applications were refused in January, 2012. The applicant did not pursue leave for judicial review of the PRRA decision due to an agreement by the respondent to reconsider the H&C application.

[3] Additional submissions for the H&C application were made in April, 2012 but were not available to the Senior Immigration Officer (the Officer) at the time of the April decision. The Officer then considered the additional submissions and issued an addendum to the reasons on July 11, 2012. The Officer refused to grant the exemption as she was not satisfied that the applicant's return to Sri Lanka would result in hardship that was unusual and undeserved or disproportionate.

[4] The July 11, 2012 decision (which incorporates the April 26 decision) is the subject of the current application for judicial review pursuant to section 72 of the *Act*.

The decision

[5] The Officer provided detailed reasons in the April and July decisions. The Officer acknowledged that the applicant identified a fear of returning to Sri Lanka because he is a young male Tamil from the northern region. The Officer noted that subsection 25 (1.3) of the *Act* directs that the factors considered in the determination under sections 96 and 97 are not to be taken into account in the H&C determination but that the Minister "must consider elements related to the hardships that affect the foreign national".

[6] The applicant's fear of persecution, torture, risk to life or cruel and unusual punishment on the basis of his race and nationality, being a young Tamil male from the northern region of Sri Lanka, had been considered by the Board in the sections 96 and 97 assessment and by the Officer in the PRRA determination. The applicant claimed that he had been detained twice, once in March 2010 for several hours, and again, briefly, in April, 2010. His family then sent him to Canada to reside with his aunt and uncle and upon arrival he claimed refugee protection. In February, 2011, the Refugee Protection Division [RPD] denied his refugee claim.

[7] The Officer noted that the onus is on the applicant to demonstrate that country conditions would affect the applicant personally and cause him undue hardship. The Officer considered the "objective documentary evidence" on the situation of Tamil Sri Lankans and the applicant's circumstances and concluded that there was insufficient evidence to satisfy her that the applicant would be targeted by security forces or would be personally at risk of discrimination due to his ethnicity.

The issues

[8] The applicant submits that the decision is unreasonable because the Officer made perverse findings, ignored or misinterpreted evidence regarding the applicant's profile as a young male Tamil from the Northern region, erred in rejecting the psychological report, discounted the applicant's level of establishment and improperly analysed the best interests of the child (who is the applicant). In addition, the applicant submits that the Officer breached the duty of procedural fairness by failing to provide reasons.

Standard of review

[9] The Supreme Court of Canada has established that there are only two standards of review — reasonableness and correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 34 [*Dunsmuir*]. Procedural fairness is to be assessed on a standard of correctness. Factual determinations and mixed questions of fact and law are to be assessed on a standard of reasonableness.

[10] The standard of review of decisions under section 25 is reasonableness: *Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835, 2006 FCJ No 1061 at para 6.

[11] It is well-established that the role of the Court on judicial review where the standard of reasonableness applies is not to substitute the decision it would have made but, rather, to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at para 47. Although there may be more than one reasonable outcome, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1SCR 339 at para 59 [*Khosa*].

Were the reasons inadequate?

[12] The applicant submits that the Officer's reasons do not address the evidence that was before her, particularly the additional submissions provided in April 2012. I do not agree.

[13] Both the reasons dated April 26, 2012 and the addendum dated July 11, 2012 refer to the evidence and submissions and reflect the Officer's consideration of that evidence in assessing whether the discretion to grant an exemption on H&C grounds should be exercised. The Officer clearly states that she reviewed all the additional submissions which included: a letter from the applicant's counsel; a letter of support from a friend; a letter of employment from the applicant's part-time employer; a T-4 tax slip; the report of a psychological assessment; photos; and country documentation, in addition to the documents previously reviewed in the April, 2012 decision.

[14] In my view, the record ably permits the Court "to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes…" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 3 SCR 708 at para 16).

Did the Officer unreasonably find that the applicant would not face unusual and undeserved or disproportionate hardship due to his profile as a young Tamil male?

