Federal Court  Cour fédérale

Date: 20190531

Dockets: IMM-5595-18

Citation: 2019 FC 772

Ottawa, Ontario, May 31, 2019

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

GURPREET SINGH GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] After obtaining permanent residence in Canada, the applicant was convicted of sexual assault. He was thereafter found to be inadmissible to Canada on grounds of serious criminality. He seeks judicial review of a decision rendered by a Senior Immigration Officer [Officer] on October 23, 2018 dismissing his application for an exemption from his criminal inadmissibility on humanitarian and compassionate [H&C] grounds.

[2] The applicant submits that the Officer failed to adequately consider the best interests of his children, ignored evidence of hardship resulting from conditions in India, ignored evidence of his establishment in Canada, and otherwise failed to appropriately balance the H&C considerations at issue against his criminal inadmissibility. The respondent opposes the present application for judicial review and submits that the impugned decision is reasonable.

[3] The applicant also applied for a pre-removal risk assessment [PRRA] on February 28, 2018. He submitted that he fears that those who are aware of his Canadian criminal conviction will target him in India. On October 18, 2018, an officer dismissed the applicant's PRRA.

[4] On January 9, 2019, this Court dismissed the application for leave and judicial review of the decision to dismiss the PRRA (file IMM-5597-18), while ordering a stay of the removal order issued against the applicant pending a final determination of the present application for judicial review for which this Court subsequently granted leave.

[5] For the reasons that follow, I find that the decision to dismiss the H&C application falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

Legal framework

[6] Section 271 of the *Criminal Code*, RSC 1985, c C-46, provides that everyone who commits a sexual assault is guilty of (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to

imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[7] While every person who has the status of a permanent resident of Canada has the right to move to, take up residence in, and pursue the gaining of a livelihood in any province, under subsection 6(2) of the *Canadian Charter of Rights and Freedoms*, being Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, only citizens enjoy the right "to enter, remain in and leave Canada". Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non−citizens will be permitted to enter and remain in Canada (*Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at pp 733-34 [*Chiarelli*]).

[8] If a foreign national or a permanent resident is convicted in Canada following a criminal indictment under paragraph 271(a) of the Criminal Code, the offender is liable to imprisonment for a term not exceeding 10 years. This means that the applicant in the present case – who has been convicted in Canada of such an offence – is inadmissible on grounds of serious criminality by virtue of paragraph 36(1)(a) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and has no right to stay in Canada because "[he has] deliberately violated an essential condition under which [he was] permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of [his] right to remain

in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this" (*Chiarelli* at p 734).

[9] Pursuant to paragraph 44(1) of the IRPA, an officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister. If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division [ID] for an admissibility hearing, and in such a case, the ID may make a removal order (paragraphs 44(2) and 45(d) of the IRPA). When the removal order comes into force, that person shall lose permanent resident status (paragraph 46(1)(c) of the IRPA).

[10] While an appeal to the Immigration Appeal Division [IAD] "is the most appropriate place for a permanent resident facing removal from Canada to have foreign hardship taken into account" (*Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84 [*Chieu*]), since June 19, 2013, pursuant to subsection 64(2) of the IRPA, if the offender is sentenced to a term of imprisonment of more than six months, he or she has no appeal to the IAD against a decision to make a removal order. However, in these cases the Minister retains the discretion under subsection 25(1) of the IRPA to grant an exemption on H&C grounds, taking into account the best interests of a child directly affected.

[11] In this respect, Justice Norris, in *Gannes v Canada (Minister of Citizenship and Immigration)*, 2018 FC 499, notes at paragraphs 17 to 20:

> [17] As has been noted many times, s. 36(1) of the IRPA reflects a form of social contract. In exchange for the opportunity to reside in

Canada, permanent residents (and foreign nationals) are expected not to commit serious criminal offences. The IRPA recognizes that immigration brings many benefits to Canada and that the "successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian society," including the obligation of the former to avoid serious criminality (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 (CanLII) at paras 1-2 [Tran]; see also s. 3(1) of the IRPA). The IRPA "aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents" (Tran at para 40). When a permanent resident commits a serious criminal offence (as defined), this breach of the social contract can lead not only to the consequences imposed by the criminal courts but also to the loss of his or her immigration status and removal from Canada.

[18] The obligation to avoid serious criminality lest adverse immigration consequences follow applies equally to all permanent residents (and foreign nationals). That being said, the uniform application of this principle to all cases can lead to injustice or unfairness in some. Section 25(1) of the IRPA exists to protect against this result.

[19] This provision authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. Relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." These considerations include matters such as children's rights, needs and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) at para 41). See Annex I to these reasons for the relevant statutory provisions.

