Date: 20090424

Docket: IMM-3813-08

Citation: 2009 FC 415

Ottawa, Ontario, April 24, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JEREMY DEAN HINZMAN
NGA THI NGUYEN and
LIAM LIEM NGUYEN HINZMAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) officer (Officer), dated July 25, 2008 (Decision) refusing the Applicant's application for permanent residence from within Canada under section 25 of the Act on humanitarian and compassionate (H&C) grounds.

BACKGROUND

[2] Jeremy (Principal Applicant), his wife Nga (Female Applicant) and their son Liam are all citizens of the United States. The Female Applicant recently gave birth to their second child, Meghan Hinzman on July 21, 2008, who is a Canadian citizen. The Applicants currently reside in Toronto.

[3] Prior to entering Canada, the Principal Applicant was a Specialist in Alpha Company, 2nd Battalion, 504th Parachute Infantry Regiment of the 82nd Airborne Division of the United States (U.S.) Army. He signed his enlistment documents with the U.S. Army on November 27, 2000. The Principal Applicant married his wife on January 12, 2001 and travelled to Fort Benning to begin basic training on January 17, 2001. He committed to a period of four years. He enlisted because of the college funding and improved job prospects he would receive.

[4] Following basic training, the Principal Applicant began three weeks of training at the Airborne School and received his parachutist badge on June 15, 2001. One month later, he received his posting orders for Fort Bragg. He became airborne qualified and continued to maintain his jump status. He was awarded his Expert Infantryman's Badge on September 21, 2001 and was promoted to Private First Class earlier than average as a result of his positive performance in the Army. The RPD noted that the Principal Applicant was one of the 15% of 135 soldiers in his company selected for the pre-Ranger course.

[5] The Principal Applicant indicates that he began to have doubts about the military and an aversion to killing when he began reading books on Buddhism at Fort Bragg. The Principal Applicant and his wife began attending weekly meetings of the Religious Society of Friends (Quakers) shortly after their wedding in 2001, when the female Applicant was pregnant with their son, Liam. At this point, the Principal Applicant realized that he had made a mistake in joining the infantry and took steps to change his situation while honouring his commitment to the Army.

[6] The Principal Applicant applied for conscientious objector status in August 2002 and requested that he be granted non-combatant status. He says he gave the appropriate forms to his commander, but three months later he was informed that his application was never received. He resubmitted his application for conscientious objector status on the eve of his battalion's deployment in Afghanistan.

[7] The Principal Applicant's hearing on his application for conscientious objector status was held in Afghanistan on April 2, 2003. He was assigned menial kitchen duties while in Afghanistan. The investigating officer concluded that the Principal Applicant was using the conscientious objector regulations to get out of the infantry, and that his beliefs were not congruent with the definition of conscientious objector outlined in the military regulations. The Principal Applicant continued his assigned duties in Afghanistan and resumed his regular infantryman duties when he returned to Fort Bragg in July 2003. He did not exercise any of his appeal rights within the military chain of command or through the outside court system with respect to the negative conscientious objector decision.

[8] The Principal Applicant received notification that his battalion was to be deployed to Iraq in mid-January 2004. He decided that he was not going to Iraq but he only discussed this decision with his wife. They considered his two options: (1) refuse the orders of his command and take the repercussions under the Uniform code of Military Justice (UCMJ); or (2) go Absent Without Leave (AWOL) to Canada. The Applicants arrived in Canada on January 3, 2004. The Principal Applicant has been AWOL since January 2004.

[9] The Applicants made refugee protection claims on February 16, 2004 based on a well-founded fear of persecution, a risk to life and risk of cruel and unusual treatment or punishment, and danger of torture. The Applicants' refugee claim was heard by the RPD on December 6-8, 2004. The RPD rendered a negative decision on March 16, 2005.

[10] The RPD found that the Applicants were not Convention refugees or persons in need of protection as the U.S. court martial process would apply to the Principal Applicant. The RPD noted that the UCMJ is a law of general application and that the Principal Applicant had not discharged the onus of showing that the law was inherently, or for any other reasons, persecutory in relation to a Convention ground. The RPD found that the Principal Applicant had brought forward no evidence to support that he would not be afforded full protection of the state. The U.S. Military Law also has regulations in place to provide for conscientious objector status. The Principal Applicant did not provide sufficient evidence to establish that he was, or would be, denied due process or treated differently were he to return to the U.S. and be court-marshalled.

[11] The RPD considered whether the Principal Applicant met the definition of a refugee based on his conscientious objection, but concluded that he was not a conscientious objector because he was not opposed to war in all forms, or to the bearing of arms in all circumstances due to his genuine political, religious or moral convictions, or to valid reasons of conscience. As well, the RPD noted the Principal Applicant's failure to pursue an appeal of his refused conscientious objector application, or to make a new application or request a delay of the hearing until he returned to the U.S. The RPD also held that the Principal Applicant had not established that he would have engaged, or been associated with or complicit in military action, condemned by the international community.

[12] The Applicants were granted leave to seek judicial review of the RPD's decision on November 10, 2005. The judicial review was denied by the Federal Court of Canada on March 31, 2006, but a certified question was put forward:

> When dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR Handbook?

