Federal Court  Cour fédérale

Date: 20221031

Docket: IMM-3953-21

Citation: 2022 FC 1485

Ottawa, Ontario, October 31, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SPENCER OSAHERUN OSAGIE

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEE AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [Officer], dated April 30, 2021 [Decision], refusing the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds. The H&C application was based on the Applicant's establishment in Canada, adverse country conditions in Nigeria, and the best interests of the children [BIOC]. The Officer was not satisfied the H&C considerations justified

an exemption under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and rejected the application.

II. Facts

[2] The Applicant is a 54-year-old citizen of Nigeria. He arrived in Canada in 2010 and was granted refugee status in 2011 based on his sexual orientation. In 2016, the Minister of Public Safety and Emergency Preparedness brought an application to vacate his refugee status, based on new information presented in the Applicant's permanent residence application. The Refugee Protection Division [RPD] vacated the Applicant's refugee status in December 2019, finding the Applicant misrepresented his identity (use of an alias), his travel history (denied travel to Spain), his residency (lived and worked in Spain) and his status in Spain in his refugee claim. At the time of the refugee claim, the Applicant's 'long residence residency' in Spain granted him many of the rights afforded Spanish nationals. Following the vacation of his refugee status, the Applicant filed three H&C applications, the last of which is the subject of this application.

III. Decision under review

[3] The Officer considered the Applicant's establishment in Canada, to which the Officer granted a small amount of weight overall. The Officer noted the Applicant had been in Canada for approximately 10 and a half years and had been working and going to school. The Officer also accepted the Applicant likely had developed personal and professional relationships in Canada through those endeavours and accorded some positive weight to these.

[4] The Officer also noted the Applicant lost his refugee status in 2019 for credibility and identity reasons which were the grounds relied upon by the RPD in its vacating decision. The Officer placed significant weight on the RPD decision. The Officer also found the Applicant's misrepresentation, loss of refugee status, and time spent with status between those two events to be indicative of poor compliance with the Canadian immigration system and accorded some negative weight to those factors.

[5] Lastly, the Officer considered the Applicant's employment and financial history while in Canada. The Officer acknowledged the Applicant was employed for the majority of his time in Canada, but found there was little information on how he supported himself in Canada. The Officer found the Applicant's bank statements and remittances to Nigeria provided little probative value in determining the extent to which the Applicant was self-sufficient.

[6] Next, the Officer considered adverse country conditions in Nigeria, which the Officer accorded a small amount of weight. The Officer recognized the Applicant had been away from Nigeria for over 10 years and may face some hardship in re-establishing himself, especially with regard to employment. The Officer placed a small amount of positive weight on the Applicant's time away from Nigeria. However, the Officer also noted all of the Applicant's reported family reside in Nigeria and found "[t]hese family ties more likely than not would alleviate some of the difficulties he would face upon return to Nigeria", which countered some of the weight afforded to the Applicant's time away.

[7] The Officer noted the Applicant spoke to few personal hardships on returning to Nigeria. The Applicant maintained he was the sole provider for his partner and children in Nigeria, but "the evidence on file [was] insufficient in determining not only the extent of Mr. Osagie's support for his family, but also any personalized hardships he or his family would face if he returns to Nigeria". The Officer placed a small amount of weight on those factors.

[8] The Officer also considered possible discrimination the Applicant could face based on his sexual orientation, though the Officer noted assessment of risk of persecution was inappropriate in an H&C application and could be dealt with in a pre-removal risk assessment [PRRA]. The Officer found the only information on the file related to the Applicant's sexual orientation was in his initial application and written statements. However, the Officer found the statements "vague and of little probative value in their ability to determine what personalized, forward-looking hardships the PA faces in relation to his sexual orientation."

[9] Finally, the Officer considered the BIOC. The Applicant and his partner have three minor children together, who all live in Nigeria with their mother. The Officer gave the BIOC a small amount of positive consideration. The Officer noted the children lived in Nigeria, where they attended school and more likely than not formed the majority of their personal and academic relationships. The Officer also acknowledged that while the children likely benefit from the remittances received from the Applicant, the children likely primarily depended on their mother and close relatives for their daily needs. The Officer afforded these factors minimal positive weight.

[10] The Officer also considered the effect of the Applicant's remittances from Canada on the children. The Officer noted the Applicant submitted he provides for medical bills, school bills, transportation, clothing, electricity, and rent, among other things, but found "little evidence of probative value to demonstrate the above statements as fact on a balance of probabilities". Further, the Officer found "the evidence on file insufficient in determining that the children's best interests or wellbeing would be negatively impacted, especially with respect to education, access to healthcare, or general quality of life, by the outcome of this decision."

[11] The Officer went on to consider the children's ties to Nigeria, finding the children would experience displacement from family, friends, and school if they left Nigeria for Canada. Further, there was little evidence the children were interested in moving to Canada.