[20] An H&C application is a weighing exercise in which an immigration officer is asked to consider different and sometimes competing factors. When, as in the present case, an H&C exemption from criminal inadmissibility is sought, the immigration officer must weigh the public policy reflected in s. 36(1) of the IRPA against the individual circumstances of the case and determine whether the latter outweigh the former so as to warrant making an exception to the usual rule that serious criminality by a

> permanent resident leads to loss of status and removal from Canada.

[12] I fully endorse this reasoning. Remember that among the objectives of the IRPA with respect to immigration, Parliament has notably found it fit "to protect public health and safety and to maintain the security of Canadian society" and "to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks" (paragraphs 3(1)(h) and (i) of the IRPA).

[13] Thus, it is clear that in enacting subsection 25(1) of the IRPA, which refers to "humanitarian and compassionate considerations", Parliament indented to confer the Minister the exceptional discretionary power "to mitigate the rigidity of the law in an appropriate case", not to destroy the essentially exclusionary nature of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909 at para 14 [*Kanthasamy*]).

[14] Accordingly, the impugned decision refusing to grant an exemption under subsection 25(1) of the IRPA – which "is essentially a plea to the executive branch for special consideration" and is "not as robust as a hearing before the I.A.D." (*Chieu* at para 54) – is reviewable on a reasonableness standard. As far as the best interests of directly affected children are concerned, the Officer must do more than simply state that the interests of a child have been taken into account, he or she must "be alert, alive and sensitive to them" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74-75). In other words, those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence (*Kanthasamy* at para 39).

[15] On the other hand, reasonableness is concerned not only with the existence of justification, transparency, and intelligibility within the decision-making process, but also with whether the decision made by the Officer falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. If the reasons allow the Court to understand why the Officer made its decision and permit it to determine whether the result is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. In that context, this Court's role is not to assess the relevant factors or to exercise the discretion anew, but simply to verify that the decision-maker turned his or her mind to the relevant factors and gave them due consideration (*Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4 at paras 5-6).

[16] In this respect, weighing of the degree of establishment, the best interests of the children, hardship and other factors respecting the country of origin, and the seriousness of the offence – when lack of status is based on criminal inadmissibility –, are all within the officer's purview and it is not this Court's role to intervene therein (*Khokhar v Canada (Citizenship and Immigration)*, 2018 FC 555 at para 16). Moreover, evidence of hardship is not sufficient in itself to justify the Court's intervention. As stated by the Supreme Court, "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds", while subsection 25(1) of the IRPA was never "intended to be an alternative immigration scheme" (*Kanthasamy* at para 23).

[17] With these principles in mind, I will now turn to the underlying facts of the case at hand.

Background

[18] The applicant, now 42 years old, is a citizen of India. He is a highly educated man. He has a Bachelor's and a Master's degree in Agricultural Economics and he worked as a research assistant at a university in India for several years. He and his wife – also a highly educated woman – married in 2001 and they enjoyed a comfortable life together. Their daughter Ravinta was born in India in 2006.

[19] Ten years ago, in June 2009, the applicant moved to Canada with his wife and daughter. The three obtained Canadian permanent residence on June 19, 2009. Their son Ranveer was born in Canada in August 2012. The applicant's wife and 12 year old daughter became Canadian citizens in August 2017. At that time, the applicant was incarcerated in a penitentiary, serving time for a criminal act committed on September 2, 2012, ten days after the birth of Ranveer.

[20] The applicant had already been working as a taxi driver for two years. He was charged with sexually assaulting an intoxicated 27 year old female passenger [complainant] while driving her home after a late night party [index offence]. The cab had an onboard security camera that the applicant intentionally blocked during the incident to prevent it from being recorded. The following day, the complainant underwent a forensic sexual assault examination at a hospital. It was observed that she had a vaginal injury in the form of an abrasion, cut or tear, and sustained a bruise on her left upper arm.

[21] After his arrest, the applicant was released on bail. He lost his job as a taxi driver due to the index offence of which he was reproached and then began working as a salesperson for two

different glass companies until April 2016 when he decided to operate his own business. Thereafter, he was incarcerated from February 2017 to September 2017. Unable to continue the employment she had in India, the applicant's wife had mostly remained at home with her children in Canada. In light of the applicant's arrest, she began working in 2015, and has been working full-time for an insurance company since January 2017.

[22] At trial, the applicant gave a version of the events that was diametrically at odds with the complainant's testimony; he testified that the complainant initiated the physical contact between them. The complainant was recalled by the Crown. She formally denied each and every one of the applicant's suggestions. On November 26, 2014, a jury found the applicant guilty and he was convicted of the index offence. He maintained his version that the complainant had initiated the physical contact – and, apparently, his wife was convinced that he had been wrongfully convicted. Today, he assumes full responsibility and his wife and family support him.