The appeal of the Federal Court's decision was denied by the Federal Court of Appeal on April 30, 2007. The Federal Court of Appeal did not answer the certified question as they found that the Applicants had failed to satisfy the Court that they sought and were unable to obtain state protection. Leave to appeal the Federal Court of Appeal's decision was denied by the Supreme Court of Canada on November 15, 2007.

[13] The Applicants submitted an H&C application on March 12, 2008, which was denied on July 22, 2008.

PRRA Decision

[14] The Applicants made a PRRA application and the decision dated July 25, 2008 found that they would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to their country of nationality or habitual residence.

[15] The Officer relied upon section 113 of the Act which requires that only new evidence can be raised once a refugee claim has been rejected. She also relied on subsection 161(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) which states that the person who makes written submissions must identify the evidence that meets the requirements of paragraph 113(a) of the Act and show how that evidence is relevant to them. The Officer also noted that her authority was limited to "whether the applicants meet the definition of Convention refugees or persons in need of protections…not…to make findings with respect to the legality of the war in Iraq or to comment on the foreign policy of the United States government."

[16] The Officer acknowledged that she was also the decision-maker for the Applicants' H&C application and that she considered the H&C submissions related to the Applicants' identified risks but not other H&C submissions. The Officer relied upon *Kim v. Canada (Minister of Citizenship and Immigration)* 2005 FC 437 at paragraph 70 for the following:

> By the same logic, I find that PRRA officers need not consider humanitarian and compassionate factors in making their decisions. There is no discretion afforded to a PRRA officer in making a risk assessment. Either the officer is satisfied that the risk factors alleged exist and are sufficiently serious to grant protection, or the officer is not satisfied. The PRRA inquiry and decision-making process does not take into account factors other than risk…

[17] The Officer stated that a PRRA is not an appeal of a decision of the RPD: *Perez v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1380. She found that the documentary evidence did not indicate a material change in the country conditions since the RPD and Federal Court of Appeal decisions. As well, the risks put forward by the Applicants were the same that had been heard and assessed by the RPD.

[18] The Officer found that the evidence did not support that the Principal Applicant would not receive due process if charged with being AWOL, desertion or missing movement upon his return to the U.S. The Principal Applicant had availed himself of some of the recourse available under the U.S. military justice system, but he had not exhausted all of the avenues available to him.

[19] The Officer accepted that the Applicants, particularly the Principal Applicant, would be the object of criticism and negative commentary from military personnel and members of the public in the U.S.. However, the Officer did not find that the Applicants had provided sufficient evidence to counter the RPD's finding that the discrimination they could face upon returning to the United States did not amount to persecution.

[20] The Officer concluded that the Applicants had not met the burden of providing clear and convincing evidence that they were unable or unwilling to avail themselves of state protection, including the military and civilian justice systems in the United States.

DECISION UNDER REVIEW

H&C Decision

[21] The Officer noted that the Applicants bear the onus of demonstrating that their personal circumstances, including the best interest of any child directly affected by the Decision, would result in unusual, undeserved or disproportionate hardship if their application was not granted. The Officer noted that she did not have the authority to make findings with respect to the legality of the war in Iraq or to comment on the foreign policy of the United States government.

[22] The Officer noted that the Applicants had been in Canada for roughly 4.5 years and had a certain level of establishment. They were involved in their community and were employed and involved with a Quaker society. Their H&C application was based on risk, establishment, best interests of the child and other factors (the pregnancy of the Female Applicant).

Hardship Associated with the Applicants' Identified Risks

Judicial Punishment

[23] The Officer found that it was objectively unreasonable to conclude that the Principal Applicant would face the death penalty if court-marshalled upon his return to the United States. As well, the Officer found that the objective evidence did not support that the Principal Applicant would be subjected to disproportionate punishment should he be charged and convicted in a court martial proceeding upon his return to the United States. The Principal Applicant had chosen not to exhaust avenues of appeal available to him in the U.S..

[24] The Officer also found that the Applicants had presented insufficient evidence to support their claim that the UCMJ would be applied in a disproportionately harsh manner against the Principal Applicant because of his personal circumstances. An H&C application is not an avenue to circumvent lawful and legitimate prosecutions commenced by a democratic country. Based on the evidence of the Principal Applicant, he would face charges and be prosecuted upon his return to the United States. However, the Officer was not unconvinced that the Principal Applicant would not be afforded due process or that accessing due process and state protection would be a hardship.

Non-Judicial Hardship

[25] The Officer found that the existence of Army Regulation 27-10 (which allows a commander to impose any non-judicial punishment deemed appropriate upon a solider under their command)

did not mean it would be applied towards the Principal Applicant in a manner that amounted to unusual, undeserved or disproportionate hardship.

Other Identified Risks

[26] The Officer considered other risks identified by the Applicants, which included being socially ostracized, possible physical danger from individuals opposed to the Principal Applicant's political opinions, the inability to vote or work in certain occupations if convicted of desertion or other military convictions, and the inability to apply to immigrate to Canada as a skilled worker.