[12] Lastly, the Officer considered the general country conditions in Nigeria. The Officer weighted and assessed the evidence and concluded the evidence "does not determine, on a balance of probabilities, that either parent or their families have suffered poverty, disease/illness, or have been victims of a crime in Nigeria."

[13] Having considered all of the circumstances, the Officer was not satisfied the H&C considerations justified an exemption under section 25(1) of the *IRPA*.

IV. Issues

[14] The only issue is whether the Decision is reasonable.

V. Standard of Review

[15] The parties agree, as do I, that the standard of review is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[16] I note as well that an H&C decision is "exceptional and highly discretionary; thus deserving of considerable deference by the Court": *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335, per Zinn J at para 30.

[17] In *Chaudhary v Canada (Minister of Immigration, Refugees and Citizenship)*, 2018 FC 128, Justice Anne Marie McDonald stated and I agree:

> [26] On an H&C application, the Officer is presumed to have reviewed all the evidence. In a similar case, the Court in *Guiseppe Ferraro v Canada (Citizenship and Immigration)*, 2011 FC 801 at para 17 states [*Ferraro*]:
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> > There is a presumption that the decision-maker has considered all the evidence before her. The presumption will only be rebutted where the evidence not discussed has high probative value and is relevant to an issue at the core of the claim…
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> [27] Here, the Officer directly addressed contrary evidence and explained why the seriousness of the offence overcame the situation of the Applicant's husband. The Applicant seeks to reargue the merits of the H&C application before this Court. Parliament delegated power to the Minister of Citizenship and Immigration to make H&C determinations on the merits. The Court cannot intervene to put more weight on the medical evidence or reweigh the evidence *(Leung v Canada (Citizenship and Immigration)*, 2017 FC 636 at para 34 [*Leung*]) absent a "badge of unreasonableness" which takes the H&C decision out of the realm of reasonable, possible outcomes (*Re: Sound v Canadian Association of Broadcasters*, 2017 FCA 138 at para 59).
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> [31] An H&C decision will be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered (*Kanthasamy*, at para 39). The BIOC must be "well identified and defined" and examined "with a great deal of attention" (*Kanthasamy*, at para 39; *Legault*, at paras 12-31), and decision-makers must be "alert, alive, and sensitive" to the BIOC *(Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 75). The BIOC does not mandate a certain result (*Legault*, at para 12) because, generally, the BIOC will favour non-removal (*Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22).

[18] I also agree with *Huang v Canada (Minister of Citizenship and Immigration)*, 2019 FC 265, where Chief Justice Crampton determined at para 21:

> [21] I recognize that in *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762, at para 23, this Court suggested that it would be an error to deny an H&C application based on the absence of "exceptional" or "extraordinary" circumstances. To the extent that this statement is inconsistent or in tension with the principles quoted in paragraphs 19 and 20 above, and with other jurisprudence that can be fairly read as having adopted a similar approach, I consider that it does not accurately reflect the existing state of the law: see, e.g., *Li v Canada (Citizenship and Immigration)*, 2018 FC 187 at paras 25-26; *L. E. v Canada (Citizenship and Immigration)*, 2018 FC 930, at paras 37-38; *Yu v Canada (Citizenship and Immigration)*, 2018 FC 1281, at para 31; *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137, at paras 14-15; *Sibanda v Canada (Citizenship and Immigration)*, 2018 FC 806, at paras 19-20; *Jani v Canada (Citizenship and Immigration)*, 2018 FC 1229, at para 25; *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29.

[19] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[20] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Analysis

A. *The Office fettered their discretion*

[21] The Applicant submits the Officer erred in unduly fettering their discretion in relying on the negative findings of the RPD. In particular, the Applicant asserts the Officer "adopted a poisoned mindset in relying slavishly on the decision of the IRB" to diminish the effects of his establishment in Canada.

[22] With respect, in this and in other areas, the Applicant's submissions are exaggerated and divorced from the facts in that no such deficiency appears in the Decision. This is an unfounded allegation not supported by the record. In my view there is no merit in the Applicant's submissions.

[23] The Applicant cites *Gutierrez v Canada (Citizenship and Immigration)*, 2018 FC 906 [*Gutierrez*] at paras 5-7 for the proposition the Court has rejected reasoning which focuses too heavily on non-compliance with Canadian law. With respect, *Gutierrez* is readily distinguished: there, the officer focused on a failure of the applicants to pay income taxes, whereas here the Applicant failed to comply with Canadian immigration laws. Further, *Gutierrez* itself provides very little detail about the decision under review or the reasons provided; an analysis of the salient facts cannot be undertaken.