[23] The applicant appealed his conviction on the grounds that the trial judge had erred by allowing the complainant – who had not been cross-examined – to be recalled by the Crown to respond to the applicant's contradictory version of events and requested that a new trial be ordered [first appeal].

[24] On September 3, 2015, the applicant was sentenced to a three year term of imprisonment. At the time, still in denial and not wanting to compromise his chances to have the conviction overturned on appeal, the applicant took the position that it would be entirely speculative for the sentencing judge to conclude that he lowered the passenger side visor, for the purpose of

concealing his intended course of conduct. The sentencing judge decided otherwise and found it was an aggravating circumstance, aside from finding that the applicant's abuse of his position of trust, digital penetration, and the resulting physical injury sustained by the complainant were also aggravating factors. That being said, the absence of a criminal record and "by all accounts a positive lifestyle both personal and professional prior to the incident, and [the offender's] contributions to his family and the community" constituted mitigating circumstances. However, the sentencing judge noted "an absent mitigating factor is the [the offender's] insight into his conduct which led to the incident and expressions of remorse for what occurred". There was a victim impact statement on file, setting forth that the complainant still suffers distress from the assault. She writes that the encounter with the applicant was traumatizing and that the events haunt her physically, emotionally, and mentally.

[25] The applicant was well aware of the impact of his criminal conviction on his immigration status. The applicant submitted to the sentencing judge that a fit sentence would be one which did not lead to a significant risk of deportation (referring to the jurisdictional bar of subsection 64(2) of the Act; *R v Pham*, [2013] 1 SCR 739). The sentencing judge did not accept the applicant's submission that a suspended sentence ought to be imposed, or a custodial term for a maximum of six months less a day. Having concluded a fit sentence would significantly exceed six months of imprisonment, the sentencing judge found that the potential collateral consequences regarding deportation did not arise in this case. Relying on jurisprudence arising in similar cases, the sentencing judge found that the low end of the sentence range was 18 months, while the higher range was four to five years. Accordingly, three years was a fit sentence (*R v*

Gill, 2015 BCSC 1907). The applicant appealed his sentence [second appeal]. He was incarcerated for two months but was released on bail.

[26] In May 2016, after the British Columbia Supreme Court declared the applicant guilty of the index offence, his wife bought the family home in Surrey, British Columbia. There is a mortgage on the property. The family rents out the basement suite in their home. Their two children attend private school.

[27] On February 14, 2017, the British Columbia Court of Appeal dismissed the first appeal and maintained the conviction (*R v Gill*, 2017 BCCA 67). The applicant's sexual assault conviction is his only criminal charge and his only criminal conviction. He has no other criminal history, and there is no allegation that he is involved in a criminal lifestyle or organized crime. His family relies on him for emotional support and financial stability. The applicant is also an active member of the Sikh community and has been an active participant in a cricket league.

[28] On September 12, 2017, the Parole Board of Canada [Board] granted day parole for six months, with special conditions imposed on the applicant, namely:

1. No direct or indirect contact with the complainant or any member of her family;

2. Immediately report all intimate sexual and non-sexual relationships and friendships with females to his parole supervisor; and

3. Not to operate a motor vehicle for the purpose of employment as a taxi driver or chauffeur.

[29] In granting day-parole, the Board noted that the applicant has family support and remains in a stable relationship with his wife, and he is going to reside in a community residential facility near his family home until he is granted full parole.

[30] However, the Board denied full parole, having considered whether the applicant will not, by reoffending, present an undue risk to society, before the expiration of his sentence. In this regard, while he reportedly now admits his responsibility and has demonstrated guilt and remorse (an undated apology letter has been apparently sent to the complainant while he was incarcerated in 2017), the Board found that the applicant still lacks insight into his assault and that he needs to demonstrate that he had stabilized in the community.

[31] In effect, the Board endorsed the view that the applicant does "continue to minimize the impact his actions had on the complainant." Indeed, in his application for parole, he referred to his sexual assault as, "non-violent", which he explained to the Board was a statement made before he had undertaken counselling and other interventions in prison. While the applicant was able to identify his risk factors, the Board noted that he "struggled with identifying high risk situations in the community".

[32] The applicant was released some time in September 2017. Shortly afterwards, an officer prepared an inadmissibility report pursuant to subsection 44(1) of the IRPA.