[27] In relation to social ostracism and physical violence, the Officer concluded that the Applicants would be able to access state protection and that it was not a hardship for them to access that protection. In relation to people disagreeing with the Principal Applicant's political opinions and public opposition to the war in Iraq, the Officer did not find that the potential or actual expression of opposing opinions to those of the Applicants amounted to an unusual, undeserved or disproportionate hardship. In relation to the Principal Applicant's inability to vote or seek employment in certain occupations, the Officer found that if the Principal Applicant is convicted of a military offence, there is no evidence that supports that the laws disproportionately targeted him compared to other individuals charged and convicted of similar military offences.

[28] Finally, in relation to the Principal Applicant's inability to apply to enter Canada under the skilled worker program, the Officer found that if the Principal Applicant was charged and/or

convicted of being AWOL, he would not be inadmissible to Canada. However, if he was charged and/or convicted of a different or additional offence, he would be inadmissible. Therefore, a conviction for being AWOL from the U.S. military was not unusual, undeserved or disproportionate hardship as it would not render the Principal Applicant inadmissible to Canada. Even if the Principal Applicant was charged and convicted of desertion and was inadmissible to Canada, the Officer still did not find that this amounted to unusual, undeserved or disproportionate hardship.

Establishment

[29] The Officer found that while the Applicants had made a commendable effort to establish themselves in Canada, severing their ties in Canada would not amount to unusual, undeserved or disproportionate hardship. The work experience of the Principal Applicant is transferable to similar positions in the United States. The Applicants would most likely be able to re-integrate themselves into the Quaker Society in the United States and it would be a family decision whether the Female Applicant remained at home to look after their children. None of this amounted to hardship.

[30] The Officer found that although the Principal Applicant had been extensively involved with the War Resisters Support Campaign in Canada, there was no evidence that he would be unable to continue similar efforts in the United States. It was also reasonable to expect that his involvement in the war resisters movement in Canada had provided him with contacts for similar movements in the United States. As well, the evidence did not support that the Principal Applicant’s family would be

recognized for their involvement in the campaigns against the war in Iraq and that this would lead to difficulties that would amount to unusual and undeserved or disproportionate hardship.

Best Interests of the Child

[31] The Officer noted that Liam would start grade 1 in September 2008 and was enrolled in French Immersion Kindergarten. He has attended all of his schooling in Canada. The Officer states that Liam will have access to the education system in the United States and that Liam's native language is English, so he will not have any language difficulties in transferring to the U.S. school system. He may not be able to attend French Immersion in the U.S.; however, this was not a hardship in the Officer's view.

[32] Although there are concerns that Liam could be bullied or negatively impacted because of sentiments directed to the Principal Applicant, the Officer cites programs available to Liam if he encounters problems at his school and discusses the availability of police involvement. Given Liam's age, the Officer found that the difficulties he would experience on integration into the U.S. would be minimal, as he would have the support of his family in the U.S., speaks English and he would remain with his family unit.

Other Factors—the Female Applicant's pregnancy

[33] At the date of the Decision, the Female Applicant was pregnant. The Officer noted that if the child was born before the Applicants left Canada, the child would be a Canadian citizen. This child will not lose Canadian citizenship no matter where she/he resides, and the child will also be a citizen of the U.S. by descent of the parents, who are both U.S. citizens.

[34] In addition, the family will be returned to the U.S. by car instead of by air, so the Female Applicant's health will not be jeopardized by their removal. There was no unusual, undeserved or disproportionate hardship arising from the Female Applicant's pregnancy.

ISSUES

[35] The Applicants raise the following issues on this application:

1) Did the Officer err in law by assessing risk in the Applicants' H&C applications under thresholds applicable to subsections 96 and 97 of the Act and by failing to assess the hardship the Applicants would face if returned to the U.S.?
2) Did the Officer err by failing to conduct an analysis of the best interests of the children directly affected by this Decision?
3) Did the Officer err in law by failing to have regard to the totality of the evidence before her, including failing to assess the Female Applicant's particular circumstances?

4) Did the Officer make an unreasonable decision in light of the evidence before her?

STATUTORY PROVISIONS

[36] The following provisions of the Act are applicable in these proceedings:

Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

STANDARD OF REVIEW

[37] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically

different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review”: *Dunsmuir* at para. 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[38] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[39] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 61 (*Baker*), the Supreme Court held that the standard of review applicable to an officer’s decision of whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness *simpliciter*. Thus, in light of the Supreme Court of Canada’s decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to issues 2, and 4 to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was

unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[40] The Applicants submit that on a question of whether the Officer applied the correct test in assessing risk in an H&C application is a question of law and therefore must be reviewed on the standard of correctness: *Pinter v. Canada (Minister of Citizenship and Immigration)* 2005 FC 296; *Mooker v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1029 at paragraph 16 and *Kim v. Canada (Minister of Citizenship and Immigration)*, [2008] FC 632 at paragraph 24. I agree with this submission. Also, I regard issue 3, in part at least, to raise procedural fairness issues which I have reviewed on a standard of correctness.

