Federal Court  Cour fédérale

Date: 20130725

Docket: IMM-11968-12

Citation: 2013 FC 817

Ottawa, Ontario, July 25, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

JUTON TARAFDER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision rendered by an Immigration Officer (the officer) on September 25, 2012. The officer refused the applicant's application for an exemption of the requirements of the Act on humanitarian and compassionate (H&C) grounds, which would have allowed him to have his permanent residence application processed from within Canada.

Facts

[2] Mr. Juton Tarafder (the applicant) is a citizen of Bangladesh and is of Hindu minority. The applicant's father was killed by a group of fundamentalists in 1994. Two (2) of the applicant's brothers were threatened following this incident and fled Bangladesh to come to Canada where they now live. They were granted refugee status by the Immigration and Refugee Board (Applicant's Record, Affidavit of Juton Tarafder, pp 22-23). The applicant's mother and his other brother are still living in Bangladesh (Applicant's Record, p 54).

[3] In 1997, the applicant became active in his Hindu community. He became a member of the Hindu Buddhist Christian Unity Council in Srimongal, Bangladesh, was active in religious and cultural affairs and demonstrated opposition to attacks against the Hindu minority. The applicant claims this allegiance still causes him to fear persecution in Bangladesh today (Applicant's Record, Affidavit of Juton Tarafder, pp 22-23).

[4] The applicant arrived in Canada on May 6, 2004. He claimed refugee status, but his claim was denied in August 2006 (Respondent's Record, Affidavit of Josée Pelletier, Exhibit "A", pp 16-22). The applicant's allegations before the Immigration and Refugee Board (IRB) were the following: i) being a member of the Hindu minority in Bangladesh; ii) his father being killed by fundamentalists in 1994; iii) the persecution and torture of his two (2) elder brothers who were forced to leave the country; iv) joining the Hindu Buddhist Christian Unity Council in 1997; and v) being victimized between 1997 and 2004 because of his religious and social activities. The IRB found the applicant not to be credible (Respondent's Record, Affidavit of Josée Pelletier, Exhibit "A", pp 16-22). This conclusion was largely based on the applicant's admission of having lied

repeatedly to Canadian authorities, and an inconsistency in his submissions whereby he initially claimed to have killed between 20 and 25 persons in 1998, and more in subsequent years. These allegations were subsequently denied when the applicant alleged that what he actually said was that he was attacked by a group of 20 to 25 fundamentalists, and submitted an affidavit from an interpreter to that effect. The IRB gave no probative value to the interpreter's affidavit and, therefore, gave no probative value to any of the documents the applicant submitted to support his claim. Application for leave to commence an application for judicial review was denied in December 2006 (Respondent's Record, Affidavit of Josée Pelletier, Exhibit "B", p 24).

[5] Since his arrival in Canada, the applicant has lived with his brother Pulak, Pulak's wife and their two (2) children, a boy aged 13, Pranto, and a girl aged 6, Protiti. The applicant is attached to the children and is involved in their daily lives (Applicant's Record, Affidavit of Juton Tarafder, p 23). The applicant is also affiliated with the Bangladesh Hindu Buddhist Christian Unity Council (BHBCUC) in Canada. The applicant is gainfully employed in Montreal: he owns a driving school and is a partner in a small company which operates a bar.

[6] On August 20, 2007, the applicant applied for a Pre-Removal Risk Assessment (PRRA) and for permanent residence on H&C grounds (Applicant's Record, H&C submissions, p 28). Both were denied. The decision on the H&C application is under review in the present application.

Decision under review

[7] In a decision dated September 25, 2012, the officer concluded that the applicant had not submitted sufficient evidence to show that he would likely suffer unusual and undeserved or disproportionate hardship should he be required to leave Canada and refused his application.