[33] By letter dated November 10, 2017, the applicant unsuccessfully asked the Canada Border Services Agency, to reconsider its decision to refer him to an admissibility hearing,

invoking various H&C grounds, and the fact he had been incarcerated and his former counsel's response was allegedly inadequate in the circumstances. But to no avail, an admissibility hearing was held before the ID, and a removal order was ultimately issued against the applicant on November 23, 2017 on grounds of serious criminality.

[34] On February 7, 2018, the British Columbia dismissed the second appeal and maintained the sentence of three years of imprisonment (*R v Gill*, 2018 BCCA 60).

[35] On March 1, 2018, the applicant filed an application for an exemption on H&C grounds under subsection 25(1) of the IRPA, together with the generic form previously completed and dated January 17, 2018, and provided written submissions and evidence in support, including the submissions previously filed in November 2017 before the ID. He notably provided numerous support letters from family friends and colleagues, two reports drafted by a psychologist regarding the applicant's children, financial documents, family photographs, documentary evidence on age discrimination in India, and documents regarding reduced employment prospects in India, in addition to support letters suggesting that the applicant will likely suffer shunning and social stigma in India because of his criminal convictions in Canada.

[36] The Court notes that the seriousness of the criminal offence and inadmissibility to Canada is treated in the submissions of the applicant's counsel of March 1, 2018 under the heading "Best interests of the children". In this respect, it is submitted that the applicant cannot immigrate back to Canada and that he cannot apply for record suspension until 10 years after completing the sentence, and his sentence has yet to be completed. Travel costs to India are

prohibitive. The determinative element is that the family could relocate to India but, “this would place the family in circumstances that [the applicant] and his wife have agreed are not in their children’s best interests”, as noted by the applicant’s counsel. On October 23, 2018, the Officer dismissed the H&C application, leading to the present application for judicial review.

Officer’s decision and reasons

[37] In balancing various relevant factors in light of the evidence on record and submissions made in this respect, the Officer apparently gave “significant negative weight” to the applicant’s establishment in Canada, “moderate positive weight” to the best interests of his children and “no weight” to country condition factors, and ultimately found that an exemption under subsection 25(1) of the IRPA was not warranted. As far as the seriousness of the criminal offence committed by the applicant is concerned, the Officer apparently treated it under the “Establishment in Canada” heading. The Officer’s reasoning is summarized in the following paragraphs. It is transparent and intelligible.

[38] **Establishment in Canada**: The applicant has demonstrated efforts to be self-sufficient and economically productive; he has had a relatively continuous occupational history since he arrived in Canada in 2009; he has been an active volunteer with his Sikh temple; and also undertook to obtain an accounting diploma in Canada. While these positive steps are to be commended, he has demonstrated a typical level of establishment given that he was a permanent resident. The Officer also recognizes that the applicant was an independent, productive and law-abiding member of Canadian society before he committed the index offence in 2012. He has many family members living in Canada who provided letters of support. Given these family ties,

deportation would inevitably cause him and his family psychological and emotional upset. However, family separation is an inherent consequence of the removal process.

[39] **Seriousness of the criminal offence**: The Officer noted in this respect that it was "[g]uided by the objective in Canadian immigration law [which is] to protect the health and safety of Canadians and to maintain the security of Canadian society." The Officer took into account the severity of the applicant's criminal behaviour. The criminal offence also involved use of physical force to obtain participation in unwanted sexual activity with an intoxicated woman. The complainant sustained physical injuries and emotional trauma, and the conduct was aggravated by actions taken by the applicant to conceal the act. Moreover, it occurred in circumstances in which he was in a position of trust (as her taxi driver). The Officer also noted that the applicant accepted responsibility and has expressed remorse; he had no prior criminal record, and has a low risk of reoffending. Be that as it may, the Officer stated that the seriousness of the criminal offence "weighs heavily against his favour when considered in totality with the other elements he has advanced supporting his establishment in Canada. Accordingly, I have ascribed significant negative weight to this element of the application."

[40] **Best interests of the children:** The Officer was not satisfied that the physical separation between the applicant and his children would sever the bonds they have established as regular contact can be realized by various means of telecommunication. The Officer indeed noted that photographs, letters from his daughter, and other documentary evidence establish a degree of emotional support, that the family is "close knit", and that the applicant has been an active participant in his children's lives. However, the children can remain in Canada with their mother

where they will be able to live in a favourable environment relative to India. While their mother may find it more difficult to raise the children without the applicant's presence, she will have the support of many extended family members, which includes their maternal grandparents, aunts, uncles, and cousins. They may also reorganize their affairs and assets to mitigate possible financial hardship resulting from his removal. The Officer also considered that the psychologist who assessed the applicant's daughter drafted a report stating that she is showing signs of distress which will worsen if the applicant is removed and stated that it is in the children's best interests for him to remain in Canada. The Officer recognized the psychological impact the prospect of him leaving Canada has had on his daughter. However, in a letter dated November 5, 2017, the applicant stated that the family will not return to India if he is removed. The Officer assigned a "moderate but not determinative amount of weight to this element of the application."