ARGUMENTS

The Applicants

[41] The Applicants submit that the Officer erred in law by applying the wrong test when assessing risk in their H&C application. The Officer also failed to assess whether the consequences the Applicants would suffer constituted undue hardship, even if they did not amount to risk.

[42] The Applicants say that the Federal Court has on numerous occasions found that it is an error in law to conduct an analysis applicable to a PRRA application or to a refugee claim when deciding an H&C application. H&C considerations involve a broader understanding of hardship than the risk provisions set out in sections 96 and 97 of the Act: *Pinter v. Canada (Minister of*

Citizenship and Immigration), [2005] F.C.J. No. 366 at paragraphs 2, 5-6; *Sha'er v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 297; *Gaya v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1308; *Ramirez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1763 (*Ramirez)* at paragraphs 46-47; *Melchor v. Canada (Minister of Citizenship and Immigration*, [2004] F.C.J. No. 1600 at paragraphs 19-20; *Sahota v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 882 at paragraphs 8, 12; *Thalang v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1001 at paragraph 14; *Liyanage v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1293 and *Kharrat v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1096.

[43] The Applicants submit that they will suffer severe consequences upon returning to the U.S., including incarceration, judicial punishment, non-judicial punishment, social stigma, disenfranchisement, financial and psychological hardship. The Applicants further argue that they will experience hardship on the H&C standard even if state protection is available to protect them from actual "persecution" within the refugee definition. However, the Applicants submit that they will not receive state protection.

[44] The Applicants submit that the Officer failed to conduct any analysis of the proper risk assessment under the tests normally applied to a PRRA application or a refugee claim. The Applicants claim that the Officer focused primarily on whether the Applicants had rebutted the presumption of state protection and whether they had exhausted avenues of state protection available in the United States prior to coming to Canada. However, the Applicants submit that, in

the circumstances of an H&C application, it is not necessary for an Applicant to rebut a presumption of adequate state protection or to demonstrate that they have exhausted all avenues of protection. In the Applicants view, all they must show is that their circumstances warrant humanitarian and compassionate relief regardless of any available state protection.

Judicial Punishment

[45] The Applicants submit that, in the judicial punishment section of the Decision, the Officer came to conclusions that show that she misunderstood the task before her. In the Applicants' view, the Officer applied the persecution test, which would justify her terminating her analysis at her findings on state protection. Therefore, there was no consideration of whether the Applicants would experience hardship. The Officer accepts that the Principal Applicant will suffer prosecution if returned; however, she should have determined whether he would be afforded due process during his prosecution proceedings rather then whether the prosecution and resulting incarceration and felony convictions would warrant granting humanitarian and compassionate relief.

[46] The Applicants also assert that the Officer inappropriately addressed the burden that the Applicants bear when rebutting the presumption of state protection. While state protection may be a relevant consideration in an assessment of an H&C application, the Officer erred when her analysis stopped with state protection. The Applicants stress that, unlike a PRRA application or a refugee claim, state protection is not a determinative factor in an H&C claim. Deciding that state protection may exist in a country of removal does not relieve the officer from the task of assessing whether,

regardless of any available protection, the circumstances warrant an exemption from the requirements of the Act based on humanitarian and compassionate considerations.

Non-Judicial Punishment

[47] The Applicants argue that the Officer's H&C assessment is almost identical with the assessment of the Applicant's PRRA decision. Therefore, the Applicants say that the Officer did not conduct an analysis of the risk of non-judicial punishment through the "right analytical prism." She simply changed the words "cruel and unusual treatment or punishment" to "unusual, undeserved, or disproportionate hardship": *Ramirez.*

[48] The Applicants submit that the Officer did not reach any conclusions on whether non-judicial punishment would constitute hardship and simply concluded that the existence of military regulation in itself did not constitute hardship. She makes no findings on whether the experience of being subjected to non-judicial punishment constitutes hardship. The Applicants conclude on this point by stating that the Officer erred in law by applying a higher threshold for risk than is applicable to a PRRA application or refugee claim.

Other Identified Risks

[49] On this issue, the Applicants submit that the Officer erred in law in her assessment of the "other identified risks" by conducting an analysis appropriate for a PRRA application or a refugee

claim instead of considering humanitarian and compassionate considerations as required by section 25 of the Act. The Applicants submit that an appropriate analysis would have considered whether, regardless of any available state protection, the Applicants' circumstances warranted humanitarian and compassionate relief.

[50] Specifically, in relation to the Principal Applicant's inadmissibility to Canada, the Applicants point out that the Officer erred by failing to note what would happen if the Principal Applicant is charged with more than one offence. The Applicants insist he will be charged with more than one offence upon returning to the U.S.. Hence, the Principal Applicant will be inadmissible to Canada. There is no requirement, as the Officer pointed out, in an H&C application to exhaust all or any available avenues of protection in an applicant's country of origin prior to seeking H&C relief in Canada.