[24] The Applicant also argues the approach taken by the Officer was "robotic" and removed the human factor from the decision-making process. There is likewise no merit in this submission. Again it is an exaggerated claim with no merit. The Applicant cites *Cojuhari v Canada (Citizenship and Immigration)*, 2018 FC 1009 [*Cojuhari*] at paras 15-19 for the proposition the Court has rejected a robotic assessment of evidence, as one would agree. However, the Applicant fails to appreciate that in *Cojuhari* the officer failed to consider several significant factors, focusing only on one criminal conviction for driving under the influence. The officer failed to consider the lenient sentence, the applicant's completion of the sentence, the applicant's record suspension application, and the applicant's compliance with the Canadian immigration scheme, rendering the decision in *Cojuhari* unreasonable. No similar situation arises in the case at bar.

[25] The Applicant also submits the Officer failed to consider the hardship he would face as a bisexual person in Nigeria if he were returned. The Applicant again relies on *Gutierrez* for the proposition it is an error for an officer not to consider generalized hardship. As noted, the

Gutierrez decision does not provide sufficient detail to draw any analogies to this case. More importantly, the assertion is simply unsustainable given the reasons in this case.

[26] I also find no basis for the argument the Officer fettered their discretion by relying on the RPD's findings and therefore failed to consider the Applicant's generalized risk as a bisexual man. In my view, the Officer was reasonably entitled to rely on the RPD's findings and to weigh them against the Applicant's establishment in Canada. I also reject the contention the Officer relied "slavishly" on the RPD's decision. This again is a exaggerated allegation divorced from the reality of this case.

[27] Moreover the Officer considered the potential hardship the Applicant might face due to his sexual orientation. The Decision recognizes "an H&C application is not an opportunity to revisit a decision of the RPD", but then considers the hardships the Applicant might face as a bisexual man in Nigeria. The Officer concluded, as was reasonably open to him, the Applicant's "written statements on their own [were] insufficient in determining the extent of any personalized and forward-looking hardships [the Applicant] would face" in relation to his sexual orientation. This is a reasonable conclusion. It seems to me the Applicant failed because he did not support his submissions with probative evidence, not because of alleged defect in the analysis.

[28] The Applicant also alleges the Officer made a veiled credibility finding against the Applicant, relying on the comments relating to the lack of probative evidence to determine personalized hardship. Respectfully, there is once again no merit in this submission. The

Decision does not doubt the Applicant is bisexual or question the authenticity of his claims; the Decision merely points out that on the evidentiary record provided by the Applicant to the Officer, the Officer found insufficient evidence of personalized hardship.

B. *Applicant's establishment in Canada*

[29] The Applicant submits the Officer erred in concluding the Applicant was not sufficiently established in Canada. This is without merit. With respect, the Officer concluded the Applicant's establishment was afforded a small amount of positive weight, which is a different conclusion.

[30] The Applicant argues the Officer erred in not according weight to the Applicant's establishment in Canada and did so because his refugee status was vacated. The Applicant argues the Officer failed to apply the compassionate approach required by *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. The Applicant cites *Yanchak v Canada (Citizenship and Immigration)*, 2019 FC 117 at para 14 for the proposition it is a reviewable error for the officer to focus on an expected level of establishment and undue hardship, contrary to the *Kanthasamy* approach.

[31] The Respondent submits the Officer reasonably discounted the Applicant's establishment, as the Court has repeatedly held that immigration cheats should not benefit from their misrepresentations, citing *Canada (Citizenship and Immigration) v Liu*, 2016 FC 460 [*Liu*]:

> [29]. I agree with the Minister's submission that the decision is unreasonable because 'the IAD, in considering the issue of establishment did not feel [Ms. Liu's] misrepresentation was a relevant factor.' In my view, it is a relevant factor when considering a person's degree of establishment. To do otherwise is

> to place the immigration cheat on an equal footing with the person who has complied with the law. Whether the impact of the fraud is to reduce the establishment to zero or to something more is a question for the discretion of the decision-maker based on the particular facts before him or her. But it must be considered.

[32] In my view, the Applicant's use of an alias, his untruthfulness re his travel history, untruthfulness about his residency in Spain, and his concealment of the fact he had many of the rights of a Spanish nation as a long term resident were relevant factors to consider in weighing his establishment, per *Liu.* Further, the weighing and assessment of the impact of his misrepresentation is well within the discretion of the Officer, which discretion is afforded deference by this Court. The Decision reasonably considered and weighed the Applicant's misrepresentation in the assessment of his establishment in Canada.

C. *Best interests of the children*

[33] The Applicant submits the Officer erred in failing to conduct an adequate BIOC analysis. The Applicant cites *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 [*Hawthorne*] at para 4 for the proposition the BIOC analysis must consider both the benefits of non-removal of the parent and the hardships the child would face if the parent is removed. No one disagrees with this legal proposition.