[8] In preliminary remarks, the officer noted that the applicant made H&C submissions on December 27, 2007; July 14, 2009; June 14, 2010; August 30, 2011; September 26, 2011 and September 18, 2012. The officer indicated that older country reports on Bangladesh would be considered as less probative than more recent versions emanating from the same or similar sources. The officer also indicated that since the applicant applied for H&C in 2007, the risk he alleges may include risks under sections 96 and 97 of the Act because the application pre-dates June 2010 modifications to the Act, precluding consideration of factors that are relevant to sections 96 and 97. Finally, the officer recalled that the H&C application cannot serve as an appeal of the IRB's earlier findings on the applicant's refugee status and on his credibility. He stated that, in the absence of new and probative evidence regarding the facts previously alleged before the IRB (political, social and religious activities in Bangladesh), the applicant remains not credible in the present H&C application.

[9] The officer fist examined the applicant's establishment in Canada. He concluded that the applicant does not adequately explain why it was beyond his control to remain in Canada after the negative IRB decision in 2006. The officer noted the evidence submitted by the applicant with regards to his assets and employment in Canada; namely, that he is a partner in a Quebec company (a bar) and owns and operates a driving school. The officer concluded that the applicant's claims in

this regard were credible in light of the documents provided. The officer also noted evidence which indicates that the applicant is known in Montreal as the only Hindu Bangladeshi driving instructor, but concluded that this could not justify an exemption from the requirements of the Act. The officer held that the applicant had not shown how a departure from Canada would cause him a disproportionate hardship, for instance by preventing his business from functioning profitably in his absence, or by incurring financial losses. The officer also considered the applicant's evidence pertaining to his community involvement. The officer held that the documents show the applicant's involvement in the Hindu community, where he is active and appreciated, but do not evidence that a temporary or permanent departure from Canada would cause him a disproportionate hardship, or cause hardship to other persons or his community in Canada, such that an exemption from the requirements of the Act would be warranted.

[10] The officer then examined the best interests of the children who would be affected by the applicant's departure; namely, his nephew Pranto and niece Protiti. The officer noted that the documents provided indicate that the applicant is involved in the daily lives of the children, particularly Pranto's. The officer also noted that the documents provided by the applicant show that Pranto is upset at the thought of the applicant's departure, but that his emotional reaction has evolved over time. The officer also explained that, while he does not conclude that the applicant is the children's primary caregiver, even if it were the case, the evidence does not show that the children's parents should not or could not be their primary caregivers. According to the officer, the applicant has failed to submit sufficient evidence to show that, if he were to leave Canada and the children's parents had to spend more time with them or arrange for alternative care, such as a

babysitter, the care of the children would be harmed in a way that would seriously interfere with their interests.

[11] The officer finally proceeded to examine risks and conditions in Bangladesh for members of the Hindu minority. He first recalled the applicant's allegations before the IRB in 2006; namely, that his father was killed, that two (2) of his brothers were forced to flee, that he was beaten for his religious and social activities, that he was targeted for extortion, and that his home was attacked. However, the officer also recalled that the IRB found the applicant not credible. The officer noted the applicant's allegations in his H&C application that he will be seriously harmed or killed because he belongs to the Hindu minority and because of his past political and social activities. The officer also considered the applicant's allegation that an interpreter misunderstood one of his initial statements, and the applicant's claim that this led to the IRB's negative conclusion on his credibility. The officer concludes that:

> [I]n the absence of new and probative evidence on this subject, the applicant remains not credible in the present H and C decision on this particular subject and in general regarding alleged past events in Bangladesh which form the basis of his story regarding threats of death or harm in Bangladesh.
>
> (Tribunal Record, p 30)

[12] According to the officer, the applicant is trying to dispute the IRB's findings on credibility, which is not the purpose of the H&C application.

[13] The officer examined the applicant's alleged political and social activities in Bangladesh, noting that he alleged being the victim of police brutality, extortion and death threats before arriving in Canada, as well as being detained in Bangladesh in 1997 and 1998. The officer reiterated that the

IRB did not find the applicant credible on these alleged facts, and absent new probative evidence, the applicant remains not credible with regards to these allegations.