[15] The applicant's submissions focus on whether the Officer assessed the risks the applicant faced in determining hardship or simply relied on the fact that the risks had been considered in the PRRA application. The applicant also submits that the Officer unreasonably found that the applicant would not be personally at risk of hardship if returned to Sri Lanka, but would face only the same general risks as other young males. The applicant submits that personalized risk is not required in a H&C determination.

[16] The jurisprudence has established that the assessment of risk in a PRRA is distinct from an assessment of those same risks as hardship in a H&C application. However, the well-settled jurisprudence must be considered in light of section 25 as amended in 2010.

[17] As noted by Justice Noël in *Gaya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 989, [2007] FCJ No 1308, the tests for a PRRA and H&C are different:

> [24] The test to be applied to H&C applications is set out in paragraph 17 of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, which confirms the standard as set out in the IP-5 Manual. Madame Justice Claire L'Heureux-Dubé wrote among other things:
>
> > 17 [. . .] Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". [. . .] [the Court's emphasis]
>
> [25] In application of this standard, this Court has established that while it is appropriate to rely on the risk factors in a prior PRRA report when making an H&C decision, the Officer must nonetheless be mindful to distinguish between the standards of proof specific to each type of application.
>
> [26] The Chief Justice said it best in *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296 at paragraphs 2 to 5:
>
> > 2 In explaining her rationale for her refusal of the Pinters' request for permanent residence within Canada, the immigration officer noted:
> >
> > > • I have not dealt with the risk factors of the applications since they were reviewed by the Pre-Removal Risk Assessment officer who determined the family would not be at risk if they were returned to Hungary. The risk identified in the Humanitarian and Compassionate

> application is identical to the risk identified in the PRRA application.
>
> Contrary to the immigration officer's suggestion, there is a difference between the assessment of risk factors in an application for humanitarian and compassionate consideration and one for protection from removal.
>
> 3 In an application for humanitarian and compassionate consideration under section 25 of the Immigration and Refugee Protection Act (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada.
>
> 4 In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
>
> 5 In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.
>
> (See also, the Chief Justice in *Liyanage v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1293, 2005 FC 1045 at paragraph 41. For an excellent analysis see Madam Danièle Tremblay-Lamer in *Sha'er v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 297, 2007 FC 231 at paragraph 7)

[18] In *Sha'er v Canada (Minister of Citizenship and Immigration)*, 2007 FC 231, [2007] FCJ No 297, Justice Tremblay-Lamer noted that:

> [7] It is well established, and the parties agree, that the proper test for H&C decisions is: considering all of the relevant

> circumstances, would the general obligation put on all foreign nationals to apply for permanent residence from abroad cause the applicant unusual, undeserved or disproportionate hardship (*Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817 at para. 17; *Legault v. Canada (M.C.I.)*, [2002] 4 F.C. 358, 2002 FCA 125 at para. 23). Unusual, undeserved or disproportionate hardship encompasses the risk the applicant allegedly faces in her country of nationality, her level of integration in Canadian society and the consequences of her removal from Canada.
>
> [8] There are significant analytical differences between H&C and PRRAs, as clearly stated by Chief Justice Allan Lutfy in *Pinter v. Canada (M.C.I.)*, [2005] F.C.J. No. 366 (QL), 2005 FC 296 at paragraphs 3-4…:
>
> [9] I note that though the tests for H&C and PRRA matters are distinct, they are related, as held by Chief Justice Lutfy in *Liyanage v. Canada (M.C.I.)*, [2005] F.C.J. No. 1293(QL), 2005 FC 1045 at paragraph 41:
>
> > […] the immigration officer could adopt the factual conclusions in her PRRA decision to the analysis she was making in the H&C application. However, it was important that she apply those facts to the test of unusual and undeserved or disproportionate hardship, a lower threshold than the test of risk to life or cruel and unusual punishment which was relevant to the PRRA decision.