[41] **Factors in country of origin:** The Officer also found that the applicant has not presented sufficient objective evidence to demonstrate that he would face marginalized job prospects as a result of his age or criminal record. While potential employers may become aware of his criminal offence, there is insufficient objective evidence to establish that he would be excluded from consideration for a position on that basis alone or that he would suffer social stigmatization due to the offence. These assertions are "highly speculative". Indeed, the applicant has a Bachelor's Degree and a Master's degree, both in Agricultural Economics, from Indian universities and worked as a research officer at an agricultural university before leaving India. He has not shown that he cannot use his education, skills, and work experience to find employment and secure a livelihood in India. While the economic climate in India is poor compared to Canada, this difference is an ordinary consequence of removal. The Officer gave "no weight" to this factor.

[42] The applicant disagrees with the result reached by the Officer. As explained further below, the applicant challenges the reasonableness of all the key findings of fact that the Officer made, and in practice, more or less, asks the Court to reweigh the evidence and balance the relevant factors differently.

Best interests of the children

[43] The applicant submits that the Officer's assessment of the children's best interests is unreasonable. The applicant basically reasserts his previous claim that he should not be removed to India and separated from his family.

[44] Firstly, while the alternative is that the family relocate to India in order to stay together, the applicant and his wife have already decided that it is in the best interests of the children that they stay in Canada. In this respect, the applicant argues that the Officer apparently ignored the financial implications that his removal to India will have on the family and children in Canada, namely: his wife will lose the family home that she bought in 2016, as she will be unable to pay off the mortgage herself; the children will effectively lose their mother as she will need to work longer hours to support them; and they will be dislocated from their private school and extra-curricular activities. In the applicant's view, it was unreasonable for the Officer to simply state in its reasons that the family could "consider a reorganization of their affairs and assets" to address the financial considerations, considering that the family has expenses of approximately $67,000 annually, to cover their mortgage, insurance, utilities, car, food, and other necessary expenses. The family needs the applicant's income as he is their "breadwinner".

[45] Secondly, the applicant argues that the Officer erred in its evaluation of the psychological evidence respecting the effects that separation will have on the two children. Essentially, the applicant takes issue with the Officer's finding that the "uncertainty" of his immigration status caused his daughter Ranvita distress. In his view, this implies that once he is removed and his status becomes certain, her distress will diminish. Moreover, the Officer mentioned the psychologist's report dating from January 2018, but did not mention another report by the same psychologist, dated October 2017, discussing potential adverse psychological consequences of his removal. The Officer should also have considered the best interests of the children separately. In this case, there is no analysis of the evidence respecting his son. His son's particular situation has to be taken in consideration, considering the fact Ranveer was born just a few days before the applicant committed the index offence. Further physical separation will be very hard on him.

[46] During her oral pleading, applicant's counsel made reference to the fact that in her October 2017 report, the psychologist notes:

> Ranvita explains that they do not tell her brother that their father is in jail. They tell him that their father is working 'there', and because it is far from their home, he has to live there. When they visit their father, her brother plays with their dad a lot and he is really happy afterwards.

[47] The respondent disagrees that the Officer did not identify or articulate the best interests of the applicant's children. Ultimately, the Officer considered how the applicant's removal would affect the children, after acknowledging that they would be staying in Canada with their mother, which demonstrates a proper assessment of the children's best interests. The respondent submits that the applicant is asking this Court to reweigh evidence before the Officer regarding the family's financial circumstances: the Officer's reasons demonstrate that it considered financial

hardship and recognized the potential difficulties the mother will face in raising the two children on her own, while remarking that the extended family in Canada can contribute. The respondent further submits that the Officer was not obligated to mention the first letter from the psychologist, given that it was substantially similar to the more recent letter that the Officer did mention, and therefore had limited probative value. As far as Ranveer is concerned, there was limited evidence in the record that was specific to him, while most of the submissions made to the Officer speak of the children together or just Ranvita.

[48] The parties do not challenge that in analyzing the best interests of the children, the Officer had to consider factors relating to the children's emotional, social, cultural, and physical welfare. However, given that "a multitude of factors may impinge on the child's best interests", this assessment is highly contextual (*Sibanda v Canada (Citizenship and Immigration)*, 2018 FC 806 at para 21; *Kanthasamy* at para 35). Ultimately, the best interests of the children is an important factor, but it is generally not determinative in and of itself, as it is almost always the case that a child's best interests weigh in favour of the continued presence of both parents in Canada; as such, this factor must be weighed together with the others (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 24; *Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180 at para 46; *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 at para 23).

[49] Although another decision-maker could have reached a different conclusion, I agree with the respondent that there was no reviewable error on the part of the Officer to assign "moderate but not determinative amount of weight" to the best interests of the children in this case. While

the Officer's reasons could have been more detailed, and considering the generality of the supporting submissions made in this respect, I am satisfied that the best interests of the applicant's children were sufficiently "identified", "defined", and "examined", and the Officer was also "alert, alive and sensitive" to them (*Kanthasamy* at para 39).

[50] The Officer specifically noted that "[a]n important factor to be considered in assessing the children's welfare is the level of dependency between the children and the applicant". The Officer also acknowledges that "forcing the applicant to go back to India will cause a potentially permanent separation of a father from his children". There was no requirement to discuss the financial implications in detail. In passing, as noted by the respondent, the record showed periods of time where the applicant was unemployed, travelling or incarcerated, but did not indicate how the family made out financially in those circumstances.

[51] The Officer also recognized that it would be more difficult for the applicant's wife to take care of the children without his presence in Canada and accepted implicitly that the applicant also financially contributes to the family. However, the Officer also remarked that the presence of many other family members in Canada and the possibility of reorganizing their finances could mitigate "any possible financial hardship" resulting from his removal to India. In my view, these findings were open to the Officer.

[52] Moreover, the Officer also acknowledged the psychologist's opinion that the applicant's removal would cause the children psychological distress: "[the psychologist] states that [the daughter] is already showing signs of distress which will worsen if the applicant was separated

from the family." However, given that the Officer mentioned and considered the psychologist's report from January 2018, there was no obligation to explicitly mention an earlier report of the same psychologist from October 2017, which did not appear to be substantially different.

[53] To sum up, it was open to the Officer to attribute to the best interests of the children element "moderate positive weight", without finding it to be determinative. In my view, this finding is not arbitrary or irrational and it is supported by the evidence.

Hardship upon removal

[54] While the Officer has accurately identified the foreign hardship issues, the applicant submits that the Officer failed to refer to the documentary evidence which contradicts its conclusions before determining that this evidence was "insufficient".

[55] Namely, the applicant relies on the following unmentioned evidence:

(a) A section of the *Punjab Civil Services (Conditions of Service) Rules*, stating that no person shall be recruited by the government if they are more than 37 years of age. The applicant also submitted that there is a general age limit of 40 for employment in the private sector;

(b) A support letter from a friend of the applicant in India stating that his conviction for sexual assault was published in an Indian newspaper;

(c) A support letter from the applicant's father stating that he and his wife were shunned by extended family in India due to the applicant's criminal conviction; and

(d) An Indian newspaper article summarizing an Indian Supreme Court decision stating that it is required to disclose a criminal record before applying for a job in India.

[56] The respondent submits that the Officer is presumed to have considered all of the evidence before it. Ultimately, no evidence suggests that the applicant could not seek employment outside of the civil service or that he does not meet exceptions provided for in the legislation. The respondent further states that the newspaper article is of limited value, since similar disclosure requirements apply in Canada as well, yet the applicant managed to secure an income through self-employment in Canada and could likely do so in India as well. The respondent further submits that the support letters regarding the notoriety of the applicant's conviction in India are vague in nature and therefore of limited probative value. Moreover, these letters lack objectivity given that they were written by individuals with a personal interest in the applicant's case and are not corroborated by objective sources.

[57] I find that the Officer did not commit a reviewable error by affording "no weight" to this particular H&C factor. I would first remark that while objective country condition documents can suffice to establish foreign hardship, it remains that an applicant must "show that they would likely be affected by adverse conditions such as discrimination" (*Kanthasamy* at para 56). With

this in mind, the Officer did not err by not explicitly mentioning the individual section of legislation regarding the age barrier to employment within the public service in India.

[58] Without a legal opinion concerning the practical application of this provision to the applicant's case, in light of the applicable exceptions, it was reasonable for the Officer to conclude that insufficient objective evidence established that the applicant would likely face marginalized job prospects due to his age. Moreover, there was limited evidence establishing that the applicant would be unable to work in the private sector or return to work at an academic institution, given his advanced education in agricultural economics. It was open to the Officer to find that the applicant could use his education to secure employment at a university as he had in the past.

[59] Second, while the applicant would likely be compelled to disclose his criminal history before applying for a position in India, the Officer considered the applicant's submissions regarding "awareness/disclosure of his criminal conviction by the community and to potential employers." However, it was open to the Officer to find that "[w]hile potential employers may become aware of his criminal offence, there is insufficient objective evidence to establish that, on balance, the applicant would be excluded from consideration for a position based solely on this fact." The evidence submitted by the applicant does not appear to contradict this finding.

[60] Third, I find that no reviewable error arises from the Officer's silence regarding the two support letters speaking of social stigma or shunning. In this regard, I agree with the respondent that the letters are relatively vague in nature and appear to speculate as to what might occur if the

applicant is removed to India. The first letter from his father speaks of his own experience of shunning by extended family members, when he resided in India, and the second was drafted by a friend of the applicant who resided in Canada at the time the offence was committed and thereafter and did not experience shunning first-hand. Ultimately, these letters do not suggest that it was unreasonable for the Officer to afford "no weight" to the hardship that the applicant would face due to the circumstances in India. I would further remark that the tribunal record contained extensive reporting about the applicant's conviction and sentence from local Canadian news outlets. One can assume that adverse consequences such as shunning and social stigma would not be uniquely felt by the applicant upon his removal to India.

Establishment in Canada

[61] The applicant also submits that the Officer committed a reviewable error by failing to explain why his establishment was "expected" and "typical". The applicant takes issue with a number of unmentioned pieces of evidence related to the applicant's establishment and family ties to Canada. Namely, the Officer ignored the applicant's submission that his entire family resides in Canada, evidence of the applicant's significant involvement as the captain of a cricket team and league organizer, and submissions regarding the impact of the applicant's removal on his wife's aspiration to requalify as a teacher in Canada.

[62] On the contrary, the respondent submits that the Officer clearly considered the applicant's evidence of establishment. The respondent further submits that it is not unreasonable to find that an applicant's level of establishment is "typical" or "expected".

[63] No reviewable error arises in this case. There is no doubt that an officer is required to "consider and give weight to all relevant humanitarian and compassionate considerations in a particular case" (*Kanthasamy* at para 33). However, the fact that the Officer referred to the applicant's establishment as "typical" and "expected" given that he has been a permanent resident in Canada for many years does not amount to a reviewable error when the Office has otherwise adequately considered the evidence of establishment before it. In the case at bar, this is what the Officer effectively did.

[64] I would further remark that it is apparent from the Officer's reasons that it was aware of the applicant's extensive family ties in Canada. The Officer noted the presence of aunts, uncles, cousins and grandparents who could assist the applicant's wife in caring for the children. Furthermore, while some evidence of establishment was not mentioned (such as the applicant's role as the captain of his cricket team, or his wife's aspirations to requalify as a teacher), an H&C Officer is not required to catalogue every piece of evidence in its reasons.

[65] Ultimately, the unmentioned evidence of establishment was not material or contradictory to the Officer's finding that the applicant has taken positive steps in establishing himself, but that his establishment is typical for a permanent resident. This Court can therefore presume that the Officer considered these documents and submissions.

Seriousness of the criminal offence

[66] The applicant further submits that the Officer improperly treated his criminal inadmissibility within the assessment of his establishment in Canada. In the applicant's view, the

Officer had to first consider and evaluate the H&C factors, and then determine if relief from the inadmissibility is warranted. In other words, the criminality is not to be balanced against a single H&C factor but is instead required to be assessed against all of them. The applicant submits that it was unreasonable to ascribe "significant negative weight" to his establishment despite his nine year history in Canada. The applicant further submits that the Officer did not reasonably approach his criminality, as he failed to meaningfully consider his rehabilitation.

[67] The respondent submits that the Officer did in fact consider the applicant's criminal rehabilitation in this case in addition to noting the aggravating factors set forth by the sentencing judge. In the respondent's view, the Officer properly exercised its discretion by weighing the public policy considerations arising from the applicant's criminality and finding that the H&C factors did not outweigh this criminal inadmissibility.

[68] Before addressing the merits of this issue, I would remark that, according to the Operational Instructions and Guidelines [Guidelines], H&C officers ought to consider the following factors when addressing an exemption request regarding criminal inadmissibility under section 36 of the Act:

> Assess whether the known inadmissibility, for example, a criminal conviction, outweighs the H&C factors. Consider factors such as the applicant's actions, including those that led to and followed the conviction such as:
>
> - the type of criminal conviction
> - the sentence imposed
> - the length of time since the conviction
> - whether the conviction is an isolated incident or part of a pattern of criminality

- any other pertinent information about the circumstances of the crime.

[69] It is trite to comment that these Guidelines are not legally binding and are not intended to be exhaustive or restrictive; that said, they may be "useful in indicating what constitutes a reasonable interpretation of a given provision of the [Act]" (*Kanthasamy* at para 32). Nevertheless, it bears mentioning that the Officer did consider these factors in the case at hand and did not neglect to consider any other pertinent information about the crime committed.

[70] I find no reason to intervene in this case. Perhaps, it would have been better for the Officer to state clearly that it has weighed the seriousness of the criminal offence against all positive H&C factors, instead of considering the obstacle within the assessment of establishment. Be that as it may, this Court has recently held that considering an applicant's criminal history when assessing the quality of their establishment in Canada does not necessarily amount to a reviewable error (*Felix v Canada (Minister of Immigration, Refugees and Citizenship)*, 2018 FC 1132 at paras 4, 9, 11, 21-22). Namely, this Court has held, with my emphasis, that "the Officer is entitled to focus on the Applicant's criminal history and to find that the history outweighs any H&C considerations, especially where the exemption sought on H&C grounds pertains to criminal inadmissibility" (*Chaudhary v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 128 at paras 16, 24-25; *Arshad v Canada (Citizenship and Immigration)*, 2018 FC 510 at paras 9, 31; *Horvath v Canada (Citizenship and Immigration)*, 2016 FC 1261 at paras 19-20, 46-53). This statement is particularly germane to the case at hand, in which most of the applicant's years of establishment in Canada were accrued after he had committed the offence

(on September 2nd, 2012) for which he was ultimately convicted and sentenced after a lengthy trial and appeal process.

[71] In the context of H&C applications to the IAD under paragraph 67(1)(c) of the IRPA, which relies on the test set forth in *Ribic v Canada (Minister of Employment and Immigration (1986)*, [1985] IADD No 4, after an oral hearing is held, yet bears many similarities to an application under subsection 25(1) of the Act, the balancing exercise is a qualitative rather than a quantitative exercise (*Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at para 19). This Court has held that when a decision-maker finds that an obstacle to admissibility (such as criminality or misrepresentation) outweighs an individual positive factor (such as establishment or hardship) as opposed to all of them, and thereby conducts part of the weighing analysis "under the wrong heading" a reviewable error does not necessarily arise (*Dhaliwal v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 157 at paras 104-108).

[72] I take from these cases that so long as an Officer's reasons reflect that it followed the approach prescribed by the Supreme Court of Canada in *Kanthasamy*, namely by considering and giving weight to "to all relevant humanitarian and compassionate considerations in a particular case", it has fulfilled its statutory duty without committing a reviewable error. With this in mind, the Supreme Court of Canada has also instructed reviewing Courts to look beyond the words of reasons to consider the decision as "an organic whole" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, [2013] 2 SCR 458 at para 54).

[73] It was certainly open to the Officer, after considering and giving weight to all the circumstances of the case and all relevant factors to find that these H&C factors simply did not outweigh the applicant's inadmissibility caused by the seriousness of the sexual assault for which he was convicted and sentenced to three years of imprisonment. Recall that the Officer set forth the positive steps that the applicant took to establish himself, for which it commended him, in addition to assessing the best interests of his children, which the officer gave "moderate positive weight". However, the Officer ultimately gave "significant negative weight" to the applicant's establishment due to the criminal conviction and concluded that an exemption was not warranted. I find that the Officer's reasons are justified, transparent, and intelligible and demonstrate that it appropriately considered and weighed the H&C factors raised before it.

[74] In this case, it turns out that the seriousness of the offence, which was of a sexual nature, and as mentioned by the sentencing judge "was disgraceful and disgusting conduct, committed by a man who was in a position of trust to transport a young woman in a safe environment to her destination", led to the applicant's criminal inadmissibility. This breach of the social contract can lead not only to consequences imposed by the criminal court, but also to applicant's loss of his immigration status and related privileges.

[75] It was open to the Officer, considering all relevant circumstances, to determine that the apparent rehabilitation, late remorse and acceptance of responsibility, were not enough to outweigh the seriousness of the index offence, so as to warrant making an exception to the usual rule that serious criminality by a permanent resident leads to loss of status and removal from Canada.

Conclusion

[76] In conclusion, the Officer considered the material evidence raised by the applicant to demonstrate positive establishment, the best interests of his children, and country condition factors in India, in addition to considering the applicant's criminality. On the whole, the Officer's decision to dismiss the applicant's request for an exemption from his criminal inadmissibility is reasonable.

[77] In the result, this application for judicial review shall be dismissed. No question of general importance has been proposed by counsel for certification. Accordingly, no such question will be certified by the Court.

JUDGMENT in IMM-5595-18

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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