[51] The Applicants conclude on this issue by stating that the Officer conducted a suitable analysis for a PRRA application but did not assess the Applicants' circumstances under the hardship standard, which is required for an H&C application. The Applicants rely on *Barrak v. Canada (Minister of Citizenship and Immigration)* 2008 FC 962 at paragraph 34:

> Of course, it may well be that the result would have been no different had the officer applied the correct standard. Indeed, the respondent alleges that the officer considered all the allegations of risk advanced by the applicants. That argument, however, begs the question…There being no certainty that the result of her analysis would have been the same had she applied her mind to the proper test, the file must be returned for a new determination.

Best Interests of the Child Analysis Inadequate

[52] The Applicants submit that the Officer did not conduct an adequate analysis of the best interests of Liam, because she did not acknowledge the effect that the loss of a parent would have on Liam if his father was incarcerated.

[53] As well, the Applicants contend that, in relation to the bullying and social stigma that Liam could suffer, the Officer discussed state protection instead of the child's best interests. The Applicants say the Officer should have determined whether it was in Liam's best interests to be placed in a situation where he may experience bullying, regardless of any recourse available to him. An officer must focus their analysis on the child themselves, and not examine protections available after the fact, which might be accessed through the help of others: *Alie v. Canada (Minister of Citizenship and Immigration)* 2008 FC 925 at paragraphs 9-10 and *Kolosovs v. Canada (Minister of Citizenship and Immigration)* 2008 FC 165 at paragraph 12.

[54] The Applicants also submit that the Officer's conclusion that Liam could maintain friendships in a meaningful way through phone calls and e-mails, at the age of 6, is absurd and shows a complete lack of sensitivity to Liam's situation. The Applicants say that the impact of Liam losing his relationships in Canada would not be in his best interests.

Ignoring Evidence and Failure to Assess the Female Applicant's Application

[55] The Applicants submit that the Officer failed to adequately assess the Female Applicant's application. This was an error in law. It is not the Female Applicant's pregnancy that would cause her hardship, but the separation from her spouse and the father of her two children at such a critical time in their lives. The Applicants cite *Mansuri v. Canada (Minister of Citizenship and Immigration)* 2008 FC 650 which states that it is necessary for officers to consider each application separately.

Decision on the Whole is Unreasonable

[56] The Applicants rely upon *Glass v. Canada (Minister of Citizenship and Immigration)* 2008 FC 881 to refute the Officer's conclusion that the Principal Applicant would not be subjected to a disproportionate punishment should he be charged and convicted in a court martial proceeding upon his return to the U.S. The Applicants also cite the *Inland Processing Policy Manual, Chapter 5* for the guidelines concerning H&C applications. The Applicants state that by requiring a "required threshold" of hardship, the Officer did not perform the proper analysis for an H&C application.

[57] The Applicants also submit that the Officer failed to address the motivations of the Principal Applicant in coming to Canada or the fact that he would be a prisoner of conscience if returned to the U.S. and incarcerated upon returning to the U.S.

[58] The Applicants conclude that the Decision is unreasonable and that it does not meet the test of "justification, transparency and intelligibility" and does not stand up to a "somewhat probing examination": *Baker* and *Dunsmuir*.

The Respondent

[59] The Respondent submits that the Officer did not apply the "wrong test" when assessing the risks set forth in the H&C application, nor did she fail to assess undue hardship. The Officer indicated that the H&C application had been "assessed on the basis of unusual and undeserved or disproportionate hardship" which is the correct test as conceded by the Applicant and outlined in the *Inland Processing Policy Manual, Chapter 5.*

[60] The Respondent rejects the Applicants' argument that the PRRA and H&C application identified the same factors for both risk and hardship by citing *Latifi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1389 at paragraph 31:

> It is clear that when the Officer refers to "risks identified" she is referring to the risks identified in the evidence as a whole. It is also clear that when she says "I find that as there is little reliable evidence of risk, so there can be little compelling evidence of associative hardships," she is not saying that she equates risk with hardship or that she is applying the same test as she did in the PRRA Decision. She is merely saying that, of the hardships that might accrue from the risks identified in the evidence, there is little compelling evidence of associated hardships. In other words, it seems to me that she relies upon the facts in her PRRA Decision but she applied the correct H&C test to those facts.

[61] The Respondent also relies upon *Mooker v. Canada (Minister of Citizenship and Immigration)* 2008 FC 518 (*Mooker*) at paragraphs 28-30 for the following:

> The applicants argue that the Officer erred by addressing the issue of state protection, which is not relevant to the assessment of an H&C application, and thereby erred in the assessment of hardship.
>
> It is clear from the Officer's reasons that state protection was addressed only in the context of the risk assessment. The Officer wrote at page 35 of the notes to file:
>
> > Therefore, even taken at face value, Mr. Mooker's statement, that he was a victim of African nationalist youth, "likely" members of Mungiki, would have to be weighed against the availability of state protection, even where the risk is described simply in terms of hardship. ...
>
> It was open to the Officer, in the circumstances, to consider state protection in so far as it might bear on the assessment of risk and therefore hardship. In fact, it was the applicants who raised the issue of state protection in their submissions to the Officer, and that it was therefore open to him to examine the question.

[62] The Respondent says that the Applicants merely disagree with the Officer's conclusions and have failed to demonstrate any error on her part. The fact that the Officer considered findings made in her own PRRA analysis was perfectly acceptable and logical given that she specifically assessed and determined whether punishment of the Principal Applicant would constitute unusual, undeserved or disproportionate hardship, and not personalized risk.

