Federal Court  Cour fédérale

**Date: 20191112**

**Docket: IMM-352-19**

**Citation: 2019 FC 1409**

**Ottawa, Ontario, November 12, 2019**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**MOHAMED FARAG M.S. MILAD**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, Mohamed Farag M.S. Milad, [Mr. Milad] seeks judicial review of the decision of an Immigration Officer [the Officer] refusing his application for permanent residence in Canada based on an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] on humanitarian and compassionate grounds [H&C] pursuant to section 25 of the Act.

[2] For the reasons that follow, the Application is granted.

## I. Background

[3] Mr. Milad is a citizen of Libya. He arrived in Canada in 2012 on a study permit and enrolled in flight training program at a commercial aviation training school in Saint-Hubert, Quebec. The program was discontinued in 2015, before completion by Mr. Milad and it appears that Mr. Milad has not pursued his aviation training or other educational programs since that time.

[4] Mr. Milad's submissions in support of his H&C application note that the 2011 uprising in Libya against the Gaddafi regime resulted in violence and that it was unsafe for Mr. Milad to remain. He stated that his father, a gynecologist, had worked in a clinic associated with Gaddafi, which heightened the risk for Mr. Milad and his family. Mr. Milad submitted that, despite Gaddafi's death, his return to Libya would be dangerous and would pose significant hardship to him, given his father's affiliation and his own likely recruitment into a militia. Mr. Milad submitted extensive country condition documents describing the conflicts in Libya and the range of risks to which residents are exposed.

[5] Mr. Milad's submissions also noted that since his arrival in Canada he had been able to pursue his post-secondary education in peace and he had established a network of friends.

## II. The Decision under Review

[6] Mr. Milad's H&C application was based on his establishment in Canada and the risks and adverse conditions in Libya.

[7] The Officer summarized Mr. Milad's submissions, including that Mr. Milad's father was identified as affiliated with the former Gaddafi regime, that militias remain in Libya and seek to take control, and that Mr. Milad is fearful of being recruited if returned to Libya.

[8] The Officer noted that Mr. Milad had come to Canada on a study permit, had attended an aviation school and had also taken two courses in English as a second language and had not provided any evidence of courses or training since 2015.

[9] The Officer further noted that Mr. Milad expressed fear for his safety in the climate of insecurity in Libya, fear of unemployment, and fear of being separated from the social network he has established in Canada if he returned to Libya.

[10] The Officer gave little weight to Mr. Milad's establishment in Canada. The Officer noted the limited evidence submitted; a bank account, invoices for Mr. Milad's cell phone, Mr. Milad's gym membership, and documents regarding Mr. Milad's aviation training and English courses.

[11] The Officer noted that the bank account showed significant amounts of money, but there was no indication who the bank account belonged to. The Officer concluded that there was no evidence to show that Mr. Milad was financially self-supporting in Canada.

[12] The Officer acknowledged the evidence of the high unemployment rate in Libya, but noted that Mr. Milad also appeared to be unemployed in Canada.

[13] The Officer found that Mr. Milad did not submit any evidence to show how his social network would be affected if he were removed.

[14] The Officer noted that Mr. Milad was 25 years old and had been in Canada for six years. His family remained in Libya. The Officer found that the evidence did not explain why Mr. Milad could not receive family support upon return to Libya, where he had spent most of his life.

[15] The Officer acknowledged the evidence describing the treatment of supporters of the Gaddafi regime. The Officer also briefly summarized the extensive objective documentation noting, among other things, that supporters and high-ranking officials within the Libyan government under Gaddafi, real or perceived, and members of their families are victims of arbitrary detention, extra-judicial killings, harassment and threats by the militias in the country, that militias are responsible for war crimes and crimes against humanity, and that due to the conflict between militias, civilians have been used as shields and have been kidnapped or displaced.

[16] The Officer did not challenge the objective documentation submitted regarding the situation in Libya, but found that Mr. Milad had not provided an explanation or evidence that his father is regarded as a supporter or affiliate of Gaddafi, nor any information to suggest that his family has faced any repercussions as a result. The Officer also found that Mr. Milad had not provided any evidence to support his fear of being recruited into a militia. The Officer concluded that this fear was not well-founded.

[17] In conclusion, the Officer gave low weight to Mr. Milad's establishment in Canada, to his claimed risk, and to the adverse country conditions in Libya. The Officer found that Mr. Milad had not demonstrated H&C considerations which would warrant an exemption in accordance with subsection 25(1) of the Act.

## III. The Issue and Standard of Review

[18] The issue is whether the decision is reasonable.

[19] The standard of review of an Officer's decision with respect to an H&C application is reasonableness (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909 [*Kanthasamy*]).

[20] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision 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,

[2008] 1 SCR 190). Deference is owed to the decision-maker and the Court will not re-weigh the evidence.

## IV. The Applicant's Submissions

[21] Mr. Milad argues that the Officer missed the point of an H&C application, which requires a sense of compassion and an empathetic approach. Mr. Milad submits that the Officer's assessment was too narrow.

[22] Mr. Milad argues that the Officer erred by not undertaking the analysis for an H&C exemption as guided by the Supreme Court of Canada's decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*].

[23] Mr. Milad argues that in the face of the extensive objective country condition documents that describe the conflict in Libya and the risks that are faced by many, not only those perceived as supporters of Gaddafi, and in particular by military aged men like himself, the Officer's assessment of the risk and hardship he would face is insufficient. Mr. Milad submits that the Officer's conclusion that his fear is not well-founded is not justified based on this evidence.

[24] Mr. Milad further submits that it is paradoxical that Canada is not returning anyone to Libya at the present time, yet the Officer downplayed the risk that Mr. Milad would face upon return, finding that he had not tied the risk described in the country condition documents to his personal situation. Mr. Milad argues that the moratorium on returning nationals to Libya supports his claim that he would face severe hardship upon return, and that this hardship was

ignored by the Officer. He notes that this was highlighted in his updated submissions to the Officer, which were not acknowledged. Mr. Milad adds that his updated submissions were not included in the Certified Tribunal Record, which suggests that these submissions were not considered.

## V. The Respondent's Submissions

[25] The Respondent submits that H&C decisions are highly discretionary. The Officer considered and assessed all the evidence that was submitted by Mr. Milad and the decision to refuse the H&C is justified, defensible and transparent.

[26] The Respondent notes that the Officer summarized all the objective country condition documents. There is no basis to suggest that the Officer ignored any evidence. The Respondent adds that the updated documents, submitted in November 2018, are not significantly different from the 2017 package of documents, which describes the deteriorating situation and conflict in Libya.

[27] The Respondent notes that a moratorium on removals to Libya does not support a positive finding on an H&C; each H&C application must be supported by sufficient evidence and the onus is on an applicant to support the exemption with sufficient evidence.

## VI. The Decision is not Reasonable

[28] Section 25 of the Act, which Mr. Milad relies on, provides that an exemption from the criteria or obligations of the Act – which in this case would otherwise require Mr. Milad to apply for permanent residence in Canada from his home country, when his return is possible – may be granted on the basis of H&C considerations.

[29] While *Kanthasamy* guides decision-makers to take a more liberal and compassionate approach, it also confirms that H&C applications are not an alternative immigration option (*Kanthasamy* at para 23).

[30] In *Kanthasamy,* at para 33, the Supreme Court of Canada notes that decision-makers shall consider and weigh all relevant facts and factors. The Court guides decision-makers to take a more liberal interpretation of H&C considerations, not limited to "undue, undeserved or disproportionate" hardship.

[31] Despite this guidance, the onus is at all times on an applicant to establish with sufficient evidence that this exemption should be granted (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45, [2009] FCJ No 713 (QL); *Liang v Canada (Minister of Citizenship and Immigration)* 2017 FC 287 at para 23, [2017] FCJ No 286 (QL)).

[32] In assessing Mr. Milad's H&C application, the Officer did not err in finding that there was little evidence of Mr. Milad's establishment in Canada.

[33] However, the Officer's findings with respect to the risk and hardship Mr. Milad would face in Libya if returned are not justified in the face of the objective country condition documents. The Officer states that the country condition documents are not challenged and provides a short summary, but the Officer does not appear to grasp that Mr. Milad could face those very risks regardless of whether he can establish that his father was a Gaddafi supporter, that his family in Libya is at a heightened risk or that he would be recruited into a militia.

[34] The preponderance of the jurisprudence of this Court has found that a moratorium on removals does not preclude the refusal of an H&C application. Rather, the jurisprudence establishes that each H&C application must be determined on its own facts. For example, in *Emhemed v Canada (minister of Citizenship and Immigration)*, 2018 FC 167, 289 ACWS (3d) 382, Justice Roussel noted at para 9:

> First, it is well-established that a moratorium on removals does not preclude an H&C application from being denied (*Ndikumana v Canada (Citoyenneté et Immigration)*, 2017 FC 328 at para 18 [*Ndikumana*]; *Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 at para 40 [*Likale*]; *Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 55; *Nkitabungi v Canada (Citizenship and Immigration)*, 2007 FC 331 at para 12).

[35] Similarly, in *Likale v Canada (Minister of Citizenship and Immigration)*, 2015 FC 43, 253 ACWS (3d) 190, Justice Locke noted at para 40,

> 40 Moreover, the case law has clearly established that the mere presence of a TSR does not mean that an application made on humanitarian and compassionate grounds will automatically be allowed (*Lalane*, at para 41; *Nkitabungi*, at para 12). In *Nkitabungi*, Justice Martineau stated the following:
>
> > Moreover, the fact that the relevant authorities have decided not to return to DRC all Congolese citizens in Canada without legal status does not create a

> presumption of undue or disproportionate hardship as learned counsel for the applicant argues. In fact, every H&C application case is a specific case. With regard to this, I note that in *Mathewa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 914, it was found that a moratorium on removals to DRC does not in and of itself prevent an application made on humanitarian and compassionate grounds from being denied.
>
> [Emphasis added.]

[36] In the present case, the Officer does not acknowledge the updated submissions which, among other information, noted that there was a moratorium on removals to Libya. While the moratorium would not automatically lead to a positive H&C finding, the moratorium is a relevant consideration in the context of the country conditions and the assessment of hardship. The Officer did not even acknowledge that a moratorium was in effect or that Mr. Milad would not be returned due to the moratorium (although this is noted in the cover letter which attaches the decision of the Officer).

[37] As guided by *Kanthasamy*, the Officer assessing an H&C application must consider all the evidence presented. In this case, the Officer was required to consider the extensive country condition documents, including the existence of the moratorium on removals, which is relevant to the country conditions and the assessment of the hardship Mr. Milad would face if he could be returned to Libya. The Officer's decision does not convey that all the relevant evidence was considered in assessing the hardship considerations. Moreover, the evidence that the Officer clearly considered and summarized does not appear to have been fully taken into account in assessing the hardship claimed by Mr. Milad.

[38] As a result, I do not find that the Officer's decision is defensible in accordance with the law and the facts.

**JUDGMENT in file IMM-352-19**

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

1. The Application for Judicial Review is granted.
2. The decision of the Officer is set aside and the matter is remitted to a different officer for determination.
3. There is no question for certification.

"Catherine M. Kane"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-352-19 |
| **STYLE OF CAUSE:** | MOHAMED FARAG M.S. MILAD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 5, 2019 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KANE J. |
| **DATED:** | NOVEMBER 12, 2019 |

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| Leanne Briscoe | FOR THE RESPONDENT |

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