[34] The Applicant cites factors in the Immigration Processing Manual that should be considered in a BIOC analysis, including: age; dependency on the applicant; the child's establishment in Canada; the child's links to the country of return; medical issues or special needs of the child; the impact to the child's education; matters related to the child's gender; links

with the applicant's country of origin; the links of family members to the applicant's country of origin; effective links with family members; and where the applicant is residing in relation to the children, among others.

[35] With respect, I find no reviewable error in the BIOC analysis. To being with it substantially considered the factors set out for consideration. While the Applicant does not agree with the Decision, in my view it goes well beyond simply stating the Officer is alive, alert, and sensitive to the BIOC. The Applicant's arguments are once again divorced from the Decision actually under review. It is clear the Officer considered both sides of the coin, as required by *Hawthorne*. The Decision directly addresses almost all of the factors highlighted by the Applicant, in particular the children's daily needs, education, health, social and familial relationship, and the children's links to Nigeria. The Decision refers to the challenges the children might face if they were to move to Canada with the Applicant.

[36] Having weighed and assessed the evidence, as the law requires - and which is for the Officer not this Court per *Doyle* - the Officer concluded by finding that "the evidence on file [is] insufficient in determining that the children's best interests or wellbeing would be negatively impacted, especially with respect to their education, access to healthcare, or general quality of life, by the outcome of this decision."

[37] Here again the absence of probative evidence was led to his lack of success. The evidence was simply not sufficient to support the Applicant's claim: reweighing and second-guessing the evidence is no part of this Court's role, per *Doyle*.

[38] Yet, and impermissibly, the Applicant's submission amounts to just that - a request that the Federal Court reweight evidence and reach a different conclusion. As Justice Favel held in *Harder v Canada (Citizenship and Immigration),* 2022 FC 1260 at para 41:

> [41] The burden is on the Applicants to provide the Officer with "sufficient" evidence to support their case for H&C relief *(Daniels v Canada (Citizenship and Immigration),* 2018 FC 463 at para 32). While the BIOC must be "'well identified and defined' and examined 'with a great deal of attention'", a decision-maker is still constrained by the evidence presented (*Kanthasamy* at para 39).

D. *Failure to properly consider hardship based on country conditions*

[39] The Applicant argues the Officer "erred in glossing over and treating perfunctorily the evidence of hardship", as the "country condition documentary evidence available to the panel supports the ills referred to by the Applicant". The Applicant relies on the National Documentation Package [NDP] for Nigeria, alleging the Officer failed to consider the information included in the NDP.

[40] Again, there is no merit in this submission because the Applicant did not submit the NDP on which he now relies to the Officer. The Decision indicates the sources the Officer considered were the RPD decision and the Applicant's applications and submissions. The NDP is not included, or referenced, either in the Certified Tribunal Record or the Applicant's submissions to the Officer in his H&C application.

[41] Justice Go recently considered the issue of failing to consider an NDP that was not before the officer in an H&C application in *Ighodalo v Canada (Citizenship and Immigration),* 2022 FC 1079 in the following passage with which I agree and adopt:

> [12] The Applicant argues that the Officer's failure to consider material evidence is a reviewable error. Specifically, the Applicant argues that the Officer ignored the National Documentation Package [NDP] for Nigeria, which showed massive unemployment, a rise in violent crimes, and a specific targeting of young people similarly situated as the Applicant.
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> [13] While the Applicant cites several cases from the 1980s, this principle is better represented in *Vavilov* at para 126 and *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC).
>
> [14] I find the Officer committed no such error given that the Applicant did not include the NDP, nor make any submission based on the NDP in his H&C submissions.
>
> [15] The Respondent submits the NDP is extrinsic evidence in the context of an H&C application and is not automatically part of the record in an H&C unless the applicant submits it: *Desta v Canada (Citizenship and Immigration)*, 2021 FC 1028 at para 26. I agree that, in the context of this case, the Applicant – who was represented by counsel in his H&C application – cannot fault the Officer for not addressing evidence and submissions that he has not submitted.
>
> [16] At the hearing, counsel for the Applicant quoted two additional cases in support of his position: *Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 824 [*Begum*] and *Ocampo v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1290 at paras 12-13 [*Ocampo*]. Neither of these cases assist the Applicant. *Begum* confirms that, while publicly available, NDP materials are extrinsic evidence and Officers who rely on these materials have a duty to give the applicant an opportunity to respond: *Begum*, para 41. In *Ocampo* the Court confirms at paragraph 16 that there is no legal obligation on the part of an officer to consult the NDP.
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> [Emphasis added]

[42] The Officer was under no obligation to consider the NDP and the jurisprudence confirms there was no reviewable error in this respect.

VII. Conclusion

[43] The Applicant has not demonstrated the Officer made a reviewable error in the Decision. In my view the Decision is transparent, intelligible and justified, and therefore reasonable. Therefore, this application will be dismissed.

VIII. Certified Question

[44] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3953-21

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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