[63] In relation to the consequences that the Principal Applicant could face upon his return to the U.S., the Respondent says that the Applicant will be afforded due process as pointed out in *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 171 at paragraph 47:

> Although the United States, like other countries, has enacted provisions to punish deserters, it has also established a comprehensive scheme complete with abundant procedural safeguards for administering these provisions justly.

[64] The Respondent says it is evident from the Officer's detailed analysis that she applied the correct test when assessing risk and that she assessed all aspects of the claimed hardship. The Respondent points out that hardship suffered by an applicant must be more then inconvenience or the predictable costs associated with leaving Canada, which are consequences of the risk an applicant takes by staying in Canada without landing. The Respondent cites *Irimie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906 at paragraphs 12 and 17:

> If one then turns to the comments about unusual or undeserved which appear in the Manual, one concludes that unusual and undeserved is in relation to others who are being asked to leave Canada. It would seem to follow that the hardship which would trigger the exercise of discretion on humanitarian and compassionate grounds should be something other than that which is inherent in being asked to leave after one has been in place for a period of time. Thus, the fact that one would be leaving behind friends, perhaps family, employment or a residence would not necessarily be enough to justify the exercise of discretion.
>
> …
>
> Objection was also taken to the fact that the H & C officer noted that the applicants had purchased a home but commented that they had done so knowing that they were subject to a departure order. Counsel for the applicants took the position that everyone who applied for relief under subsection 114(2) of the Act knew that they could be required to leave. If this should become a ground for not allowing the application, there would be no successful applications, he argued. In fact, counsel is correct to this extent: the risk of the loss of assets acquired while in Canada is common to all who are in Canada without permanent resident status. That possibility is therefore not unusual. Whether such a loss is undeserved may well vary with the circumstances but in general, one would think that if one assumes a certain risk, the occurrence of the eventuality giving rise to the risk

> does not create undeserved hardship. The hardship is a function of the risk assumed.

[65] The Respondent concludes on this point that the Applicants' hardship can hardly be characterized as "undeserved," "unanticipated" or "beyond their control" as they came to Canada so that the Principal Applicant could evade lawful sanctions with respect to his military desertion. The Applicants made a refugee claim based on the Principal Applicant's claim of conscientious objection, but this claim has been rejected as invalid. The Respondent cites *Legault v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 at paragraph 19:

> In short, the Immigration Act and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

Best Interests of the Child/ Female Applicant

[66] On these issues, the Respondent submits that the Officer considered the best interests of the child and the H&C considerations of the Female Applicant and came to a reasonable conclusion. The Respondent stresses that an H&C officer does not have the jurisdiction to review a failed refugee claim.

[67] The Respondent concludes that any hardship that the Principal Applicant may experience for being prosecuted and punished for his military desertion cannot be laid at the feet of the state, as it was the Principal Applicant who is responsible for the legal consequences of his actions. The Officer was alert to the totality of the evidence before her and the general situation of the Applicants.

ANALYSIS

Wrong Test

[68] The Applicants say that the Officer failed to assess the hardship they would face if returned to the U.S.. They say this occurred because the Officer adopted the wrong test and applied an analysis applicable to a PRRA and a refugee claim instead of deciding whether what the Applicants faced would constitute hardship under their H&C claim. Further, they say the Officer failed to assess whether, even if the consequences of their return did not amount to risk, they would, nevertheless, still constitute undue hardship.

[69] The Applicants concede that the Officer states the applicable test under an H&C claim as being unusual and undeserved or disproportionate hardship, but they say that the Officer's analysis is really nothing more than a risk assessment which stops short at the availability of state protection and due process.

[70] In other words, the Applicants argue that the Officer clearly misunderstood the task before her and applied a persecution and risk test that justified her in terminating her analysis on finding that state protection existed in the U.S.. Deciding that state protection may exist in a country of removal does not relieve the Officer from the task of assessing whether, regardless of any available protection, the Applicants' circumstances warrant receiving an exemption from the requirements of the Act on H&C grounds.

[71] In the section of the Decision dealing with "Identified Risks," the Officer acknowledges that she is being asked to consider "the hardships associated with their identified risk" and whether those hardships are "unusual and undeserved, or disproportionate … ."

[72] In order to decide whether the consequences of return will result in unusual and undeserved, or disproportionate hardship the Officer was obliged to consider, *inter alia*, the risks identified by the Applicants and whether those risks would result in the required degree of hardship.

[73] One of the basic premises of the Decision is that "the possibility of prosecution for a law of general application is not, in and of itself, sufficient evidence that an applicant will face unusual and undeserved, or disproportionate hardship." This is because an "H&C application is not an avenue to circumvent lawful and legitimate prosecutions commenced in a democratic country."

[74] The Officer even acknowledges that the Principal Applicant will face prosecution if returned to the U.S.:

> Nevertheless, accepting the Applicant's submissions that he will face charges and prosecution upon his return to the United States, documentary evidence and evidence personal to the principal applicant, indicates that he will be afforded due process and that accessing due process and state protection would not be a hardship. As a result, I find that the evidence does not support that the principal applicant would not receive due process if charged with being AWOL, desertion, or missing movement upon his return to the United States.

