

Federal Court



Cour fédérale

**Date: 20121128**

**Docket: IMM-4819-11**

**Citation: 2012 FC 1383**

**Ottawa, Ontario, November 28, 2012**

**PRESENT: The Honourable Mr. Justice Lemieux**

**BETWEEN:**

**MUHAMMAD ASHRAF GONDAL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction and Background**

[1] The proceeding before this Court is a challenge by the applicant to the June 15, 2011 decision of a Pre-Removal Risk Assessment (PRRA) Officer who denied his application for permanent residence to Canada based on H&C considerations. The previous day, June 14, 2010, this same PRRA Officer refused the Applicant's application he be found at risk if returned to Pakistan.

[2] The Applicant is a citizen of Pakistan who came to Canada in June 2003 seeking Canada's protection fearing persecution at the hands of the Pakistan Muslim League (PML) because of his involvement in the Pakistan People Party (PPP). He made a refugee claim shortly after arriving in Canada, a claim the hearing of which had to be postponed because on June 21, 2005, while working as a gas station attendant, his life was tragically changed when he was brutally attacked by three men who beat him to the point of near death.

[3] As a result of that attack he suffered a serious brain injury which led to the development of a medical condition called Aphasia, a communication impairment which results from a trauma to the language centre of the brain. Mr. Gondal experiences varying challenges in understanding spoken language, both in Hindi and in English, reading, writing and speaking.

[4] He was first admitted to St. Michael Hospital in Toronto where he was operated on; on September 29, 2005 he was transferred to the Toronto Rehabilitation Institute where he remained to March 2, 2006 in the Neurorehab Program. He continues to attend an out-patient rehabilitation program two days a week for physiotherapy and speech language pathology services.

[5] On March 2, 2006 he was discharged to live at the Annex, a retirement home. He was referred to the Aphasia Institute by the Toronto Rehab Institute in October 2006. Since the spring of 2007 he has been attending weekly conversation groups which provide a social opportunity for people living with Aphasia to practice attentive communication strategies, use communication supports and enter into conversation with others. According to a letter from the Aphasia Institute

dated November 12, 2008 Mr. Gondal cannot expect ever to regain his ability to speak, read or write in either language.

[6] The hearing before the Refugee Protection Division (RPD) was held on September 28, 2007. Mr. Gondal could not testify at his hearing. His refugee claim was rejected on the basis of the Minister's evidence and on what Mr. Gondal had told the Immigration Officer at point of entry and what he wrote in his Personal Information Form (PIF). The evidence before the RPD led it to conclude the applicant's story was not credible and that the allegations by his political party that the PML had filed a false rape charge was a fabrication. Leave from the RPD's decision was denied by a judge of the Federal Court.

[7] The Officer expressed his conclusion for denying Mr. Gondal relief in the following terms:

I find that the evidence before me does not establish that the personal circumstances of the applicant are such that would cause him to face unusual and undeserved, or disproportionate hardship if he were required to apply for a permanent resident visa from outside Canada. After a careful analysis of all the evidence before me, I am not satisfied that sufficient humanitarian and compassionate grounds exist to approve this exemption request.

[Emphasis added]

## II. The Decision Under Review

[8] At the very beginning of his analysis, the Officer stated the Applicant's H&C grounds were based on his establishment in Canada, his medical condition and unusual, underserved or disproportionate hardship if returned to Pakistan to make his application for permanent residence to

Canada from Pakistan. He noted Mr. Gondal had no relatives in Canada; his wife, children (6 in number) and his mother all reside in Pakistan.

[9] The Officer further stated:

The applicant is seeking an exemption from the in-Canada selection criteria based on humanitarian and compassionate or public policy considerations to facilitate processing of the applicant[ion] for permanent residence from within Canada. The applicant bears the onus of satisfying the decision-maker that his personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside Canada in the normal manner would be 1) unusual and underserved or ii) disproportionate.

[Emphasis added]

a) Establishment

[10] The Officer reviewed Mr. Gondal's submissions on establishment:

1. His arrival in Canada in June 2003;
2. His history for refugee recognition;
3. His working at the gas station from October 2003;
4. The June 2005 attack causing serious brain injury from which he has never recovered;
5. Due to his injury he has been in receipt of Workplace Safety and Insurance Board (WSIB) benefits to the present time;
6. The fact he has been here eight years;
7. The letters of support by all who knew him in Canada; and
8. His participation in his religious and cultural community.

