

Federal Court



Cour fédérale

Date: 20190129

Docket: IMM-1541-18

Citation: 2019 FC 123

Toronto, Ontario, January 29, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JUNAID AKHTAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] There is an adage that hard facts make bad law. Lawyers, for that reason, often avoid litigating cases with hard facts. They fear that the results will be negative not only for their clients, but equally for future litigants who follow in those footsteps, and become burdened by precedent. But the hard-facts-bad-law adage occasionally has exceptions.

[2] Mr. Akhtar found his Humanitarian and Compassionate [H&C] application severed from his family, who ultimately obtained Canadian permanent residence. Mr. Akhtar did not: the reviewing Officer decided that his establishment in Canada was neither exceptional, nor would he face significant hardship in applying from Pakistan. Mr. Akhtar now challenges this H&C refusal.

[3] There is no doubt that Mr. Akhtar's background includes significant blemishes, including allegations of domestic violence. However, Mr. Akhtar's H&C was refused in part due to his failure to submit evidence on the best interests of the child [BIOC], given circumstances that arose during the processing of the application. This resulted in a situation in which Mr. Akhtar was not aware of the case he had to meet, which constitutes a breach of procedural fairness. A brief outline of the facts that led to the breach follows.

I. Background

[4] Mr. Akhtar, after arriving in Canada in 2002, made a refugee claim with his wife and three children, that was rejected in 2005. The following year, after having had a fourth child, Mr. Akhtar filed an H&C application on behalf of his family under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. This application was approved in principle, but ultimately refused due to Mr. Akhtar's kidney condition, for which he ultimately received a transplant.

[5] In 2012, Mr. Akhtar and his family submitted a second H&C application. According to the evidence, however, he had a history of physically and emotionally abusing his wife,

eventually leading her to leave the marriage in August 2015. In September 2016, she wrote to the Minister to both update her H&C application, and to request the severance of her husband's application from the rest of the family.

[6] The Minister accepted the request for severance. The Officer later approved her and the children's H&C application in February 2017. Those four family members became permanent residents shortly thereafter.

[7] On May 24, 2017, Mr. Akhtar received a letter [Letter], requesting that he update his submissions. The Letter is the critical piece of evidence for this judicial review, because the Applicant's procedural fairness arguments turn on it. The Letter's key section reads:

Before a decision is made about exempting you from the requirements of the *Immigration and Refugee Protection Act*, we are giving you an opportunity to update your H&C submissions.

You may choose to include updates in the following areas:

- Recent employment or educational information with supporting documentation
- Updated information or any changes to your medical condition
- Volunteer work
- Community involvement
- Personal relationships in Canada
- Current financial information
- Confirmation of current residential address, e-mail address
- Travel document (i.e. Valid Passport).

This Letter is reproduced at Annex A to these Reasons for ease of reference.

[8] Based on the Letter, Mr. Akhtar submitted, among other documents, (i) his rental agreement; (ii) employment letters; (iii) financial information; (iv) donations made to the

hospital where he received his kidney transplant; (v) a letter from his transplant surgeon that attested to his need to remain in Canada; and (vi) certificates for training courses.

[9] Mr. Akhtar's H&C application was denied in March 2018. He deposes that he thereafter contacted his local Member of Parliament, and it was only at that point that he learned for the first time that his wife and children had successfully severed their applications from his, and had been granted Canadian permanent residency.

II. Decision Under Review

[10] Among various findings in the decision, the Officer noted that Mr. Akhtar did not provide any submissions concerning why it was in the best interests of the children [BIOC] for him to remain in Canada. While the Officer stated that BIOC submissions were made when the H&C application was originally submitted in 2012, given the severance of the applications and family circumstances, those original BIOC submissions could not be considered. The Officer also maintained that BIOC did not require Mr. Akhtar to remain in Canada, stating that he had disassociated from his family, which now included three children over the age of 18.

[11] It is this BIOC analysis, and in particular the process that led to it, which is determinative of the outcome of this judicial review. The next section explains why.

III. Issues and Standard of Review

[12] Mr. Akhtar raises two issues: first whether the Officer breached his procedural fairness rights, and second whether the Officer reasonably assessed the evidence. Since the first issue is determinative, there is no need to consider reasonableness. As for fairness, the Federal Court of Appeal in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 54 found that a court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances. A sharp focus must be placed on the nature of the substantive rights involved and the consequences for an individual. While the exercise is best reflected in the correctness standard, strictly speaking, no standard of review is being applied.

IV. Analysis

[13] Mr. Akhtar argues that the Officer failed to provide him with proper notice of his removal from his family's H&C application, only learning of the severance after his application was denied. The Respondent rejects that the process was unfair in any way.

[14] I am persuaded by the Applicant's position. The Officer did not provide Mr. Akhtar with a fair opportunity to respond in his separate H&C application. This flaw renders the process procedurally unfair and requires that the application be reconsidered.

[15] The Officer's rationale appears to have been that Mr. Akhtar made BIOC submissions in the original application, when he was still with his family. However, once his marriage

dissolved, those BIOC submissions were moot, and Mr. Akhtar made no mention of BIOC in his subsequent, post-Letter submissions, or in the accompanying, updated H&C application.

Therefore, BIOC was a non-issue in this application.

[16] The Officer's rationale might have been reasonable if Mr. Akhtar had been notified that the dissolution of his marriage meant that he needed to provide new BIOC submissions, and the Officer had considered such submissions. Otherwise stated, had Mr. Akhtar known that BIOC was an issue, and not said anything further on the matter, then the Officer could have fairly concluded as he did in his decision, namely that:

Submissions from the applicant's children or their mother have not been provided with the applicant's updated submissions of July 2017 to indicate that the children's best interests would be negatively affected should the applicant depart Canada. The applicant has not indicated that the best interests of his children are a factor in this assessment. As no evidence has been adduced, it is determined that the best interests of the applicant's children would not be compromised should the applicant return to Pakistan.

[17] However, the Officer based his conclusion on non-production of evidence. Yet in the Letter, which invited updated evidence, the Officer listed eight specific areas in which the Applicant "may choose to provide updates". These indicate key areas such as employment, community service and contact information. BIOC was not mentioned anywhere in the list (again, see the Letter at Annex A).

[18] While one rarely sees Latin terminology these days, sometimes those classic expressions still neatly crystallize a legal concept, as does *expressio unius est exclusio alterius* in this case. The Officer put Mr. Akhtar on notice to provide information with respect to the eight specific

areas. Given that none of them touched on BIOC, a natural interpretation of the Letter could be that additional BIOC submissions were unnecessary, which was precisely how Mr. Akhtar interpreted the Letter.

[19] Justice Rennie, writing for the Federal Court of Appeal in *CP*, made it clear that an applicant must be aware of the case to meet in order to have a fair process. There, the Federal Court of Appeal clarified that there is an inherent “awkwardness” to “shoehorn” the question of procedural fairness into a standard of review analysis. Evaluating whether a decision-maker provided a procedurally fair process requires the reviewing court to ask “whether the procedure was fair having regard to all of the circumstances” and “with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed” (*CP* at paras 54–55). Ultimately, the reviewing court must first determine whether the applicant knew the case to meet, and second, whether he or she had a full and fair chance to respond (*CP* at para 56).

[20] While now twenty years old, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] is still a leading case on the content of procedural fairness. There, in deciding whether Ms. Baker was entitled to an oral hearing in the context of an H&C application, the Supreme Court took five factors into account, which it summarized in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48:

[5] The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate

expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body.

[21] Here, looking at whether the Applicant knew the case he had to meet — the key document is the Letter. In it, the Officer chose not to alert Mr. Akhtar that his separate H&C application meant that the previous BIOC submissions were moot. Instead, the Officer provided a list of eight areas which Mr. Akhtar could “choose to update”. The Officer could have easily mentioned BIOC as a ninth area, or indicated that the previous BIOC submissions were no longer applicable, or that Mr. Akhtar should provide new BIOC submissions. The Officer took none of these approaches.

[22] The Respondent argues that because the Letter states that the Applicant “may” update submissions, Mr. Akhtar was not barred from providing new submissions on BIOC.

[23] I am not persuaded by this response. Had the Officer decided to take the approach of leaving the Letter open-ended, the outcome may well have been different. But the Officer provided very specific guidance, excluding any mention of BIOC from the Letter. These particular circumstances led Mr. Akhtar down a path which significantly impacted his rights and had serious consequences. According to *CP* and *Baker*, this was the type of fairness issue that could not be glossed over or otherwise overlooked. Although those two cases were published two decades apart, the principle remains the same: the greater the interest at stake, the more procedurally fair and clear the process ought to be.

[24] Here, the context is a father being returned to Pakistan after some 16 years in Canada, with his children remaining in Canada. Given his background, it may very well be that Mr. Akhtar ultimately is unable to provide sufficient BIOC evidence to exempt him from applying from abroad. But the Officer simply had no way of making an informed finding on the issue, because Mr. Akhtar did not provide submissions on the point.

V. Conclusion

[25] However odious someone's conduct might appear, Canadians are fortunate to live in a country that respects the rule of law and honours the basic values that are enshrined in our Constitution and reinforced in legislation. Indeed, convicted criminals benefit from the presumption of innocence for any new prosecution they might face and retain the right to have their grievances or challenges dealt with in a fair manner. So too does every litigant in a civil context, including those with serious blemishes, such as Mr. Akhtar.

[26] When it comes to staying in the same place as one's children, every parent has the right to a fair chance to state their side of the story. One would expect no less in family court: even if the outcome goes against the parent who has misbehaved towards an ex-spouse, both parents have a right to be heard on areas such as custody and access.

[27] Sometimes, even if it can be validly argued that one was not foreclosed from submitting evidence, circumstances can nonetheless make it so. This was one such instance. In spite of its "hard" facts, Mr. Akhtar, as a basic matter of fairness, had the right not only to know the case to meet, but also a full and fair chance to respond to it.

JUDGMENT in IMM-1541-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The March 2018 decision, which denied Mr. Akhtar's H&C application, is set aside, and the matter is remitted for redetermination by a different officer.
3. No questions for certification were argued, and none arise.
4. There is no award as to costs.

"Alan S. Diner"

Judge

ANNEX A



Immigration, Refugees
and Citizenship Canada

Immigration, Réfugiés
et Citoyenneté Canada

Backlog Reduction Office
4318 Portage Road
Niagara Falls, ON L2E 6A4

Date : May 24, 2017

Application Number: [REDACTED]
Unique Client Identifier [REDACTED]

Junaid AKHTAR
[REDACTED]

HUMANITARIAN AND COMPASSIONATE (H&C) REQUEST

This refers to your application for permanent residence from within Canada on humanitarian and compassionate grounds.

Your Humanitarian and Compassionate (H&C) application is being assessed at the Niagara Falls Backlog Reduction Office.

This is a two step decision making process:

First, humanitarian and compassionate factors are assessed to decide whether to grant an exemption from certain legislative requirements to allow your application for permanent residence to be processed from within Canada.

Second, you must meet all other statutory requirements of the *Immigration and Refugee Protection Act*, for example, medical, security and passport considerations and arrangements for your care and support. The second decision is made only if you have received an exemption.

Before a decision is made about exempting you from the requirements of the *Immigration and Refugee Protection Act*, **we are giving you an opportunity to update your H&C submissions.**

You may choose to include updates in the following areas:

- Recent employment or educational information with supporting documentation
- Updated information or any changes to your medical condition
- Volunteer work
- Community involvement
- Personal relationships in Canada
- Current financial information
- Confirmation of current residential address, e-mail address
- Travel document (i.e. Valid Passport)

Please send the requested information/documents to this office **within thirty (30) days of the date of this letter.** If you do not, the decision about your exemption will be made, based upon the information on your file.

Canada

In addition, please complete the enclosed forms. Namely, IMM 0008 *Generic Application Form for Canada*, IMM 5406 *Additional Family Information*, IMM 5669 *Schedule A Background Declaration*, and if you have someone representing you, please complete the IMM 5476 *Use of Representative* form.

If you require clarification or additional information please send your request to:
[REDACTED]@cic.gc.ca

The client number (UCI) in the upper right corner of this letter is your personal identification number and it provides access to information on your file. For your own protection, do not allow any other person to use this number.

Niagara Falls Backlog Reduction Office

Cc. File

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1541-18

STYLE OF CAUSE: JUNAID AKHTAR v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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