[19] Justice Tremblay–Lamer found that on the facts of that case, the officer had applied the wrong test:

> [14] Furthermore, the officer's decision shows that he accepted the applicant's allegations of discrimination, and then discounted their significance through the wrong legal analysis:
>
> > [w]hile it is true that discrimination is a fact of life for ethnic and religious minorities in Israel, this does not in itself constitute persecution, nor demonstrate that the Israeli government is unwilling an unable to protect the applicant. The documentary evidence indicates that Israeli citizens can expect the protection of the police and the courts, and that official recourses exist for

> individuals who feel they have been the object of discrimination by police officers. [Emphasis added]
>
> [15] The officer essentially accepted the fact of discrimination, but failed to properly consider whether it constituted unusual and undeserved or disproportionate hardship for the applicant in the circumstances, as required in the context of an H&C application. Instead, his analysis reveals that he applied a PRRA analysis in rejecting the discrimination as a valid ground for granting the H&C application. This is an error in law, and warrants the intervention of this Court (*Pinter*, above, at para. 6; *Liyanage*, above, at para. 44).

[20] In *Hamam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1296, [2011] FCJ No 1585 at paras 41-42, Justice Mandamin also noted that:

> **41** The jurisprudence sets out that the risk in an H&C application is that of hardship which is different from the risk to be considered in a PRRA application. As Justice Montigny stated in *Ramirez*, "[i]t is beyond dispute that the concept of 'hardship' in an H&C application and the 'risk' contemplated in a PRRA are not equivalent and must be assessed according to a different standard."

[21] The law is also well-settled that the risks alleged in a H&C must be risks that are personal to the applicant.

[22] In *Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6, [2009] FCJ No 658 [*Lalane*], Justice Shore noted:

> [1] The allegation of risks made in an application for permanent residence on humanitarian and compassionate grounds (H&C) must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application. That conclusion would be an error in the exercise of the discretion provided for in

> section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) which is delegated to, *inter alia*, the Pre-removal Risk Assessment (PRRA) officer by the Minister (*Mathewa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 914, [2005] F.C.J. No. 1153 (QL) at para. 10; see also chapter IP 5 of the Citizenship and Immigration Canada manual on inland processing of applications, entitled "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", which expressly provides that the risk identified in an H&C application must be a personalized risk (section 13, p. 34), Exhibit "B", Affidavit of Dominique Toillon; *Hussain v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 719, 149 A.C.W.S. (3d) 303).

[23] In *Ramaischrand v Canada (Minister of Citizenship and Immigration)* 2011 FC 441, [2011] FCJ No 551 [*Ramaischrand*], Justice Mosley also found that a generalized risk is not sufficient to succeed on a H&C application and that there must be a link between evidence supporting generalized risk and that of a personalized risk.

[24] The jurisprudence that established that the same risk could be considered under section 25 but with a lower threshold because the assessment was of hardship must be considered in light of the amendments to section 25.

[25] Section 25 (1) of the *Act*, which is the general provision governing H&C applications, provides:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se

may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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 affected.	conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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.

[26] The *Act* was amended in 2010 to clarify the scope of the H&C assessment. Subsection 25 (1.3) was added and provides:

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[27] In *Caliskan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190, [2012] FCJ No 1291 [*Caliskan*], Justice Hughes examined the amendments to the H&C provisions of the *Act*,

particularly the addition of subsection 25 (1.3) which directs that the factors taken into account in a determination under sections 96 and 97 are not to be taken into account in a H&C application.

[28] Justice Hughes considered the testimony of witnesses who appeared before the Parliamentary Committee studying the proposed amendments to interpret the subsection and identify its intention and what might be considered "elements related to the hardships that affect the foreign national".

[29] The witnesses indicated that the reform was intended to make a distinction between a determination of refugee protection, a PRRA and a H&C exemption. The H&C determination is not intended to be an additional assessment of those same risks, but an assessment of other hardship. The witnesses suggested that generalised adverse country conditions, systemic discrimination, best interests of the child, and establishment in Canada would be considered under subsection 25 (1.3).

[30] Justice Hughes raised the same issue is *Caliskan* that arises in this case:

> [14] The question is, therefore, whether section 25(1.3) of IRPA, as amended, which exempts sections 96 and 97(1) considerations is itself constrained by the exemption to section 97(1) afforded by subsection 97(1) (b) (ii). Put another way, is the Minister, or Minister's Officer, still required to consider "generalized risk" in the context of considering "hardship"?
> …
> 22] I conclude that the Guidelines got it right in construing how the amended provisions of section 25 of IRPA are to be interpreted. We are to abandon the old lingo and jurisprudence respecting personalized and generalized risk and focus upon the hardship to the individual. Included within the broader exercise in considering such hardship is consideration of "adverse country conditions that have a direct negative impact on the applicant".

[31] The Guidelines provide:

> 5.16. H&C and hardship: Factors in the country of origin to be considered
>
> While A96 and A97 factors may not be considered, the decision-maker must take into account elements related to the hardships that affect the foreign national. Some examples of what those "hardships" may include are:
>
> a. lack of critical of medical/healthcare;
>
> b. discrimination which does not amount to persecution;
>
> c. adverse country conditions that have a direct negative impact on the applicant.

[32] In *Caliskan*, Justice Hughes found that the officer improperly focused on the risks faced by the applicant and not on the hardship, as required in section 25. He then certified a question on the nature of the risks to be considered under section 25 as amended:

> [26] I find that the Reasons improperly focus on risk and embark on an exercise of distinguishing personalized from generalized risk, which should not be done. The focus should be on hardship, including any adverse country conditions that have a direct negative impact on the applicant. The matter will be sent back for redetermination by a different Officer, having these principles in mind.
>
> [27] I recognize that this case raises a new issue not considered by earlier jurisprudence and will certify the following question:
>
> > *What is the nature of risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the Balanced Refugee Reform Act?*

[33] In the present case, the issue remains whether the hardships — as opposed to the risks that were considered under sections 96 and 97 — would have a direct impact on the applicant. While Justice Hughes indicates that the old "lingo" should be abandoned, he does not suggest that there is no need to assess the hardship of the particular applicant. If that were the case, then as noted in *Lalane*, cited above, "…every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation." To justify a H&C exemption, the considerations, including adverse country conditions and discrimination, should have a direct and negative impact on the particular applicant.

[34] The jurisprudence established in *Lalane* and *Ramaischrand* can be adapted to the amended section 25. In the present case, the applicant must, therefore, establish the link between the hardship faced generally by young male Tamils and the hardships that he would face upon his return.

[35] The Officer clearly assessed the circumstances that the applicant would face. The Officer noted that some Tamils are singled out for questioning and detention but this is done on suspicion that those targeted are LTTE supporters or sympathizers. The Officer noted that the applicant's family in Sri Lanka had not been targeted for mistreatment due to their ethnicity and that there was no evidence that the applicant was a person of interest or that inquiries had been made to his family about his whereabouts. The Officer found that there was insufficient evidence to satisfy her that the applicant will be targeted or to support the applicant's statements that he would be personally discriminated because of his ethnicity.

[36] The Officer assessed whether and how the adverse country conditions and discrimination against young male Tamils would directly impact the applicant and concluded that any impact would not amount to hardship to warrant an exemption.

[37] As a result of the amendments to section 25, the risks alleged by the applicant of persecution, torture, risk to life or cruel and unusual punishment on the basis of his race and nationality were considered in his refugee and PRRA determination and cannot be reconsidered in the H&C. The H&C considerations focus on other hardships which would not meet the same threshold as required under sections 96 and 97. In some circumstances there may be some overlap between the allegations of risk and of hardship. However, to give effect to the amendments, the assessment should focus on other hardships, including discrimination and adverse country conditions and how they affect the particular applicant, and whether this amounts to unusual and undeserved or disproportionate hardship.

[38] This approach is consistent with the decision of Justice Near, as he then was, in *JMSL v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1274, [2012] FCJ No 1374 at paras 18-19 [*JMSL*]:

> **18** I am satisfied in this case that the Officer considered all of the evidence before her and came to a reasonable conclusion. Her cognizance of the "problems [the Applicants] face at the hands of the Mara Salvatruchia [*sic*]" is clear from her identification of the decisions pertaining to their refugee and PRRA applications. Given subsection 25(1.3) of IRPA, it was reasonable for the Officer to determine that the Applicants' fears had already been addressed in those other applications, and to focus on the hardship that might be suffered by the Applicants if returned to El Salvador to apply for permanent residence.

> **19** As the Respondent rightly points out, the documents referred to in pages 145 to 188 of the Application Record consist primarily of identification documents and police record checks. The only document that relates to the particular problems the Applicants might face with respect to MS is a single affidavit sworn by Mrs. R.E.A.D.S., which alleges that she received threatening phone calls asking for the Applicants' whereabouts. There was no specific mention of this document in the Applicants' submissions, and there is no other corroborating evidence. The Officer is entitled to weigh the evidence before her, and need not mention every piece of evidence she considers. It is clear from the decision that the Officer considered the hardship that might specifically be faced by the minor Applicant and by the female Applicant. Her conclusion that this hardship did not amount to unusual and undeserved or disproportionate hardship was reasonable.
> [Emphasis added].

[39] In the present case, the Officer applied the proper test and his factual determinations are reasonable.

Establishment

[40] The applicant submits that the Officer erred in discounting his level of establishment in Canada because this occurred while he was without status in Canada.

[41] I do not agree. The Officer thoroughly considered the applicant’s establishment in his Canadian community and family in both sets of reasons. The Officer noted that the applicant had adapted to life with his aunt and uncle, did well in school, held a part-time job with his uncle and had made friends. However, the Officer found that this level of establishment was what would be expected in similar circumstances. The Officer acknowledged that the applicant would prefer to remain in Canada and that his return to Sri Lanka would result in a separation from his new friends and his aunt and uncle and Canadian relatives, but that he had family in Sri Lanka to support him.

The Officer assessed all of the aspects of his establishment and reasonably concluded that the separation may be difficult but did not amount to unusual and undeserved or disproportionate hardship.

[42] The Officer noted, as would I, that the H&C exemption is an exemption from applying for permanent residence from outside Canada and the applicant may pursue an application upon his return home.

[43] In *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, [2006] FCJ No 425, Justice de Montigny considered whether the officer fettered her discretion by not considering evidence of establishment after the applicants became subject to a removal order. At paragraphs 20 to 24, Justice de Montigny noted:

> One of the cornerstones of the Immigration and Refugee Protection Act is the requirement that persons who wish to live permanently in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent resident visa. Section 25 of the Act gives to the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy […]
>
> It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident. This circular argument was indeed considered by the H & C officer, but not accepted; it doesn't strike me as being an unreasonable conclusion.
>
> […]
>
> [I]t cannot be said that the exercise of all the legal recourses provided by the IRPA are circumstances beyond the control of the Applicant. A failed refugee claimant is certainly entitled to use all the legal remedies at his or her disposal, but he or she must do so knowing full

> well that the removal will be more painful if it eventually comes to it.
> […]
>
> In any event, the Immigration Officer did not refuse to consider the establishment of the Applicants in Canada, but decided to give this factor little weight. It cannot be said, therefore, that she fettered her discretion; quite to the contrary, she looked at all the circumstances before concluding as she did, and therefore exercised her discretion.
> […]

[44] In the present case, the applicant had availed himself of all opportunities to remain in Canada and while in Canada had adapted and done what would be expected of a young student — he went to school, made friends, adapted to his relatives in Canada, and had a part-time job. The Officer took this into account and did not discount this establishment. She merely observed the obvious — that he did so while awaiting immigration status.

[45] As noted by Justice Snider in *Alexander v Canada (Minister of Citizenship and Immigration)*, 2012 FC 634, [2012] FCJ No 863:

> [14] As the Respondent notes, *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8, [2004] 2 FCR 635, teaches that "applicants have the onus of establishing the facts on which their claim rests". Although the Applicant says a positive determination based on her establishment in Canada was inevitable, this is simply not the case. The evidence as to her establishment in Canada was that she has family here, has worked here, and has become connected to the community here. Inherent in the notion of H&C applications is that hardship is a normal consequence of deportation proceedings, and that relief is to be granted only when hardship goes beyond the inherent consequences of deportation. The Officer considered all of the evidence and reasonably concluded that the Applicant's establishment would not cause undue hardship. (Emphasis added)

[46] H&C assessments involve the consideration of a wide range of factors, and the level of establishment is not determinative (*Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 813, [2011] FCJ No 1014, at para 13).

Best Interests of Children [BIOC]

[47] The applicant also submits that the Officer did not conduct an adequate BIOC analysis of the applicant, which is required in a H&C determination.

[48] The applicant was under 18 when he arrived and was 18 at the time the H&C application was submitted. Although a BIOC analysis focuses on children under 18, it is apparent that the Officer did consider this aspect of the H&C determination specifically in the April reasons and considered the applicant's age in the context of assessing his level of establishment in the July reasons.

[49] The Officer noted that the applicant had made ties to his Canadian relatives who he lived with but that he also had parents and siblings in Sri Lanka and that he had spent his life up to 2010 in Sri Lanka and attended school.

[50] The Officer reasonably concluded that there would be no unusual or undeserved hardship should the applicant return to his family to continue his education in Sri Lanka.

[51] The Officer did not err in the BIOC analysis. The Officer was "alert, alive and sensitive" to the BIOC: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999]

SCJ No 39 at para 75. The starting point is to determine where the best interests of the child lie and the Officer did so. The Officer determined that the applicant's best interests were to return to his family in Sri Lanka. While the applicant takes the position that his best interests are to remain in Canada, the case law has established that while life may be better in Canada for children, more is required to justify an exemption relying on a BIOC analysis (see, for example, *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2002] FCJ No 1687 at para 5),.

Psychological Assessment

[52] The applicant submits that the Officer erred in rejecting the psychological assessment because it was based on what the applicant told the psychologist. As there was no adverse credibility finding, the applicant submits that there was no valid reason to reject the psychologist's report.

[53] The applicant also submits that it is impossible for the Officer to accept the applicant's diagnosis but not the reasons for the diagnosis. In addition, the applicant argues that the Officer failed to consider the harm the applicant would suffer if he returned to Sri Lanka.

[54] It is clear from the reasons that the Officer did not reject the report. The Officer considered it in both sets of reasons. In the addendum, the Officer noted that the psychologist reported that the applicant had recounted his detention, along with other boys, for several hours, the threats made by the military during this period of detention and that the military continues to inquire about the applicant's whereabouts with his family.

[55] The Officer considered the psychological assessment which canvassed the effects of the applicant's impending removal to Sri Lanka. The Officer noted that the psychologist's report contained hearsay on the country conditions in Sri Lanka, and that the doctor was not in a position to proffer expert testimony on such matters. The Officer acknowledged that the applicant may suffer from anxiety and distress for a number of reasons.

[56] The Officer also noted that the applicant was not seeking any treatment in Canada, and if treatment were needed, he could obtain it in Sri Lanka. The Officer did not fail to consider that the report indicated that the applicant's well-being was declining as a result of his deportation order.

[57] The Officer reasonably concluded that this would not amount to undue hardship.

[58] The Officer did not misconstrue the evidence which indicated that he would suffer harm if returned — i.e., that the applicant's PTSD would be exacerbated by a return to Sri Lanka. The Officer took this into account noting that hardship results from deportation for most people but that she was not satisfied that this evidence amounted to unusual and undeserved or disproportionate harm for the applicant.

[59] The Officer concluded by indicating that the H&C process is not designed to eliminate hardship, but rather to relieve undue and undeserved or disproportionate hardship.

Conclusion

[60] As noted above, the standard of review for decisions made regarding H&C applications is that of reasonableness.

[61] As the Officer notes in her reasons, the H&C process permits an exemption from applying for permanent residence from outside of Canada. It is an exceptional provision to be exercised where there is unusual and undeserved or disproportionate hardship. The Officer assessed all the factors and made the appropriate distinction between an assessment of risk, which was conducted for the PRRA, and an assessment of hardship which is required for H&C determinations. The Officer acknowledged general adverse conditions for Tamil males in Sri Lanka but reasonably found that there was insufficient evidence that the applicant had any profile that would result in him being targeted and insufficient evidence that he would be directly negatively impacted. The Officer supported her assessment and decision with clear reasons. There is no basis to disturb those findings.

[62] While the applicant is eager to remain in Canada, his return home to Sri Lanka will not prevent him from seeking to apply as a permanent resident.

Certified Question

[63] The applicant proposed two questions for certification. The first question is accompanied by a preamble which refers to the Officer's assessment of the H&C application submitting that the Officer took into account positive factors but discounted them all, including his establishment in

Canada. The applicant suggests that there is a trend in decisions that the exceptional nature of the H&C discretion justifies discounting positive factors.

[64] The first proposed question is:

> Is it an unreasonable exercise of discretion for an officer to consistently turn positive factors in favour of the person remaining in Canada into negative ones, such that they are essentially all discounted in the balancing of the humanitarian and compassionate discretion?

[65] The respondent submits that the question is not a serious question of general importance which would be dispositive of an appeal.

[66] The proposed question focuses on the determination the Officer made based on the facts of the case. A H&C exemption is a discretionary provision. There is no guarantee of a particular outcome. In the present case, the Officer did not discount any factors; rather, he assessed all the relevant factors and submissions and concluded that the discretion would not be exercised.

[67] I agree that the first question proposed should not be certified.

[68] The applicant's second question is:

> Did the officer err in law in requiring that the applicant establish that the hardship he faced, being rooted in discrimination, had to be personalized?

[69] The applicant premised this proposed question with the comment that discrimination is rooted in group characteristics.

[70] The respondent notes, with respect to the second question, that the statute and jurisprudence have settled that H&C considerations must relate to the circumstances of the foreign national. The respondent submits that *Lalane* and *Ramaischrand* have settled that an individual assessment is needed.

[71] The respondent also submits that the question seeks to re-open the factual issue of whether the Officer properly applied the test for hardship rather than for risk under s 96 and 97. The law is settled that the tests are separate. Therefore, certifying this question would not be an issue of general importance.

[72] I note that Justice Near, as he then was, certified a question on this issue in *JMSL*:

> 1. What is the nature of the risk, if any, to be assessed with respect to the humanitarian and compassionate considerations under section 25 of IRPA, as amended by the *Balanced Refugee Reform Act*?
>
> 2. Does the exclusion from consideration on humanitarian and compassionate grounds of the "factors" taken into account in the determination of whether a person needs protection under section 96 or 97 of IRPA mean that the facts presented to the decision-maker in the application for protection may not be used in a determination of the "elements related to the hardships" faced by a foreign national under subsection 25(1.3) of IRPA?

[73] In my view, there is merit in certifying the same broad question certified by Justice Hughes in *Caliskan* because the question proposed by the applicant is encompassed in that question. I have

found that the hardships must be personal in the sense that the hardship must directly and negatively affect the applicant. If this is not the proper interpretation of section 25, then the nature of the risks that should be taken into account pursuant to section 25 do need clarification.

[74] I would therefore re-certify the following question:

> What is the nature of risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the *Balanced Refugee Reform Act*?

JUDGMENT

THE COURTS JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The following question is proposed for certification:

> What is the nature of risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the *Balanced Refugee Reform Act*?

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 27, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	July 19, 2013

APPEARANCES:

Barbara Jackman	FOR THE APPLICANT
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BARBARA JACKMAN PROFESSIONAL CORPORATION Jackman, Nazami & Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
WILLIAM F. PENTNEY Deputy Attorney General of Canada	FOR THE RESPONDENT