[75] In discussing the Federal Court of Appeal's decision in this case dealing with the availability of state protection, the Officer concludes as follows:

> I recognize that the Court was applying the standard of providing "clear and convincing evidence" outlined in *Ward* when determining whether the applicants had rebutted the presumption of state protection. Nevertheless, I find that the democratic nature of the United States and the country's sophisticated and comprehensive military justice system is relevant to an assessment of an unusual and undeserved or disproportionate hardship faced by the applicants.

[76] When read in the context of the whole Decision it is clear to me that the Officer considers hardship from two perspectives:

1. She looks at the prosecutorial and military processes that the Principal Applicant will face and concludes that they cannot be considered unusual, undeserved or disproportionate hardship because the United States is merely applying laws of general application and the Principal Applicant will be able to avail himself of due process. Lawful and legitimate prosecution cannot, *per se*, be unusual, undeserved or disproportionate hardship; and
2. She considers and concludes that accessing due process and state protection will not be a hardship.

[77] In other words, I do not think it can be said that the Officer's analysis stops at risk assessment and the availability of state protection and due process.

[78] The Applicants have provided no authority or rationale to suggest that being subjected to prosecutorial and military processes and sanctions in a democratic country should itself be considered unusual and undeserved or disproportionate hardship, or that being forced by a democratic state to rely upon due process and state protection constitutes the necessary degree of hardship under an H&C application.

[79] The Officer obviously had to address issues of due process and state protection in her Decision because the Applicants identified their hardship with the legal and military processes in the U.S.. But this does not mean that the Officer did not go beyond risk to consider hardship.

[80] It is obviously a hardship for anyone to face and experience what awaits the Principal Applicant in the United States; however, that does not make it an unusual and undeserved or disproportionate hardship for the purposes of the Canadian immigration system. Many people will undoubtedly hold the view that the Principal Applicant should not be sanctioned for his conduct, and they may have good reasons for that view, but there is no evidence that U.S. laws against desertion, *per se*, are out of step with international norms or that Canadian immigration law was intended to save people such as the Principal Applicant from facing the consequences of their own choices in the United States by elevating laws of general application to a form of unusual and undeserved or disproportionate hardship.

[81] In my view, then, the Officer does examine and address hardship. In fact, she accepts that the Principal Applicant will face prosecution and possible sanctions, but she comes to the conclusion that the hardships attached to laws of general application in a democratic state cannot be considered as unusual and undeserved or disproportionate under Canadian law. She appropriately addresses hardship for both judicial and non-judicial punishment. I have no authority before me to suggest that she was wrong or unreasonable in these conclusions.

Other Risks

[82] The Officer acknowledged and addressed various "hardships associated with their identified risks" as including "being socially ostracized, physical danger from individuals opposed to the principal applicant's political opinions, the inability to vote or work in certain occupations if convicted of desertion or other military convictions, and the inability to apply to immigrate to Canada as a skilled worker."

[83] In considering the Applicants' refugee claim, the RPD had found that "Although Mr. Hinzman may face some employment and societal discrimination, such discrimination does not amount to persecution in that discrimination does not lead to a consequence of a substantially prejudicial nature":

> I find that it does not constitute cumulative discrimination, amounting to persecution or to cruel and unusual treatment or punishment. The treatment does not amount to a violation of a fundamental human right, and the harm is not serious.

[84] Once again, the Applicants complain that the Officer did not consider whether treatment, which may not be persecution, might nevertheless be hardship of a kind that the Applicants should not be required to face.

[85] As regards physical violence, the Officer points out that state protection will be available to the Applicants just as it is available to everyone else. This is not a state protection analysis. The Officer is obviously concerned with hardship but is making the point that the threat of physical violence is not an unusual or undeserved or disproportionate hardship where state protection is available.

[86] As regards social ostracism, the Officer concludes as follows:

> While I accept that being socially ostracized by certain members of the public will be difficult, I find that the applicants would be able to access state protection should they encounter incidents of violence and I do not find that it amounts to a hardship for them to access such protection.

[87] Less violent forms of social ostracism are not susceptible to state protection, but the Officer also addresses those "difficult," non-violent forms of confrontation and finds that "I do not find that the potential or actual expression of opposing opinions to those of the applicants amounts to an unusual and undeserved, or disproportionate hardship."

[88] Once again, it is certainly possible to disagree with these conclusions, and I am sure that many people do, but I do not think that they can be said to be unreasonable in the legal sense and I

do not think that the Officer applied a wrong legal test and did not go beyond risk to consider hardship.

[89] The same can be said for each of the other identified hardships that the Officer addresses.

Best Interests of the Child

[90] The Applicants claim that, in relation to their son Liam, the Officer was not alert, alive and sensitive to his best interests and did not provide an adequate analysis of the hardships that he will face if the family is returned to the U.S.. In particular, they say that the Officer did not address the separation from his father and the bullying and ostracism he might experience from those opposed to his father's views.