[11] In his analysis, the Officer notes the Applicant has lived in Canada since June 20, 2003 and, in that time, a certain level of establishment is expected to have occurred. He then wrote:

I have considered various factors including the applicant's work history, involvement in the community, individual and community support and any other factor that would demonstrate the applicant's establishment in Canada was such, that it would cause hardship if he were to apply for an immigrant visa from outside Canada. I acknowledge that the applicant has taken positive steps in establishing himself in Canada, however, I note that he has received due process through the refugee program and was accordingly afforded the tools and opportunity to obtain a degree of establishment in Canadian society. However, I also acknowledge that the applicant's ability to further establish himself in Canada was interrupted by the injury that he suffered when he was attacked at his place of employment in June 2005. Based on the evidence provided, I find the applicant's establishment in Canada is as expected and not exceptional. Consequently, I do not find the applicant's establishment in Canada justifies an exemption under humanitarian and compassionate considerations.

[Emphasis added]

b) The Applicant's Medical Condition

[12] The Officer noted the Applicant's submissions on his medical condition:

1. His serious brain injury as a result of the attack which left him permanently disabled;
2. Unable to express his thoughts and feelings due to severe communication impairment and his physical disability makes it very difficult to walk;
3. His submission that it was highly unlikely that the specialized health care he requires would be available to him in rural Pakistan.

[13] The Officer analysed the documentary evidence on this point and concluded:

The applicant submitted that it is highly unlikely that the specialized health care that he requires would be available to him in rural Pakistan. Based upon a careful analysis of the evidence before me, it

is my finding that there is insufficient evidence before me to indicate that the applicant will not be able to obtain the health services/medication and/or treatments that he may need upon return to Pakistan. According to documentary evidence, adequate medical care is available in Pakistan, albeit limited in rural areas. However, there is no evidence before me to indicate that the applicant would not be able to obtain access to any medical facilities he may require outside of his place of residence if necessary. Based upon the information before me, the applicant's medical condition is chronic and other than some minor improvements, he will continue to suffer from his physical disability and communication impairment for the rest of his life. I acknowledge that the government of Pakistan's expenditure on health care may not be as much as in many other countries, however, based upon the evidence before me, and in the absence of any evidence to the contrary, it is my finding that the applicant would be able to obtain medication and/or medical treatments he may need. The applicant also submitted that all his family, including his mother, spouse, and six children continue to reside in Pakistan and therefore, should be able to provide him with the support he may need in order to assist him in his daily living. Therefore, I find that there is insufficient evidence to indicate that the applicant would face unusual, underserved or disproportionate hardship due to the loss of his medical support system in Canada, and the need to obtain medical care should he return to Pakistan.

[Emphasis added]

#### c) The Volatile Political Situation

[14] The Officer analysed this point under the hardship criteria which closely relates to what the Applicant put forward as the risk factors justifying a favourable decision on his PRRA application.

[15] As noted above, the PRRA Officer, on June 14, 2011, refused Mr. Gondal's PRRA application. A review of this decision was also sought in this Court and is the subject of Reasons for Judgment cited at 2012 FC 1384.

[16] The PRRA Officer expressed his conclusions as follows:

Based upon the evidence before me, including current documentary material on country conditions and taking into account the personal circumstances of the applicant, it is my finding that the applicant has not established that the hardships related to his allegations of risk amount to unusual and undeserved or disproportionate hardship.

Based upon careful analysis of all the evidence before me, it is my finding that the applicant has not established that the hardships related to his allegations of risk amount to unusual and undeserved or disproportionate hardship. With respect to hardship and general country conditions as they relate to the applicant's return to Pakistan, I find that these are conditions that are also generally faced by the population. Considering all the evidence before me, it is my finding that the applicant has not established that the hardships associated with general country conditions in Pakistan amount to unusual and undeserved or disproportionate hardship that would warrant a positive exemption under humanitarian and compassionate considerations.

[Emphasis added]

### III. The Position of the Parties

#### a) On Behalf of Mr. Gondal

[17] Counsel for the Applicant submits the Officer committed a reviewable error by assessing Mr. Gondal's hardship without regard to the facts, that is, an understanding of what Aphasia is and how this specific condition impacts upon his hardship if returned to Pakistan for the following reasons:

1. In Canada he has access to specialized medical care which he needs as he is learning to cope with his new life, manage his condition, communicate in new ways and is surrounded with health care professionals and friends in a similar situation who can communicate with him through learned techniques and frequent and ongoing contact;

2. Although he might have access to primary medical care in Pakistan it is highly unlikely he would have access to specialized health practitioners who can provide the specialized attention he requires;
3. In Pakistan he will be unable to continue learning new communication techniques and coping mechanisms and will not have people around him who have learned to communicate with him. As a result he will be isolated in an environment where his is unable to realistically express himself; and
4. He will not be able to apply for permanent residence from outside Canada because he is most certainly medically inadmissible.

[18] The Officer ignored vital evidence in that he made no reference to the multiple letters provided by the Rehab Institute or from the Aphasia Institute. Counsel for the Applicant relies on the decision of my colleague Russell J. in *Mughrabi v Canada (Citizenship and Immigration)*, 2008 FC 898.

[19] Counsel for the Applicant also argues the Officer's finding on the availability of adequate medical services for the Applicant in Pakistan is flawed because the documentary evidence referred to speaks of the availability of basic non-emergency medical care in major cities in Pakistan when the Applicant's family lives in a rural area and his needs are for highly specialized ongoing support from professionals and people similarly situated as he who are able to communicate with him.

[20] Applicant's counsel argues the finding the Applicant will not suffer hardship if required to apply for a permanent resident visa from outside Canada is faulty because what the Applicant was



seeking was an exemption from the medical inadmissibility provision in section 38 of the Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA).

b) On Behalf of the Respondent

[21] Counsel for the Respondent submits that the Applicant's H&C application was heavily premised on his need for medical and other services to manage his daily life and that he same was not available in Pakistan. He argues the Applicant's argument proceeds on an erroneous premise, i.e. the presumption the Applicant put evidence before the Officer about the medical care he required and whether said care was not available to him in Pakistan. He submits that other than a reference to nursing home care that the Applicant did not address any evidence as to what medical care he was receiving in Canada or the availability of such care in Pakistan.

[22] He also argues the Applicant's assertions presume that having to live with an acquired disability in another country qualifies as undue hardship. He argues, based on the Supreme Court of Canada's decision in *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703, at paragraphs 26 to 30, a disability can impose functional limitations that no law or societal effort in any country can ameliorate and having to adapt as a person with a disability to a different environment is part of the inherent consequences of removal and cannot itself qualify as undue hardship. Moreover, the Applicant has not addressed any evidence his removal from Canada would set back his recovery.

[23] In sum, the essence of the Respondent's position is the Applicant had the onus of establishing the factors that warrant H&C relief in his case, and he cannot fault the Officer for not assessing evidence that was not before her.

#### IV. Analysis and Conclusions

##### a) The Standard of Review

[24] Both parties agree that the reasonableness standard applies to the H&C decision and that it would only be unreasonable if it fell outside the range of possible options open to the H&C Officer considering the facts and the applicable law. The question is not whether the decision could have been different if the Officer had weighed the evidence another way.

##### b) Conclusions

[25] It is also useful to recall what Justice L'Heureux-Dubé said the statutory scheme requires immigration officers to do. She wrote, at paragraph 66 in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 that the enabling statute and regulations "requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" and that these words and their meaning must be central in determining whether an individual H&C decision was a reasonable exercise of the power conferred by Parliament. She added at paragraph 66:

The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner.

[26] As stated by Justice Trudel in *Hinzman et al v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 177 at paragraph 26 that when dealing with the applicant's H&C application, the H&C officer needed to have regard to public policy considerations and humanitarian grounds.

[27] In my view this judicial review application must be allowed for the following reasons.

[28] First, the Officer assessed the applicant's H&C application without regard to the evidence before him on what Mr. Gondal's medical condition is and what his needs are flowing from that condition. Nowhere in his reasons does the Officer analyse and discuss the voluminous evidence put forward by the applicant. In other words, he made his hardship finding in the abstract.

[29] Second, the Officer never came to grips with the exemption the applicant was seeking. He was not seeking, as the Officer found, an exemption from the requirement that an application for permanent residence to Canada must be made outside Canada. Making such application from outside Canada would do him no good because he would be medically inadmissible. What Mr. Gondal was seeking was an exemption from the medical disqualification provision in section 38 of the *IRPA* on H&C grounds related to the fact that it was in Canada that he was brutally attacked while at work and it is in this country that he is receiving workman's compensation and substantial medical care. In other words, the Officer never truly assessed his humanitarian and compassionate case.

[30] For these reasons, Mr. Gondal's H&C application must be considered.

[31] I conclude by mentioning that during the hearing and in post-hearing submissions Counsel for the Minister raised the question whether the Officer had the authority to exempt the applicant from the medical restriction under section 38 of the *IRPA*. For the reasons expressed by Counsel for Mr. Gondal, making reference to the new and revised Operations Manual, I am satisfied that the Officer did have that authority.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this judicial review application is granted, the Officer's decision denying his application for permanent residence to Canada based on H&C grounds is set aside and that application is to be re-determined by a different officer. No certified question is proposed.

“François Lemieux”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4820-11

**STYLE OF CAUSE:** MUHAMMAD ASHRAF GONDAL v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, ON

**DATE OF HEARING:** April 16, 2012

**REASONS FOR JUDGMENT:** LEMIEUX J.

**DATED:** November 28, 2012

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