[14] The officer considered letters from the BHBCUC, from both Canadian and Bangladesh branches. He concluded that they constitute probative evidence of the applicant's present activities with the BHBCUC. However, he was of the opinion that letters from the BHBCUC in Bangladesh dated May 8, 2007 (Tribunal Record, pp 389-90) and May 29, 2010 (Tribunal Record, pp 255-56) did not show the authors had independent knowledge of the applicant's activities (and could merely be repeating what the applicant would have told them), and were therefore not probative evidence of the applicant's alleged past activities in Bangladesh. The officer came to similar conclusions with regards to two (2) letters from the General Secretary of the BHBCUC in Canada, dated May 25, 2007 and September 16, 2011 (Tribunal Record, pp 118-19 and 391-92), as well as a letter from the Bangladesh Hindu Association of Quebec dated May 20, 2007 (Tribunal Record, pp 393-94).

[15] The officer observed that the BHBCUC letter from Canada, dated September 16, 2011 (Tribunal Record, pp 118-19), states that the applicant is active in programs of the BHBCUC by bringing awareness to the Canadian government of the difficulties Hindus face in Bangladesh, but does not elaborate on the manner in which this was done, nor on how persons or the government in Bangladesh would learn of such activities. Consequently, the officer concluded that the applicant's activities in Canada would not cause him to suffer any serious mistreatments or hardship in Bangladesh. The officer did conclude that this letter, along with a letter from the Bangladesh Hindu Welfare Association, also dated September 16, 2011 (Tribunal Record, pp 120-21), constitute evidence that the applicant is a Hindu who is involved in his community.

[16] The officer then examined discrimination and persecution of Hindus in Bangladesh in general. The officer first discounted an IRB decision from 2001 that had been quoted by the applicant, in which the IRB granted refugee status to Hindus from Bangladesh, indicating that such evidence was too old and of no probative value. The officer considered the reports showing violence and discrimination against Hindus submitted by the applicant since 2007. In recent submissions, the applicant indicated that despite the election of the Awami League (AL) in 2008, which is secular and supported by most Hindus, minorities are still victims of continuing discrimination, that disputes over lands and violence remains, and noted the ineffectiveness of the National Human Rights Commission in Bangladesh from 2010 reports. The officer considered a document from the United States Commission on International Religious Freedom's Annual Report 2011, which states that the AL government has reduced ethnic and religious discrimination and improved security. The officer also noted similar reports of a significant decline in discrimination and societal abuses from the United States Department of State, dated September 2011 and September 2012. The officer also took note of 2011 reports indicating residual problems with land disputes affecting Hindus, but observed that the applicant himself has not shown him or his family to be directly affected by such problems.

[17] The officer held that the applicant had not shown that he was personally affected by serious acts of discrimination or mistreatment as a Hindu in Bangladesh, given his lack of credibility before the IRB. Since reports show mistreatments of Hindus are diminishing, and given the lack of proof of past personal victimization of the applicant as a Hindu, the officer concluded that "the applicant has not shown that he is now or in the near future likely to be personally seriously mistreated as a Hindu in Bangladesh in such a way that would represent a disproportionate hardship" (Tribunal Record,

p 34). The officer further noted that the applicant's mother and brother, who are also Hindu, still reside in Bangladesh. According to the officer, the applicant has failed to explain why, if his family in Bangladesh has not encountered problems, it would be probable that he would.

[18] The H&C application was therefore refused.

Issues

[19] The following issues are raised in this application for judicial review:

a. Did the officer violate procedural fairness by failing to conduct an oral interview?

b. Did the officer unfairly minimize the best interests of the children?

c. Did the officer apply the incorrect legal test for assessing hardship in an H&C application?

d. Did the officer consider H&C factors in isolation, omitting a global assessment?

Statutory provisions

[20] The relevant provisions of the *Immigration and Refugee Protection Act* which were in force at the time of the applicant's application in 2007 were as follows:

PART 1	PARTIE 1
IMMIGRATION TO CANADA	IMMIGRATION AU CANADA
DIVISION 1	SECTION 1
REQUIREMENTS BEFORE	FORMALITES PREALABLES A

ENTERING CANADA AND SELECTION	L'ENTREE ET SELECTION
Requirements Before Entering Canada	*Formalités préalables à l'entrée*
Application before entering Canada	Visa et documents
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11**. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.
…	[…]
DIVISION 3	SECTION 3
ENTERING AND REMAINING IN CANADA	ENTREE ET SEJOUR AU CANADA
…	[…]
Status and Authorization to Enter	*Statut et autorisation d'entrer*
…	[…]
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	**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

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.	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

[21] The first issue raised by the applicant concerns procedural fairness. Questions of procedural fairness require no deference from this Court, which must determine whether the process followed by the officer satisfied the requirements of procedural fairness in the circumstances (*Eshete v Canada (Minister of Citizenship and Immigration)*, 2012 FC 701 at para 9, [2012] FCJ No 697 (QL) [*Eshete*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

[22] The second and fourth issues concern the officer's determination of the H&C application and involve mixed questions of fact and law (i.e., whether the best interests of the children were adequately assessed, and whether the officer globally considered all the factors). They are reviewable on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190 [*Dunsmuir*]; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18, [2010] 1 FCR 360). Consequently, the Court will only intervene with regards to these two (2) issues, should the decision-making process not be justified, transparent and intelligible, or if the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

[23] The third issue raised by the applicant is whether the officer applied an incorrect test for the H&C application. Recent jurisprudence from the Supreme Court of Canada has indicated that the more deferential standard of reasonableness should apply to an officer interpreting his or her home statute, a tenet that has been examined in the context of H&C applications by this Court in *Diabate v Canada (Minister of Citizenship and Immigration)*, 2013 FC 129 at paras 11-17, [2013] FCJ No 124 (QL) [*Diabate*]. In *Diabate*, Justice Gleason observed the following at paragraph 17:

> [17] The application of the correctness standard to an officer's interpretation of section 25 of the IRPA lives uncomfortably with the Supreme Court's recent jurisprudence. The IRPA is undoubtedly the home statute of an immigration visa officer undertaking an H&C analysis. Thus, following the jurisprudence of the Supreme Court of Canada in this regard, one would think that the standard of review applicable to the test employed under section 25 should be reasonableness. …
>
> (Emphasis added.)

[24] Indeed, the Supreme Court of Canada, in a recent string of decisions in relation to the standard of review (*Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160, *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654; and *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364), has provided guidance with respect to the application of the reasonableness standard and the application of the correctness standard. In the circumstances of this case, which relates to an officer's interpretation of his own statute - i.e. section 25 of IRPA, the teachings of the Supreme Court of Canada indicate that the standard of reasonableness should apply.

Arguments

[25] The parties submitted detailed written submissions.

Applicant's arguments

[26] The applicant argues that, when an officer makes adverse credibility findings, he should give the applicant an opportunity to respond to his concerns (*Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR (4th) 422). The applicant refers to the case of *Duka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1071, 92 Imm LR (3d) 255 [*Duka*], as an example where an officer deciding on an H&C application should have convened an interview because of his concerns about the applicant's credibility. The applicant also claims that this is a case where adverse credibility findings hide behind findings of insufficiency of evidence (citing *Haji v Canada (Minister of Citizenship and Immigration)*, 2009 FC 889, 83 Imm LR (3d) 208; and *Latifi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1388, 58 Imm LR (3d) 118). The applicant claims that, even when the duty of fairness is at the low end of the spectrum, a violation of natural justice can occur if no interview is held when the credibility, accuracy or genuine nature of the information submitted is the basis for the officer's concern, as opposed to a concern which would arise from the requirements of the legislation (*Cishahayo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1237 at para 24, [2012] FCJ No 1354 (QL); *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501).

[27] The applicant maintains that he submitted several documents from the BHBCUC stating that he was an active member of that organization, both in Canada and in Bangladesh, and that he

was a victim of persecution in Bangladesh. According to the applicant, by dismissing these letters as probative evidence of the applicant's activities in Bangladesh, the officer demonstrated that he was convinced of the applicant's lack of credibility. Consequently, the officer would have relied on a conclusion on insufficiency of the evidence as a pretext to justify what are actually adverse credibility findings. The applicant further claims that the officer was wrong in concluding that the reasons why the applicant's brothers were found to be refugees in Canada were not specified, since the brothers' sworn declarations explain the persecution they suffered in Bangladesh.