[91] As regards the bullying, the Officer notes that protections are available in U.S. schools against such behavior. It is repugnant, of course, to think that Liam might be subjected to any kind of adverse treatment as a result of the views and actions of his father, but any concern that this will occur has to remain speculative. I do not think the Officer could do more here than acknowledge such concerns by Liam's parents and point out that there are ways of dealing with them.

[92] When it comes to dealing with the possible temporary separation from his father, however, the Officer acknowledges submissions that were made by counsel for the Applicants that "the

Principal Applicant's likely incarceration upon his return to the United States would also cause hardship to Liam." The Officer makes the following observations:

> However, given his young age, it is reasonable to expect that the difficulties associated with returning and re-integrating into the United States would be minimal. He speaks English and has extended family members residing in the United States who could help facilitate his re-integration.

The Officer does not deal with the family separation issue in the way that the Applicants feel it should have been dealt with. Obviously, from the family's perspective, the thought of temporary separation while the Principal Applicant is subjected to judicial and non-judicial assessment and possible punishment, is a matter of concern. But just because the Officer does not single out and showcase this particular issue in the way the Applicants feel it should be addressed, and just because the Officer does not find it determinative, does not mean it was overlooked or unreasonably discounted. If the Decision is read as a whole it is obvious that the Officer was aware of and considered this concern (it was specifically acknowledged) and that it was necessarily a factor taken into account when assessing Liam's re-integration into U.S. society. The Officer understood that temporary family separation could well occur in the U.S. but, in analyzing Liam's best interests, felt that Liam would remain with his primary caregivers as they faced whatever awaits them in the U.S. and that any difficulties faced by Liam as a result of what might happen in the U.S. would be minimal. It is possible to disagree with the Officer's position on this issue, but I cannot say that separation was overlooked or that the Officer's approach was unreasonable.

The Female Applicant

[93] Much the same can be said for the way the Officer handles family separation in relation to the female applicant. The Applicants feel that, in this regard, the Officer's conclusions were wide-of-the-mark and suggest that the only issue she dealt with was Nga's pregnancy: "I do not find that the female applicant's pregnancy amounts to an unusual and undeserved, or disproportionate hardship."

[94] The whole point of the submissions made to the Officer concerning the Female Applicant was the consequences of enforced family separation. Once again, however, I do not think this was left out of account. The Officer acknowledges and identifies the hardships that the Female Applicant claims she will face:

> The female applicant is a homemaker and provides child care to a friend's son for 2 ½ hours per week. Her affidavit states that it will be very difficult for her to continue to be a stay-at-home parent if the family is returned to the United States because of her husband's likely incarceration.
>
> …
>
> Counsel's submissions state that the family would suffer severe hardship if the principal applicant, as the primary breadwinner, were incarcerated upon their return to the United States.

I cannot conclude that issues surrounding the Female Applicant were overlooked or discounted merely because every concern raised is not given separate treatment in the reasons. This would allow a microscopic treatment of the Decision to prevail over what is a comprehensive set of reasons. The Officer points to extended family and support available to the Applicants in the U.S.. I

think it is reasonable to assume that the Officer's general conclusion that the family would remain a family unit with extended support available to it as the Principal Applicant faces laws of general applicability in the U.S., which could give rise to temporary separation, includes the Officer's assessment of the Female applicant's particular concerns.

Differential Treatment

[95] The Applicants introduced evidence to show that, although the Principal Applicant will be subject to laws of general application in the U.S., he will, because of his high profile and virulent criticism of the U.S. policy in Iraq, be singled out for differential treatment, which could well amount to unusual and undeserved or disproportionate hardship and which would take the punishment he faces outside of the range of what is considered acceptable under international human rights law.

[96] I have reviewed the evidence in question and the Officer's treatment of it in the Decision, and, in my view, while it is certainly possible to disagree with the Officer's conclusions on this issue, I cannot say that relevant evidence was overlooked or that the Officer's conclusions were unreasonable within the meaning of *Dunsmuir*. I cannot re-weigh the evidence and substitute my own opinion for that of the Officer in these circumstances.

CONCLUSIONS

[97] If Court room attendance at the hearing is anything to go by, this application has attracted significant public interest and debate. In completing my review of the Officer's Decision I have simply applied the relevant jurisprudence and the principles of judicial review as I understand them. The result will obviously displease not only the Applicants but also the larger community of supporters behind them. My conclusions are in no way intended as a comment upon, or sympathy for, either side in the public debate. They are simply the conclusions I feel compelled to reach in applying Canadian law to the facts and arguments before me. The fact that I have to conclude against the Applicants does not mean that the Court does not recognize, or have sympathy for, the significant challenges they may face as a family when returned to the U.S..

[98] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, a Judgment will be issued.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	**JEREMY DEAN HINZMAN** **NGA THI NGUYEN and** **LIAM LIEM NGUYEN HINZMAN** v. **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	February 10, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	April 24, 2009

APPEARANCES:

Ms. Alyssa Manning	FOR THE APPLICANTS
Mr. Stephen H. Gold	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Alyssa Manning Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT