Federal Court  Cour fédérale

Date: 20140627

Docket: IMM-12718-12

Citation: 2014 FC 630

Ottawa, Ontario, June 27, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

IBRAHIM AINAB

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of an officer [Officer] of Citizenship and Immigration Canada [CIC] dated November 20, 2012 [Decision], which refused the Applicant's

application for permanent residence based on humanitarian and compassionate grounds under s. 25(1) of the Act [H&C Application].

BACKGROUND

[2] The Applicant is a Convention refugee who came to Canada from Somalia in 1990, fleeing that country's civil war. He was granted refugee protection by the Immigration and Refugee Board on June 11, 1991, but failed to apply for permanent residence within the 180 day window set out by Regulations in effect at the time. Since then, he has struggled with alcoholism and mental illness, and has acquired a criminal record that makes him inadmissible to Canada on grounds of serious criminality under s. 36(1) of the Act. As such, while he continues to enjoy refugee protection and cannot be deported except under narrow circumstances, he is ineligible for permanent residence according to s. 21(2) of the Act.

[3] After he quit drinking and obtained medical help for his previously undiagnosed mental health condition of schizophrenia, in December 2011 the Applicant applied on H&C grounds to be granted permanent residence despite his criminal convictions and despite missing the normal window to apply after being granted refugee protection. That application was denied in the Decision under review here.

[4] In the Applicant's view, as set out in his H&C Application, his criminal convictions are minor and are all related to his problems with alcohol and mental illness, which are now being addressed through medication and his ongoing sobriety. He wrote that he "never hurt anyone" and "[m]y run-ins with the police always had to do with my drunken behaviour and bothering my

family." That family includes his wife, who also fled Somalia and is now a Canadian citizen, and their seven children, six of whom were born in Canada. He also has five siblings living in Canada, as his parents and siblings also fled the civil war in Somalia.

[5] The Applicant's criminal history includes an impaired driving conviction in August 1995 and three indictable offences since that time. He was convicted of assault with a weapon in May 1997, use of a stolen credit card in February 2006, and being unlawfully in a dwelling house in 2009. He was sentenced to three months in jail and three years of probation in 1997, received a suspended sentence and six months' probation in 2006, and served a month in jail and completed two years' probation after the 2009 offence. It was while in jail in August 2009 that the Applicant decided to quit drinking, and he attests that he has been sober since. He says the 1997 assault with a weapon conviction was a wrongful conviction, as he did not commit the crime but was in the wrong place at the wrong time, and the 2006 conviction relates to using his wife's credit card to buy alcohol without her knowledge. In 2009, he went to the family home while drunk and broke a window when they would not let him in. His oldest son, then 18, called the police.

[6] The Applicant's drinking put a severe strain on the family, and he has for many years kept a room elsewhere, as his wife did not want him in the home when intoxicated. However, he has continued to spend weekends and holidays with the family, and he and his wife both say that his relationship with them has improved since he quit drinking. He hopes to one day return to the family home on a full time basis.

[7] The H&C Application included supportive letters from the Applicant's sister and family physician, a consultation report from a psychiatrist, and sworn statements from the Applicant and his wife, as well as documents describing the stigma attached to mental illness in Somalia and Somali communities abroad. After considering this evidence, the Officer found that an exemption from the Applicant's inadmissibility under s. 36(1)(a) was not warranted on H&C grounds.

DECISION UNDER REVIEW

[8] The Officer found that the 1995 impaired driving conviction was not a barrier to permanent residence, but that the 1997, 2006 and 2009 convictions were all for indictable offences and made the Applicant inadmissible for serious criminality under s. 36(1)(a). The Officer weighed this inadmissibility against the H&C factors put forward by the Applicant, including his establishment in Canada, his family ties in Canada and the absence of such ties in Somalia, the impact of his mental illness, and the best interests of his children.

[9] With respect to establishment and family ties, the Officer described the "long and difficult history" of the Applicant, his wife and their family. The Officer found that the Applicant had worked as a general labourer from 2002 to 2004 and has been unemployed since, and that the "majority of the applicant's stay in Canada" had been "checkered (sic) [by] numerous encounters with legal authorities," including several more minor charges in addition to the indictable offences noted above. While he has lived in Canada for more than twenty years, the Officer found that the Applicant's behaviour over that time "has been punctuated by community

and home disturbances." The Officer gave some weight to the Applicant's establishment, but found that it did not outweigh his criminal past.

[10] Regarding the Applicant's mental illness, the Officer noted the letter from the Applicant's family physician observing "an almost complete transformation in Mr. Ainab's health status" since he began taking antipsychotic medication in 2009. The doctor observed that it is not uncommon for psychiatric patients to use substances such as alcohol to self treat their mental health conditions, and stated that Mr. Ainab's symptoms had regressed and he had regained a good level of functioning. He was actively engaged in his family's life. The Officer acknowledged that "Mr. Ainab has been a very sick man for many years and… the problems he has had with the law may be rooted in his mental illness," and noted that the information from the Applicant's doctors "indicates that he has made great strides on the road towards mental and physical recovery." While giving "significant weight" to the positive changes the Applicant has made, the Officer was not satisfied "that this recent diagnosis exonerates Mr. Ainab of his past" or that the Applicant would not relapse, since he had struggled with these problems for many years. The Officer noted that the Applicant stopped drinking while in jail and after a strong warning from immigration authorities, and concluded that the warning letter and the threat of removal may have been the impetus for the positive change. While recognizing that the Applicant was very likely ill when he broke into his wife's home in 2009, the Officer found that he had a long history of problems with the law by the time this occurred, and concluded: "The fact that the incident happened just three years ago does not assure me that Mr. Ainab is not prone to recidivism."

[11] Regarding the best interests of the Applicant's children, the Officer agreed that it was in the best interests of the Applicant's children that he remain in Canada, but found that a negative decision on the H&C Application did not affect the Applicant's ability to do so. The Officer cited CIC's Enforcement 2 / Overseas Processing 18 manual (ENF 2/OP 18 Evaluating Inadmissibility), which states at section 13:

> Canada's obligations with respect to Convention refugees may be found in the provisions of the 1951 Geneva Convention relating to the Status of Refugees and the 1967 Protocol. Incorporated therein is the obligation that Convention refugees, lawfully in Canada, have a right to remain.
>
> Consequently, a protected person, or a person who has been recognized as a Convention refugee, cannot be removed from Canada unless:
>
> - they are determined to be inadmissible on grounds of serious criminality and constitute, in the opinion of the [Minister of Citizenship and Immigration], a danger to the public in Canada; or
> - they are determined to be inadmissible on grounds of security, violating human or international rights or organized criminality and, in the opinion of the [Minister of Citizenship and Immigration] they should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or on the basis of being a danger to the security of Canada.

[12] The Officer found that immigration officials would not seek to remove the Applicant from Canada unless he was again convicted of a serious crime, and that the Applicant would continue to receive the support of his family and health care professionals.

[13] The Officer concluded that, having carefully examined the evidence provided, the H&C factors both individually and cumulatively were not sufficient to waive the Applicant's inadmissibility. As such, he would need to apply for a pardon and then reapply for permanent residence. While not eligible for a pardon for several years, the Applicant would still have the protection of Canada in the meantime, and "can therefore continue to strengthen his relationship with his family and obtain the mental health care and alcohol addiction support that he requires."

ISSUES

[14] The following issues arise for the Court's consideration in this matter:

(A) Did the Officer apply the wrong test in considering whether an exemption from the normal consequences of inadmissibility on grounds of serious criminality was warranted under s. 25(1)?

(B) Was the Decision reasonable?

STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review

analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[16] With respect to the Officer's appreciation and weighing of the evidence in support of an H&C Application, and his or her conclusion regarding whether that evidence warrants an exemption, it is well established that deference is owed and a standard of reasonableness applies: see *Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 36; *Lopez v Canada (Citizenship and Immigration)*, 2013 FC 1172 at para 29; *Daniel v Canada (Citizenship and Immigration)*, 2011 FC 797 at para 12; *Jung v Canada (Citizenship and Immigration)*, 2009 FC 678 at para 19.

[17] While there was previously some disagreement in the jurisprudence regarding the standard of review that applies when determining whether the tribunal applied the proper test to the H&C decision, the Court of Appeal has recently held that a standard of reasonableness applies: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 30 and *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 18.

[18] However, as I have recently set out in another case dealing with s. 25 of the Act (see *Blas v Canada (Minister of Citizenship and Immigration)*, 2014 FC 629 at paras 17-23), the range of reasonable outcomes available to the officer is constrained by the established principles set out in the jurisprudence regarding s. 25(1): see *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 37-41; *Mills v Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para 22; *Canada (Attorney General) v Abraham*, 2012 FCA 266

at paras 37-50; *Canada (Attorney General) v Canadian Human Rights Commission* (sub nom *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*), 2013 FCA 75 at paras 13-19; *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 at para 26; *Canada (Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 95. In other words, it will normally be unreasonable to depart from the well-established tests and legal principles set out in the jurisprudence on s. 25(1), though the Court must still consider, in light of that caselaw, whether the decision-maker's approach was reasonable in the circumstances of the case.

[19] 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." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only 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."

STATUTORY PROVISIONS

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

Permanent resident	**Résident permanent**
21. (1) A foreign national becomes a permanent resident if an officer is satisfied that the	21. (1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé

foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(a) and subsection 20(2) and is not inadmissible.

ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)a) et au paragraphe 20(2) et n'est pas interdit de territoire.

Protected person

(2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.

Personne protégée

(2) Sous réserve d'un accord fédéro-provincial visé au paragraphe 9(1), devient résident permanent la personne à laquelle la qualité de réfugié ou celle de personne à protéger a été reconnue en dernier ressort par la Commission ou celle dont la demande de protection a été acceptée par le ministre — sauf dans le cas d'une personne visée au paragraphe 112(3) ou qui fait partie d'une catégorie réglementaire — dont l'agent constate qu'elle a présenté sa demande en conformité avec les règlements et qu'elle n'est pas interdite de territoire pour l'un des motifs visés aux articles 34 ou 35, au paragraphe 36(1) ou aux articles 37 ou 38.

[…]

[…]

Humanitarian and compassionate considerations — request of foreign national

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se

who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché

[…]

[…]

Serious criminality

Grande criminalité

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

[…]

[…]

Criminality

Criminalité

(2) A foreign national is inadmissible on grounds of criminality for

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise

way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

[…]

Application

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

[…]

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

[…]	[…]
Protection	**Principe**
115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
Exceptions	**Exclusion**
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
[…]	[…]

ARGUMENT

Applicant

[21] The Applicant argues that the Officer made a fundamental error by failing to apply the proper legal test for an H&C application. He argues that it has long been established that the test

to be applied – and the only test endorsed by this Court – is whether an applicant will suffer "undue hardship," defined as "unusual, undeserved or disproportionate hardship." As the Court observed in *Singh v Canada (Citizenship and Immigration)*, 2009 FC 11 at para 38 [*Singh*], while this test originates with guidelines established by Citizenship and Immigration Canada (CIC), "the criterion of 'unusual, undeserved or disproportionate hardship' or 'difficultés inhabituelles et injustifiées ou excessive' has now been adopted by this Court in its decisions on subsection 25(1), which means that these terms are more than mere guidelines" (see also *Serda v Canada (Citizenship and Immigration)*, 2006 FC 356; *Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186; *Aguilar Espino v Canada (Citizenship and Immigration)*, 2008 FCA 77 [*Espino (FCA)*]. CIC has recognized this in its *Inland Processing Manual, Chapter IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* [IP5 manual] at subsection 5.10, citing *Singh*, above.

[22] Despite this, the Applicant argues, not once in the Decision does the Officer refer to the undue hardship test, or the standard of unusual, undeserved or disproportionate hardship. Instead, the Officer refers to weighing the H&C factors against the Applicant's criminal inadmissibility, finds that his establishment does not "outweigh his criminal past" and his recent schizophrenia diagnosis does not "exonerate" him of his past, and refers to a risk of relapse and / or recidivism. In short, the Applicant argues, the Officer saw his or her role as determining whether the Applicant is rehabilitated, and whether H&C factors "outweigh" his criminal inadmissibility such that that inadmissibility can be "waived." The Applicant says this is a totally different assessment from the undue hardship assessment mandated by law.

[23] The Applicant concedes that the Officer was entitled to consider the circumstances of his criminality as part of the undue hardship analysis (see *Aguilar Espino v Canada (Minister of Citizenship and Immigration)*, 2007 FC 74 at para 20 [*Espino (FC)*]). However, the Applicant argues, the Officer was not entitled to apply a totally different test for undue hardship.

[24] As a consequence of this error, the Officer placed a singular focus on the Applicant's criminality, and used it as a complete answer to all of the positive H&C factors individually and cumulatively, the Applicant submits. He says that approach has been repeatedly rejected by this Court (*Curry v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1350; *Lodge v Canada (Citizenship and Immigration)*, 2009 FC 870 at para 19), and a new assessment on the proper standard is required.

[25] The Applicant also argues that the Officer exceeded his or her jurisdiction and usurped the role of the Director of Case Review [Director] at CIC's National Headquarters [NHQ] to determine H&C applications in cases of inadmissibility for serious criminality under s. 36(1). The Applicant says there is a well-established procedure for such cases, as set out in the IP5 manual at sections 10 and 5.25, and that the first level Officer has only one role in this process: to consider, on the regular undue hardship standard, whether the H&C factors might justify an exemption. If the answer is no, the Officer may refuse the application, but if the answer is yes, they must refer the case to the Director at NHQ, and the applicant must have an opportunity to provide submissions to the Director. The Applicant says the Director then has two decisions to make, which are:

(a) A re-assessment of the H&C factors based on the undue hardship standard; and (if this decision is positive)

(b) A decision on whether there are sufficient H&C grounds to warrant granting an exemption from inadmissibility, weighing the undue hardship against the inadmissibility.

In other words, the Applicant says, the Director undertakes a fresh assessment of the stage 1 decision (whether the H&C factors give rise to undue hardship), and then proceeds to the second stage weighing exercise. The structure of the decision-making is clear, the Applicant argues. First stage officers can only assess undue hardship, as this is their expertise. They do not have jurisdiction to bypass this first stage and jump to considering whether the H&C factors outweigh the inadmissibility. Indeed, even the Director cannot bypass the first stage, but must determine whether there is undue hardship before deciding whether the H&C factors outweigh the inadmissibility.

[26] The Applicant says this Court rejected the Officer's approach of simply weighing the inadmissibility against the H&C factors in *Espino (FC)*, above, which was affirmed by *Espino (FCA)*, above. There, the applicants sought to challenge the standard approach, arguing that applicants have different types of inadmissibilities they are seeking to overcome, and the H&C assessment should be a single-stage exercise of balancing "the extent of the legal obstacle to admission against the degree of compelling circumstances in favour of admission" (*Espino (FC)* at para 26). The Court found that the two-stage process was reasonable and should not be interfered with, based on the following analysis (*Espino (FC)* at paras 34-35):

> [34] To instead move, as the applicants argue, to balance the extent of the obstacle to admission against the circumstances in favour of admission would, in my view, create a new admission stream that would by-pass the legislated requirement that permanent resident applications are to be made from abroad.
>
> [35] I do not accept that the existing process is perverse, or contrary to the intent of Parliament because it treats all forms of inadmissibility in the same fashion. To use the example cited by

> the applicants, I do not agree that at the first step of the assessment "[t]he worst criminals are put at the same level [...] as the most technical offenders of the [Act]". While it is true that no decision as to inadmissibility is made at the first step, as section 11.3 of IP 5 (set out above) makes clear, facts relating to inadmissibility may be relevant to the humanitarian and compassionate decision.

[27] The Applicant says the Officer in the present case misinterpreted his or her role and "did an end run" around the procedures established in the IP5 manual and the long-established test for H&C applications, thereby exceeding the Officer's jurisdiction.

Respondent

[28] The Respondent argues that the Applicant is approaching the Decision from an overly technical perspective and ignoring the unique circumstances of the case. The Applicant does not face removal from Canada because of the refusal of the H&C Application, and this refusal was in accordance with the fundamental principle that s. 25 of the Act provides for an exception and a highly discretionary decision-making process. It addresses hardship that is not anticipated or addressed by the Act, and that results from circumstances beyond a person's control. As the IP5 manual explains (as quoted at para 17 of *Espino (FC)*, above):

> The purpose of H&C discretion is to allow flexibility to approve deserving cases not anticipated in the legislation. Use of this discretion should not be seen as conflicting with other parts of the Act or Regulations but rather as a complementary provision enhancing the attainment of the objectives of the Act. It is not an appeal mechanism.

[29] The Respondent argues that the Officer did not fail to consider the potential hardship on the Applicant should his H&C Application be refused, and considered all of the relevant H&C factors, but was also entitled to consider the circumstances of the Applicant's criminality as part

of the undue hardship assessment. The Respondent quotes subsection 11.6 of the IP5 manual (formerly covered under subsection 11.3):

> **11.6. Criminal inadmissibilities**
>
> Officers should assess whether the known inadmissibility, for example, a criminal conviction, outweighs the H&C grounds. They may consider factors such as the applicant's actions, including those that led to and followed the conviction. Officers should consider:
>
> - the type of criminal conviction;
> - what sentence was received;
> - the length of time since the conviction;
> - whether the conviction is an isolated incident or part of a pattern of recidivist criminality; and
> - any other pertinent information about the circumstances of the crime.
>
> […]

[30] The Respondent says it is evident that the Officer did not consider the Applicant's criminal history to the exclusion of all other factors. Rather, in essence, the Officer concluded that the Applicant had not demonstrated that he satisfied the very high threshold of "unusual, undeserved or disproportionate hardship," as the positive H&C factors were insufficient in the circumstances of his case.

[31] Moreover, the Respondent notes that the requirements for protected persons differ from those required of other H&C applicants, as subsection 14.3 of the IP5 manual outlines specific procedures and criteria that apply to protected persons who are not subject to removal from Canada should their H&C application be refused.

[32] The Respondent says the assertion that the Officer usurped the role of the Director is unfounded. The Officer found that an exemption was not warranted because there were insufficient H&C grounds. The Officer was therefore not obliged to forward the Applicant's application to NHQ for a decision. According to the Instrument of Designation and Delegation signed by the Respondent Minister on January 8, 2013, a local citizenship officer has the authority to *refuse* to grant permanent residence or an H&C exemption where the officer assesses that there are no or insufficient grounds. By contrast, only certain officials at NHQ have the authority to *grant* permanent residence status or exempt a foreign national who is inadmissible for serious criminality.

[33] In essence, the Respondent argues, the Applicant is asserting that the Officer cannot take into account criminality when assessing an H&C application, which is incorrect and does not make sense in the context of his own case. As quoted above, subsection 11.6 of the IP5 manual indicates that immigration officers should assess whether the circumstances of a known inadmissibility – for example, a criminal conviction – outweigh the H&C grounds. In the present case, the Officer acknowledged the positive changes the Applicant had made in his life, but was not satisfied that he would not relapse. He had struggled with mental illness and alcoholism for many years, had stopped attending Alcoholics Anonymous after only two months, and had a long history of problems with the law, most recently in August 2009.

[34] The Respondent argues that the decision in *Espino (FC)* does not assist the Applicant. In that case, the Court recognized that the former subsection 11.3 (now subsection 11.6) of the IP5

manual indicates that even at the first stage of the analysis immigration officers can consider the facts relating to criminal inadmissibility.

[35] In the present case, the Respondent argues, the Officer was obliged to consider the Applicant's criminal history, and was entitled to assess whether his inadmissibility fell under s. 36(1) or (2) of the Act, in accordance with the specific procedures and criteria set out in subsection 14.3 of the IP5 manual in relation to protected persons. The Applicant addressed his criminal history in his H&C Application, and his counsel argued that his inadmissibility fell under s. 36(2) of the Act, which would have the consequence that, as a protected person, he would be exempted from criminal inadmissibility.

Applicant's Reply Submissions

[36] The Applicant says the central issue is that the Officer applied the wrong test, by asking only whether the circumstances of the Applicant's case *outweighed* his criminal inadmissibility and if he was *rehabilitated* rather than addressing undue hardship. This is not a case where the Officer applied the proper test despite using the wrong language, as implied by the argument that the Applicant is being "overly technical." Rather, the Officer expressly and repeatedly stated the wrong test. The Officer was quite precise in his or her approach, but it was not the approach mandated by law.

[37] The Applicant concedes that the Officer was entitled to consider criminality as part of the H&C assessment. However, the Respondent has established a clear procedure whereby initial officers assess H&C factors and the Director considers the whole case and determines whether

the H&C factors outweigh the criminal inadmissibility. Having established these procedures, the Applicant says, it is contradictory for the Respondent to now argue that the Officer's failure to follow them is just a technicality.

[38] While acknowledging that the new language of subsection 11.6 of the IP5 manual guides officers to assess whether a criminal conviction outweighs the H&C grounds, the Applicant argues that this is inconsistent with the rest of the manual and the caselaw of this Court on the undue hardship test for H&C applications. The Officer is still bound by the overarching duty to determine whether the circumstances give rise to undue hardship. In this case, the Officer focussed solely on balancing any and all hardship against the countervailing factor of criminality. It is inaccurate to say the Officer did not place a singular focus on criminality simply because he or she discussed hardship factors, as criminality was used as a complete answer to all other factors, the Applicant submits. The Officer did not explain why the criminality always outweighed the other factors, including the fact that the criminality itself resulted from mental illness.

ANALYSIS

[39] The Applicant concedes that the Officer was entitled to consider his criminality as part of the H&C assessment, but says that the Officer left out of account hardship factors that are a well-established basis for an H&C analysis and therefore applied the wrong test.

[40] As a protected person, however, the Applicant cannot be removed from Canada. Even though he does not have permanent residence status, he will continue to enjoy significant rights

here. This means that the personal hardship factors that are usually part of a s. 25(1) analysis do not arise on the facts of this case. If the H&C Application was refused, the Applicant would remain in Canada and carry on with his attempts to reintegrate with his family.

[41] The Applicant's H&C Application only referred to hardship in the context of his returning to Somalia. The Applicant did not articulate what possible "unusual and undeserved or disproportionate hardship" he would face if his application for an exemption from criminal inadmissibility and from the visa requirements was refused. Had the Applicant articulated any such hardship it might be possible to say that the Officer did not consider it. On the facts of this case, however, it is obvious that the Officer assessed the relevant factors that were placed before him and concluded that these were insufficient H&C factors to balance out criminality and to grant an exemption from requirements of the Act. I am not convinced by the Applicant's argument that the Officer did not know his job and did not know the correct test to apply. Any deficiencies are contained in the Applicant's s. 25(1) application, which does not refer to any relevant unusual and undeserved or disproportionate hardship taking into account the Applicant's present protected status in Canada.

[42] This left the Officer to assess the Application in accordance with section 116 of the IP 5 manual, which involved assessing the Applicant's known inadmissibility (in this case the criminality) against the other H&C grounds found in his Application. Those grounds were establishment, family ties, mental illness and the best interests of the Applicant's children.

[43] A reading of the Decision reveals that all of these factors were considered, assessed for weight and then balanced against the Applicant's criminality. The Officer was not just concerned with rehabilitation as the Applicant argues. Section 11.6 of IP5 specifically directs the Officer to consider recidivism, as well as other factors related to the Applicant's criminality. This is what the Officer did.

[44] As the Officer points out, even Ms. Aden, the Applicant's wife, clearly has doubts about whether the Applicant would be able to stay healthy and avoid past problems.

[45] I can find no reversible error in the Decision.

[46] Counsel agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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