[28] According to the applicant, the respondent's position mistakenly intends to demonstrate that the IRB's findings on credibility fetter the H&C officer's discretion. The applicant further points out that in the case of *Monteiro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322 at para 12, [2006] FCJ No 1662 (QL) [*Monteiro*], the Court stated that officers are not bound by IRB findings.

[29] The applicant also claims that the officer unfairly minimized the best interests of the children involved. He recalls that an officer must be alert, alive and attentive to the best interests of any child affected by the outcome of the H&C application. The applicant relies on *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at para 63-65, [2012] FCJ No 184 (QL) [*Williams*], to indicate that the officer should have first established what was in the child's best interests, from the child's perspective, followed by the degree to which these interests are compromised by one decision as opposed to the other, and finally determined the weight to assign this factor in the analysis. According to the applicant, the officer's assessment of the children's best interests fails for two (2) reasons: 1) he minimized their best interests by implying that the children

do not suffer enough to warrant the exemption, and 2) the officer did not weigh this element cumulatively with the other hardship factors in this case, despite explicitly recognizing that the children's best interests may be served by the applicant's presence in Canada (*Mangru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 779 at para 27, 2 Imm LR (4th) 105).

[30] The applicant also argues that the officer applied the incorrect legal test for assessing hardship in an H&C application. According to the applicant, the officer clearly required him to demonstrate personal risk, and found he was unable to do so. The applicant claims this was the wrong legal test, and that the officer failed to appreciate that the test for hardship in an H&C application is different than a test for personalized risk in a PRRA (*Walcott v Canada (Minister of Citizenship and Immigration)*, 2011 FC 415 at para 60, 98 Imm LR (3d) 216; *Shah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1269 at para 72-73, 399 FTR 146; *Sahota v Canada (Minister of Citizenship and Immigration)*, 2007 FC 651 at para 7-8, [2007] FCJ No 882 (QL)). The applicant claims that, notwithstanding the fact that his application pre-dates the modifications to the Act, it is an error of law to substitute a personalized risk assessment for a hardship analysis in an H&C application. The applicant cites *Diabate*, above, in order to outline that imposing such an analysis under section 25 would frustrate this section and strip it of its function. The applicant claims that the officer's analysis is not saved by simply reverting to a recitation of the proper H&C test in conclusion. The applicant also recalls that officers who decide both PRRA and H&C applications should take care not to confuse the two (2) separate and distinct analyses required by each procedure (*Ramirez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404 at para 46-48, 304 FTR 136).

[31] Finally, the applicant submits that the officer erred by considering the H&C factors in isolation, omitting a global assessment as prescribed by the IP 5 Guide – Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds. The applicant argues that the officer found him to be self-supporting in his work and finances, to be involved in and appreciated by his community in Canada, and that the children's best interests may be served by his remaining in Canada, but failed to weigh these positive elements globally, deeming that each on its own was insufficient to grant him an exemption from the Act under H&C considerations.

Respondent's arguments

[32] On the issue of the oral interview, the respondent submits that one was not required in this case. The respondent claims that the applicant was found not credible only in relation to his allegations of risk in Bangladesh as a member of the Hindu minority, while all his other allegations were believed by the officer. According to the respondent, in the absence of probative evidence rebutting the IRB's conclusions on credibility, it was reasonable for the officer to reject allegations of risk which were the same as those previously rejected by the IRB (*Monteiro*, above at para 16). The respondent recalls that the applicant had no legitimate expectation of being interviewed, and could not rely on an interview to re-establish his credibility (citing *Owusu*, above at para 8). Furthermore, the respondent submits that a hearing is not required for the mere fact that the applicant is found not to be credible (*Monteiro*, above at para 17).

[33] The respondent also claims that the case of *Duka*, above, cited by the applicant, was distinguished in *Leonce v Canada (Minister of Citizenship and Immigration)*, 2011 FC 831, [2011] FCJ No 1033 (QL) [*Leonce*], and that such a distinction is also possible in the present case. In *Duka*,

above, the applicant had claimed for the first time in her H&C application to fear domestic violence and adduced evidence in that regard. She had not alleged this risk before the immigration authorities upon her arrival, or before the IRB. The respondent claims this case is much different, since the applicant merely reiterates the same alleged risks as he had advanced before the IRB.

[34] According to the respondent, the evidence submitted by the applicant (letters from the BHBCUC) provides no probative corroboration of his past persecution in Bangladesh because the letters do not indicate whether the authors have personal knowledge of the applicant's history. The respondent insists that the applicant has not explained why it would be unreasonable to give no probative value to such documents which do not attest to personal knowledge of the events alleged within. The respondent further claims that, in any event, these documents seek to support a story that the IRB did not believe. The respondent claims the officer was not entitled to reassess the credibility of the applicant (*Herrada v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1003 at paras 37-39, [2006] FCJ No 1274 (QL)). The applicant having failed to adduce probative evidence which casts doubt on the IRB's credibility findings, the respondent claims it was reasonable for the officer to rely upon such findings, and that procedural fairness did not require an interview.

[35] On the second issue of the best interests of the children, the respondent claims the officer examined this factor with a great deal of attention. The respondent submits that the officer was indeed alert, alive and sensitive to the best interests of the applicant's nephew and niece, but that this factor is one of many to consider (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193; *Legault v Canada (Minister of Citizenship and*

Immigration), 2002 FCA 125, [2002] 4 FC 358). The respondent claims that the officer reasonably concluded that, while the children would be sad if the applicant were to leave Canada, this level of interference with their best interests is simply insufficient to justify an exemption. The respondent claims the officer accurately noted that the children would not be left without primary caregivers should the applicant leave Canada. The respondent also submits that the officer's analysis of the best interests of the children spans almost three (3) pages of his entire decision, and that this is clearly a case where the children's interests were fairly considered.

[36] On the third issue of the officer's assessment of hardship, the respondent first recalls that, since the applicant's application was filed before June 29, 2010, the officer was correct in considering section 96 and 97 risks, in accordance with manual IP 5, at paragraph 5.9, which states that "[a]pplications received before June 29, 2010, will continue to have Sections 96/97 risks assessed". According to the respondent, the officer's analysis of the applicant's hardship has three (3) components: 1) the applicant has not shown that the mere fact that he is a member of the Hindu minority indicates that he would suffer unusual, undeserved and disproportionate hardship in Bangladesh; 2) there is no evidence that potential persecutors in Bangladesh are aware of the applicant's activities in Canada; and 3) the applicant's allegations about events prior to his arrival in Canada are not credible, and therefore cannot indicate that the applicant would face hardship if returned to Bangladesh. The respondent observes that the applicant challenges only the third conclusion, but that despite his arguments, it remains clear that the officer did not apply a risk-based analysis instead of a hardship-based analysis. According to the respondent, nothing in the officer's reasons demonstrates that he required the applicant to show that he met the requirements of sections

96 or 97 of the Act. Instead, the applicant was required to show that he would experience unusual, undeserved or disproportionate hardship, and he has failed to meet this burden.

[37] Finally, on the fourth and last issue of global assessment, the respondent notes that the officer organized his consideration of different factors under corresponding subheadings, concluding that each was insufficient to justify an exemption. The respondent claims that a "boilerplate" sentence referring to a global evaluation of hardship may have made the officer's reasoning clearer, but its absence does not create a presumption that he erred in this regard.

Analysis

a. Did the officer breach procedural fairness by not conducting an oral interview?

[38] The applicant claims the officer should have convened him to an interview since much of his decision is based on credibility issues. The Court cannot agree with this position. The case of *Duka*, above, cited by the applicant, is distinguishable from the case at bar. In *Duka*, the applicant had raised, for the first time in her H&C application, a risk of domestic violence. In the case at bar, the applicant merely reiterates risks that have already been examined by the IRB, which determined that the applicant was not credible. A similar distinction was made in the case of *Leonce*, above, as correctly indicated by the respondent. Furthermore, in *Duka*, above, the issue of credibility was at the center of the officer's decision. In the present case, the applicant's credibility was an issue already determined by the IRB on one single factor: his previous social and political activities in Bangladesh. Credibility was not an issue with regards to all other factors and allegations in the applicant's H&C application, which the officer found were credible and properly supported by the documents provided.

[39] The officer did not hide credibility findings behind insufficiency of evidence findings as the applicant suggests. What the officer found was that the applicant did not submit sufficient probative evidence which could modify the IRB's credibility findings. The officer indicates on several occasions that the letters submitted from the BHBCUC do not show how the authors would have independent knowledge of the applicant's alleged activities in Bangladesh, prior to coming to Canada.

[40] The officer adequately explains why he thinks the letters submitted by the applicant have little probative value with regards to the applicant's activities and alleged risks in Bangladesh: namely, because they do not indicate how the authors would have independent knowledge of the applicant's activities and alleged difficulties, but could instead be merely recounting what the applicant would have told them. This conclusion on lack of probative value of the documents is reasonable and should not be interfered with. Consequently, it was open to the officer to conclude that the applicant "remains not credible in the present H and C decision on this particular subject and in general regarding alleged past events in Bangladesh which form the basis of his story regarding threats of death or harm in Bangladesh" (Tribunal Record, p 30; emphasis added).

[41] The Court recalls an excerpt from *Monteiro*, above at para 12, a case on which both parties relied:

> [12] It is important to note that H&C applications are not appeals from previous decisions of the Immigration and Refugee Board (IRB). The Minister's officers are not bound by the conclusions of the IRB. When the evidence before the officer is substantially the same as that which was before the IRB, it is reasonably open to the officer to reach the same conclusions (*Klais v Canada (Minister of Citizenship and Immigration)*, 2004 FC 783 at paragraph 11).

[42] In this case, although the officer was not bound by the IRB's findings on credibility, it was reasonable for the officer, on the basis of the evidence, to conclude as the IRB had. Furthermore, given that the credibility issues in the H&C decision flowed from the same elements that had been considered in the IRB decision, procedural fairness in this case did not require an oral interview.

b. Did the officer err by minimizing the best interests of the children?

[43] The Court is of the view that the officer was alert, alive and sensitive to the best interests of the children. He recognized that they were attached to the applicant, who provides much help on a daily basis with the care of his niece and nephew. However, the officer correctly observed that the evidence on record cannot lead to the conclusion that he is the children's primary caregiver, or in the event that he is, that the children's parents (the applicant's brother and his wife) could not fulfill that role. The applicant was not required to show that he was the children's primary caregiver, and, contrary to the applicant's contention, this is not what the officer required. Instead, what the officer noted was that the children would not be deprived of primary caregivers should the applicant leave Canada. The officer came to the conclusion that while the children's best interests may well be served by the applicant remaining in Canada, it was not shown that "the interests of the children would be harmed to such an extent that would justify an exemption from the Immigration regulations" (Tribunal Record, p 29).

[44] The applicant claims the officer implied that the children were not "suffering enough" to warrant an exemption on H&C grounds for the applicant, contrary to the analysis proposed in *Williams*, above. The Court does not find such an unreasonable approach in the officer's analysis on the best interests of the children. The officer is not asking whether the child is "suffering enough

that his 'best interests' are not being 'met'" (*Williams*, above at para 64), but instead is identifying what the best interests of the children are, and then determining the impact of a negative H&C application from their perspective, as well as from the applicant's perspective.

[45] In *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060, [2012] FCJ No 1147 (QL), a case similar to this one in that the child affected was not the applicant's own child and would remain in Canada with her parents regardless of the outcome of the H&C application, Justice Mosley commented as follows at paragraph 13:

> [13] An assessment of the best interests of the child in the circumstances of a case such as this does not conform readily to the type of analysis described in *Williams*, above. In my view, the *Williams* formula provides a useful guideline for officers to follow where it may be helpful in assessing a child's best interests but it is not mandated by the governing authorities from the Supreme Court and the Federal Court of Appeal. In *Williams*, the interests of the Canadian born child in question were directly and significantly affected by the removal of his mother as he had to leave Canada with her. Here, it is likely that Alika's interests would best be served by the applicant remaining in Canada. But it is difficult to see how an officer could assess the degree to which that interest would be compromised by a negative decision and weigh that in the ultimate balancing of positive and negative factors. As stated in the paragraph cited from *Hawthorne* above, immigration officers are not bound by any magic formula in the exercise of their discretion.
>
> (Emphasis in original.)

[46] The Court is satisfied that the officer's three (3) pages assessment of the best interests of the children was reasonable in this case. He was attentive to the evidence pertaining to the children's attachment to the applicant, but also to the fact that the children would continue to be cared for in Canada by their parents. Given the particular circumstances of this case – the children involved being the niece and nephew of the applicant, living with their parents who are capable and willing to

care for them – the officer's assessment of the factor of the best interests of the children was reasonable.

c. Did the officer apply the wrong legal test when assessing the H&C application?

[47] The applicant's application was made prior to amendments to section 25 of the Act according to the amendments.

[48] The Court is satisfied that the officer considered risks under the appropriate test of hardship, and as one factor among many.

[49] This Court made the following comments in the context of a similar allegation in an H&C application in *Webb*, above at paras 15 and 17:

> [15] The applicant submits that the officer applied the wrong legal test for the assessment of hardship on return in requiring that the applicant be personally affected. The requirement to show personalized risk is only relevant for a pre-removal risk-assessment. Hardship analysis is broader and country conditions are relevant to determine if the applicant will suffer unusual and undeserved or disproportionate hardship if removed and thus must be considered.
>
> […]
>
> [17] It is clear from the reasons that the officer did not evaluate risk to life or risk of torture or unusual treatment as in a pre-removal risk analysis. A determination of disproportionate hardship requires the evaluation of personal circumstances. The officer was simply not convinced that the general conditions of St. Vincent and the Grenadines would constitute unusual and undeserved or disproportionate hardship. That was a finding reasonably open to the officer on the evidence. She found that the applicant produced insufficient evidence that he would be personally affected by the conditions. This does not demonstrate that the officer applied the incorrect test.
>
> (Emphasis added.)

[50] Similarly, in the present case, the officer has indicated that the applicant has not shown he would be personally mistreated in a way that would represent disproportionate hardship. He examined general conditions in Bangladesh from the documentary evidence and concludes that "[w]hile the reports show that there is some discrimination and violence against Hindus and other religious minorities in Bangladesh, the applicant has not adequately shown that he would be exposed to such a mistreatment that would amount to a disproportionate hardship for him there" (Tribunal Record, p 34). Personal circumstances remain relevant in the determination of risk as a factor of disproportionate hardship. As such, the Court's intervention on this ground is not warranted (*Webb*, above).

[51] The applicant relied on *Caliskan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190, 12 Imm LR (4th) 132 [*Caliskan*] in his written submissions. However, the issue in *Caliskan* related to the proper interpretation of section 25 of the Act, as amended by the *Balanced Refugee Reform Act*, SC 2010, c 8, for applications filed after June 29, 2010. The live issue in *Caliskan* is therefore irrelevant to the present application for judicial review.

d. Did the officer err by not engaging in a global assessment of the factors relevant to the H&C application?

[52] The Court finds no indication that the officer limited his analysis to the individual factors without considering them globally as submitted by the applicant. The use of subtitles for each factor provides for clarity in the officer's decision and is not an indicator that all factors were not considered as a whole within the officer's decision-making process. Furthermore, the fact that more than one factor (in this case, establishment and best interests of the children) contained some

positive elements does not necessarily mean that an H&C application should be automatically granted, and that a denial of the application necessarily implies that the factors were not globally assessed. It is possible that certain favourable factors, even when combined, remain insufficient to warrant an exemption from the requirements of the Act. In light of the teachings of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union*, above, the Court is satisfied that the officer's decision is reasonable.

[53] For all of these reasons, the Court's intervention is not warranted.

[54] No question was proposed for certification and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed. No question is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mitchell Goldberg	FOR THE APPLICANT
Thomas Cormie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Blanshay Goldbert Berger Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT