Federal Court Cour fédérale

Date: 20150522

Docket: IMM-1106-14

Citation: 2015 FC 661

Ottawa, Ontario, May 22, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

BERNARD JOSEPH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act] challenging a decision by an immigration officer [the Officer] refusing the applicant's humanitarian and compassionate application for permanent residence from within Canada [H&C].

[2] The applicant is seeking an order setting aside the Officer's decision and referring the matter back to another decision-maker for reconsideration.

[3] For the reasons that follow, the application is dismissed.

II. Background

[4] The applicant, Mr. Bernard Joseph, is a citizen of Haiti. In 2004, Mr. Joseph fled Haiti, fearing political persecution. The applicant's spouse and his five children remained in Haiti. He went first to the Bahamas, where he stayed until 2009. He then went to the United States, but was unable to obtain a work permit or apply for asylum in that country. He entered Canada on November 18, 2010 and applied for refugee protection.

[5] The applicant's refugee claim was refused by the Refugee Protection Division [RPD] on January 31, 2012. The RPD concluded that the applicant was not credible, that he lacked a subjective fear of persecution on a Convention ground, and that his return to Haiti would only expose him to the generalized risks to which the general population is subject (e.g. deteriorating country conditions after the January 2010 earthquake, the collapse or near-collapse of civil society and the rule of law, and economic hardship).

[6] The RPD also found that the applicant failed to provide evidence in support of his claim or to provide a reasonable explanation for his failure to do so. It further found that his actions

after leaving Haiti were inconsistent with the actions of someone fearing for his life should he be forced to return to his country of origin.

[7] He was not removed from Canada after his refugee claim was refused because the Government of Canada had instated a temporary suspension of removals to Haiti.

[8] The applicant applied for permanent residence on H&C grounds on June 28, 2012. In his application, he submitted that he had found stable employment as a technician with Bell Technical Solutions Inc. [Bell] and that his income is used to support his dependents in Haiti. He had also become involved with his community and church.

[9] The applicant alleged that he would face problems if returned to Haiti – he would lose the life he had built in Canada due to the suspension of removals, he could face serious risks in Haiti because he is returning from abroad (e.g. kidnapping), and he would have serious financial problems due to the extreme poverty and unemployment in Haiti.

[10] Finally, the applicant invoked the best interests of his children and spouse in Haiti, stating that he would like to sponsor them to Canada due to the economic hardship and terrible conditions in Haiti. He is their sole source of financial support and he stated that they would become destitute if he returned to Haiti, since he would not be able to find work and there are insufficient social supports.

[11] He submitted the following documents as supporting evidence:

- A four line letter from Bell, stating that he has been employed by them since June 2011 and was currently earning $15.40 per hour (Certified Tribunal Record at 69);

- A 2011 Notice of Assessment from the Canada Revenue Agency [CRA] showing income of $20,320 (CTR at 71);

- Money transfer receipts to Haiti from 2011-2012 (CTR at 86-199);

- Handwritten notes from a Haitian clinic attesting to the ages, heights, and eye colours of his family members (CTR at 75-85)'

- A letter, dated April 10, 2012, from the applicant's church stating that "he is a good asset to the Christian environment in Toronto by his desire to serve the Lord as his personal Saviour…very courteous, reliable, honest, ambitious and hardworking" and recommending him "for the consideration to be a good citizen" (CTR at 60); and

III. Impugned Decision

[12] In a letter dated December 16, 2013, the Officer refused the H&C application, as the factors cited in the application were insufficient for the applicant to be granted an exemption on H&C grounds.

[13] The decision noted that the applicant was subject to a removal order but since a temporary state of removal was in effect for Haitians, he could remain in Canada as long as those conditions were in place.

A. *Establishment in Canada*

[14] The Officer concluded that the applicant had not provided sufficient documentation to demonstrate that he is firmly established in Canada. While there was an employment letter, the Officer found it to be insufficiently informative on the state of the applicant's employment, e.g. whether he is a permanent employee or on temporary contract, qualifications, the nature of his work, or his record of employment. The Officer noted that no additional documentation was submitted in relation to the job, such as letters from managers or coworkers. The Officer acknowledged that the fact that the applicant was regularly sending money to help his family in Haiti and that most of the money is sent to his spouse was a positive element. However, the Officer found that the applicant's financial independence in Canada or the source of the funds being sent to Haiti could not be assessed since he had only submitted a single Notice of Assessment from 2011 (no banking information or tax documents for 2010, 2012 or 2013).

[15] Finally, the Officer acknowledged that while having a job and being involved in a church are positive elements, these factors are not sufficient in themselves to demonstrate that there is a sufficient degree of settlement to warrant an exemption.

B. *Best Interests of the Children*

[16] The Officer concluded that there was too little information about the applicant's children and the conditions in which they live for any weight to be given to this factor in the assessment. The only documents submitted were photocopies of their birth certificates and a document from an eye clinic confirming their age, height, and eye colour. The Officer acknowledged the applicant's financial support as a positive element, but noted several gaps in the evidence:

- Whether the children were internally displaced;
- Whether the children attended school;
- Whether the children had access to health care;
- What the children's' needs were;
- What problems the children had faced since he left Haiti;
- To what extent the applicant contributes to the welfare of his children;
- Whether the applicant's spouse has a job; and
- How the applicant's spouse looks after their children with the applicant being away.
- Risk and Adverse Country Conditions

[17] The Officer found that the applicant had not filed any documentation that concerned him personally – it was general in nature and related primarily to the humanitarian crisis in Haiti that followed the January 2010 earthquake. The Officer found that he could only give "relative weight" to this type of evidence since there was "no direct relationship with a

situation in which Mr. Joseph would have experienced events that could be considered acts of discrimination" and the documents did not demonstrate personal risk.

[18] The Officer stated that the applicant's concerns arising from the current conditions in Haiti (kidnappings, violence, etc.) are legitimate, but they do not demonstrate personal risk because they represent a common reality in that country. The documentary evidence consulted shows that the diaspora as a whole cannot be considered a "risk group" and that each case must be considered individually and within "its own context." Despite the fact that he left Haiti more than nine years ago, the applicant had not established that his profile would make him a direct target for kidnapping.

[19] Finally, the Officer noted that the applicant had not mentioned the risks due to his political involvement that he had previously invoked before the RPD. The Officer concluded that it was reasonable to find that this threat was minor given the time that passed and the many political changes that had occurred in the interim.

IV. Issues

[20] The following issues arise in this application:

1. Did Officer err in his assessment of the evidence of the applicant's establishment in Canada or breach natural justice or the duty of procedural fairness?

2. Did the Officer err in his assessment of the best interests of the children?

3. Did Officer err in denying a hardship claim based on the country conditions in Haiti because they do not demonstrate a personal risk but represent a common reality in that country?

4. Is evidence of kidnapping relevant to an H&C analysis?

V. Standard of Review

[21] The jurisprudence dictates that immigration officers exercising the powers conferred by section 25(1) of the IRPA ought to be given considerable deference given the fact-specific nature of the inquiry, the role of H&C applications as an exception in the statutory scheme, the fact that the Minister is the decision maker, and the considerable discretion afforded to them (*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62*, Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18, *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paras 82-84 [*Kanthasamy*], *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 18).

[22] It is well established that breaches of procedural fairness are to be reviewed on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62, *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, *Mission Institution v Khela*, 2014 SCC 24 at para 79).

VI. Statutory Provisions

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

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
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 — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — 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. …	**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 — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — 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. …
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient

taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.
50. A removal order is stayed …	**50**. Il y a sursis de la mesure de renvoi dans les cas suivants: …
(e) for the duration of a stay imposed by the Minister.	e) pour la durée prévue par le ministre.
53. The regulations may provide for any matter relating to the application of this Division, and may include provisions respecting …	**53**. Les règlements régissent l'application de la présente section et portent notamment sur : …
(d) the circumstances in which a removal order may be stayed, including a stay imposed by the Minister and a stay that is not expressly provided for by this Act; …	d) les cas de sursis — notamment par le ministre ou non prévus par la présente loi — des mesures de renvoi; …

[24] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] are applicable:

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés,* DORS/2002-227
230. (1) The Minister may impose a stay on removal orders with respect to a	**230**. (1) Le ministre peut imposer un sursis aux mesures de renvoi vers un pays ou un

country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of	lieu donné si la situation dans ce pays ou ce lieu expose l'ensemble de la population civile à un risque généralisé qui découle :
(a) an armed conflict within the country or place;	a) soit de l'existence d'un conflit armé dans le pays ou le lieu;
(b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or	b) soit d'un désastre environnemental qui entraîne la perturbation importante et momentanée des conditions de vie;
(c) any situation that is temporary and generalized.	c) soit d'une circonstance temporaire et généralisée.
(2) The Minister may cancel the stay if the circumstances referred to in subsection (1) no longer pose a generalized risk to the entire civilian population. …	(2) Le ministre peut révoquer le sursis si la situation n'expose plus l'ensemble de la population civile à un risque généralisé. …
[Emphasis added.]	[Soulignement ajouté.]

VII. Analysis

A. *Did Officer err in his assessment of the evidence of the applicant's establishment in Canada or breach natural justice and the duty of procedural fairness?*

[25] The respondent has rightfully pointed out that there was little supporting evidence apart from the applicant's own statements. Given the number of cases that are rejected in H&C applications for insufficiency of evidence, applicants should be fully aware that

omitting relevant evidence from their submissions is “at their peril” (*Owusu v Canada (Citizenship and Immigration)*, 2004 FCA 38 at paras 5, 8, [2004] 2 FCR 635; *Din v Canada (Citizenship and Immigration)*, 2013 FC 356 at para 11, 430 FTR 208). This includes updating information where it would normally be expected. Given the conclusions of the RPD that the applicant had failed to provide evidence in support of this claim and failed to provide a reasonable explanation for its failure to do so, one would have thought that extra efforts would have in made to ensure that this did not happen again.

[26] I agree with the respondent that the onus to provide evidence of his financial status rested with the applicant. The Officer could reasonably conclude that the limited informative documentation provided was insufficient to determine the extent of the applicant’s financial independence and integration into the Canadian economy, when more fulsome information was readily available to the applicant.

[27] The applicant claims that the Officer’s treatment of the evidence of employment is unreasonable and that in assessing that evidence, the Officer was, in fact, making veiled credibility findings because there was no reason to disbelieve the applicant’s statements about his employment and financial status in Canada. On this basis, the applicant argues that the Officer breached procedural fairness and natural justice as he gave no indication of his concerns of insufficiency to the applicant.

[28] I disagree. There is no requirement on officers conducting H&C assessments to provide applicants with an opportunity to supplement insufficient evidence not provided in

the first place. The burden remains on applicants to provide sufficient evidence to establish hardship throughout the assessment process. This is not an unfair requirement. This is not an adversarial process where the Officer can rely upon other parties to provide complete evidence that might undermine the applicant's claim. There is an onus on the applicant to provide complete evidence on a matter when that evidence may not support his or her claim. The Officer must rely on the applicant to provide complete evidence in support of his or her case; in effect putting his best foot forward and not omitting evidence where it would normally be expected.

[29] The applicant has also attempted to argue that the Officer gave no value to the evidence that was provided. This is incorrect - the Officer referred to each piece of evidence provided and noted its positive aspects.

[30] The applicant further submits that the Officer has not taken into consideration the fact that he was required to remain in Canada for two years for reasons beyond his control due to the temporary suspension of removals to Haiti and that CIC has recognized that a prolonged stay or inability to leave may lead to establishment (Citizenship and Immigration Canada, *IP-5 Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds*, April 4, 2011). The moratorium is not a factor which adds to the years actually spent in Canada. The consideration of the existence of a moratorium is intended to prevent time living here being discounted as being by choice, or in some cases remaining unlawfully. The Officer found that 2 to 3 years is a relatively short period in terms of establishment. This is not

unreasonable when measured against successful establishment cases, where normally the duration in Canada is for longer periods.

[31] In any event, I do not conclude that the Officer's decision turned on the issue of establishment. I think that the fact is that his time in Canada is relatively short and that the information provided is less than what is normally found in H&C applications and could have been compensated for had there been more complete evidence provided on the best interests of his children.

B. *Did the Officer err in his assessment of the best interests of the children?*

[32] The Officer found that he was unable to make a meaningful assessment of the best interests of the children due to a lack of sufficient probative evidence. As described above, the supporting evidence consisted of a handwritten note confirming the children's age, height and eye colour, with no information on the family's situation in Haiti.

[33] I cannot conclude that the Officer's conclusion was unreasonable. There was no information about their living conditions, schooling, or access to health care or family hardships. There was no evidence about his spouse and her employment, other family support, or her ability to care for the children. There was no evidence on the applicant's relationship with his spouse or the children given his absence from Haiti since 2004. There was no apparent obstacle to providing more information about his children, for instance by way of an affidavit from his spouse describing the circumstances of the family's situation in Haiti. This

would have been expected. As in the RPD decision, there is no explanation for the absence of this evidence.

[34] The applicant argues that there is evidence of providing financial support to the children and that, given the deplorable living conditions known in Haiti, this was sufficient. I disagree. It was fully within the Officer's discretion to conclude that the evidence was insufficient in the circumstances without having any information on the status of the applicant's family in Haiti.

[35] The applicant also argues that the Officer applied the wrong test in requiring that he demonstrated his children were living in extraordinary circumstances that would justify granting exemption. This statement tends to suggest that the Officer was requiring the demonstration of hardship to the children, which has been criticized in other cases of this Court (see for example *E.B. v Canada (Citizenship and Immigration)*, 2011 FC 110 at para 11, 383 FTR 157). However, this statement does not detract from the Officer's conclusion that "too much information is missing about the children and the conditions in which they live for me to be able to give weight to this element." As indicated, the Court does not find this an unreasonable conclusion in the circumstances.

[36] I will add an *obiter* comment to the effect that I agree with the common sense principle that hardship to children needs to be demonstrated, if relied upon by the applicant as a ground for preventing their removal. The law in this area is complicated enough, such that

additional distinctions are unnecessary. To the extent possible, one set of consistent principles should be applied to all persons affected by the applicant's removal.

[37] However, it is worth bearing in mind that children, by their intrinsic vulnerability and the situation of dependency arising therefrom, more readily demonstrate hardship, before one even considers the particular evidence applying to them. In other words, they start out at the 50 yard line, as opposed to adults, in the hundred yard challenge to demonstrate hardship. I believe their intrinsic vulnerability to be the reason why the best interests of the children are singled out for special consideration in section 25. Therefore, it is relatively easier to demonstrate hardship and special circumstances of children. This consideration, which appears to have been overlooked, provides a more consistent manner to consider the hardship of children without changing the legal rules that apply to them.

C. *Did Officer err in denying a hardship claim based on the country conditions in Haiti because they do not demonstrate a personal risk but represent a common reality in that country?*

(1) Risk and Adverse Country Conditions

[38] The applicant claims that since the earthquake in 2010, there has been widespread crime in Haiti that places him at risk of being kidnapped if returned to Haiti. He argues that he will be identified as possessing wealth because he has been living in Canada and that this will make him a target for criminals, in addition to general gang violence. Otherwise, he provides no evidence of being at risk from his personal circumstances.

[39] The Officer rejected that submission, stating that hardship claims are not permitted under section 25 for risks generalized to a segment of the population as a whole. As the applicant did not have the appropriate profile to be a target of kidnapping, he faced no likely hardship on this basis. The Officer's reasons on this issue are as follows:

> Mr. Joseph's concerns, although legitimate, do not demonstrate a personal risk, but rather a reality common to all the people of Haiti. Indeed, crime and kidnappings are a worry shared by the population as a whole.
>
> The kidnappings and violence invoked by the applicant if he returned to his country cannot be considered a personal risk. The documentary evidence consulted shows that the diaspora as a whole cannot be considered a "risk group" and that each case must be considered individually and within "its own context." The applicant did not demonstrate in this application that he has a profile that would make him a direct target for kidnapping by criminals.
>
> …. Mr. Joseph did not state in this application that he does not speak Creole or that he has characteristics that would set him apart from other Haitian citizens and make him a target for criminals.

[40] The applicant contends that the Officer has imported the requirement of personalized targeting found in section 97 into a hardship analysis done under section 25. He argues that adverse country conditions can establish a reasonable inference as to hardships affecting the individual – even if he has not been personally threatened or targeted. He claims that this permits evident hardships to be considered, even if they did not qualify the person for protected person status under section 97.

[41] At the hearing, the applicant made reference to recent decisions in support of the principle that an H&C claim may not be rejected on the basis that the circumstances the applicant faces are similar to those generally faced by others in the country of origin requiring

the applicant to distinguish his or her situation from that of the general population (*Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at para 36, 427 FTR 87 [*Diabate*]; *Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714 at para 4, 242 ACWS (3d) 924 [*Aboubacar*] and *Lauyure v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 30, 250 ACWS (3d) 674 [*Lauyure*]).

[42] I agree with the applicant that the Officer has applied an analysis which requires him to distinguish his situation from that of the general population. The Officer noted that the applicant was facing a reality common to all the people of Haiti. He found that the applicant did not demonstrate that he has a profile that "would set him apart from other Haitian citizens" and "make him a target for kidnapping by criminals." The Officer imposed on the applicant, for example, the requirement to demonstrate that he could not speak Creole in order to set himself apart from other Haitian citizens and to make him a target for criminals.

[43] The reasoning of the Officer appears therefore, to be contrary to the cases cited by the applicant. See for example, the remarks of Justice Gleason in *Diabate* where she observed at paragraph 36 as follows:

> [36] …The officer's role in an H&C analysis is to assess whether an individual would face "unusual and undeserved or disproportionate hardship" if required to apply for permanent residence outside of Canada. It is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin. Rather, the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate.

> [Emphasis added.]

[44] I also agree that this analysis resembles that under section 97, for example found in *Guerrero v Canada (Citizenship and Immigration)*, 2011 FC 1210, [[2013] 3 FCR 20 [*Guerrero*]. In that matter, the applicant's grandmother was killed before his eyes and then the same attackers threatened him. Justice Zinn reversed the panel's decision, indicating at paragraph 34 that "where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under s. 97 of the Act if the other statutory requirements are met" (emphasis added).

[45] The applicant further argues that country conditions can establish a <u>reasonable inference</u> of hardship affecting the individual. He relies on the reasoning of Justice Rennie, as he then was, in *Aboubacar*. In reliance upon *Diabate* and other cases cited in the decision, he concluded that country conditions applying to the population as a whole could "support a <u>reasoned inference</u> as to the challenges a particular applicant would face on return to [the country of origin]." These remarks are found at paragraph 12 of his decision as follows:

> [12] While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return to Niger. <u>This is not speculation, rather it is a reasoned inference, of a non – speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis as required by [*Kanthasamy*].</u>
>
> [Emphasis added.]

[46] Whether it is intended or not, I find that the reasoning in *Diabate* and cases of similar expression, create a conundrum for the Officer for which there is no apparent solution. An applicant is entitled to rely on general country conditions without having "to establish that the circumstances he or she will face are not generally faced by others in their country of origin." Since general country conditions are <u>by definition</u> a risk to everyone, it follows that they apply personally and directly to the applicant. The Officer is left therefore, with no other option but to accept that the applicant is at risk of the form of hardship faced by fellow country persons generally (in this case, kidnapping), with the requirement to consider "whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate".

[47] With all due respect to my colleagues, I believe that the Federal Court of Appeal decision in *Kanthasamy*, read comprehensively and taking into consideration the jurisprudence relied upon, stands for the principle that an applicant may not establish the circumstances of hardship based upon risks generally faced by the population without having to demonstrate that these risks are not those generally faced by others in their country of origin.

[48] In the passage in *Kanthasamy*, when the Court stated that the "hardship must affect the applicant personally and directly," it was relying upon a policy of avoiding a situation where every H&C application made by a national of a particular country would have to be assessed positively. Paragraph 48 of the decision is as follows:

> [48] The Federal Court's cases underscore that unusual and undeserved, or disproportionate hardship must affect the applicant

> personally and directly. Applicants under subsection 25(1) must show a link between the evidence of hardship and their individual situations. It is not enough just to point to hardship without establishing that link: see, e.g., *Lalane v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 at paragraph 1.

[49] The Court expressly adopted the reasoning of Justice Shore in *Lalane v Canada (Citizenship and Immigration)*, 2009 FC 6, 338 FTR 224 [*Lalane*] by its reference to paragraph 1 of that decision, which reads as follows:

> [1] The allegation of risks made in an application for permanent residence on humanitarian and compassionate grounds (H&C) must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application. That conclusion would be an error in the exercise of the discretion provided for in section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) which is delegated to, inter alia, the Pre-removal Risk Assessment (PRRA) officer by the Minister (*Mathewa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 914, [2005] F.C.J. No. 1153 (QL) at para. 10; see also chapter IP 5 of the Citizenship and Immigration Canada manual on inland processing of applications, entitled "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", which expressly provides that the risk identified in an H&C application must be a personalized risk (section 13, p. 34), Exhibit "B", Affidavit of Dominique Toillon; *Hussain v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 719, 149 A.C.W.S. (3d) 303).
>
> [Emphasis added.]

[50] The Haitian applicant in *Lalane* argued, among other grounds, that he could not be returned because of the general situation in the country and his profile as a deportee. The Court endorsed the reasons of the immigration officer at paragraph 45 of the decision as follows:

> [45] In this case, the immigration officer concluded that there was no personalized risk that would result in unusual and undeserved or disproportionate hardship for Mr. Lalane. His conclusion on that point was as follows:
>
> > [TRANSLATION] Notwithstanding that situation, I find that the applicant has not established that his situation is different from that of other Haitian citizens. Accordingly, I find that the sources and the evidence submitted do not establish the existence of a possibility that he would be personally at risk in that country.
>
> [Emphasis added.]

[51] As I understand Justice Shore's reasons, there is a general policy that prevents entire populations of foreign nationals, or large groups of them, from claiming permanent residency in Canada as a right. Logically, because general country conditions by definition apply to all members (or subsets of members) of society, it is not enough to rely simply on being a member of society, all of whom are subject to a risk of unusual hardship from these conditions. If this were the case, "every H&C application made by a national of a country with problems would have to be assessed positively" (*Lalane* at para 1).

[52] Accordingly, the principle has been adopted that permanent residency may only be granted to individuals based on their personal circumstances, and not based simply on the evidence of those conditions generally faced by all the population in their country of origin. If, as in this case, only evidence of general conditions is put forward, the claim will be defeated for lack of sufficient evidence demonstrating exceptional personal circumstances that cause those conditions to directly affect the applicant.

[53] An applicant may nevertheless, demonstrate that he or she is suffering hardship because of personal circumstances that relate to country conditions. However, the onus remains on applicants to demonstrate that the country conditions apply to the extent that they are directly and personally experiencing unusual, undeserved, or disproportionate hardship in comparison with the circumstances of all the members of society in his or her country of origin that are also facing the same country condition(s).

[54] I recognize that this requirement is similar to the requirement under section 97 for an applicant to demonstrate personalized targeting where her or relies on general country conditions, as described above in *Guerrero* (see also: *Wan v Canada (Citizenship and Immigration)*, 2014 FC 124, 243 ACWS (3d) 955; *Gomez v Canada (Citizenship and Immigration)*, 2011 FC 1093, 397 FTR 170; *Guifarro v Canada (Citizenship and Immigration)*, 2011 FC 182, 198 ACWS (3d) 470; *Pineda v Canada (Citizenship and Immigration)*, 2007 FC 365, 65 Imm LR (3d) 275). However, I do not see how any allegation of a generalized risk that meets the requirement to apply personally, directly and exceptionally to the applicant can be otherwise construed without avoiding the result that "every H&C application made by a national of a country with problems would have to be assessed positively" (*Lalane* at para 1).

[55] Based on similar reasoning, I also reject the applicant's argument that personal circumstances may be reasonably inferred from country conditions. In this regard, I respectfully disagree with my former colleague, Justice Rennie, as he then was, in *Aboubacar* as described above.

[56] In my opinion, inferring a particularized hardship from the general country conditions is an indirect means to apply them to the entire population, without having to demonstrate that the conditions personally and directly affect the claimant. It also results in a situation where "every H&C application made by a national of a country with problems would have to be assessed positively" (*Lalane* at para 1). Accordingly, I also conclude that inferring particularized personal hardship from generalized country conditions would be inconsistent with the principles enunciated in *Kanthasamy* in adopting the reasoning in *Lalane*.

[57] I also think it is the Minister's mandate to assess general country conditions based on the all of the information available to him with the advice of experts who work on these issues every day and to take measures under the Act and Regulations when the conditions deteriorate to a point that a generalized inference of risk of harm can be made. This occurred in this case with the suspension of removals to Haiti pursuant to section 230(1)(c) of *The Immigration and Refugee Protection Regulations*, SOR/2002-227.

D. *Is evidence of kidnapping and of similar acts of violence relevant to an H&C analysis?*

[58] There arises a further preliminary issue concerning the relevance of kidnapping evidence to an H&C decision. In my view, the Officer was required to consider the relevance of kidnapping evidence to an H&C application before turning his mind to the issue of generalized country conditions. The Court raised the issue of the relevance of kidnapping evidence and requested submissions from the parties. Specifically, this issue arises from

comments of the Court in *Kanthasamy* at paragraph 75 recognizing that not all factors under sections 96 and 97 may be relevant to an H&C application:

> [75] Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3) but the facts underlying those factors may nevertheless be relevant insofar as they relate to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.
>
> [Emphasis added.]

[59] The Court in *Kanthasamy* did not state that risk evidence that is relevant to an assessment under sections 96 and 97 would always be relevant to an H&C assessment, only that it may be relevant. In my view, the initial task of the officer in an H&C application is to determine whether the applicant's evidence, which may be relevant to risk factors under sections 96 and 97, is also relevant to a hardship analysis under section 25 of the Act.

[60] In carrying out this assessment, the officer should be cognizant that any rational regime operates on a principle that a party should not have "two kicks at the same can," particularly when the "second kick" (unusual and undeserved, or disproportionate hardship under section 25) does not require the can to travel as far as was required on the first kick (well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment under sections 96 and 97).

[61] Indeed, I believe that this rationale underlies the amendment that added section 25(1.3) to the Act. This principle must be considered because hardship encompasses situations of risk

of harm. The greater the risk of harm, the greater the hardship. In other words, evidence of risk of harm rising to the level required in a successful refugee protection application, would be the clearest example of circumstances constituting a hardship.

[62] The question for an officer therefore, is how to determine whether the evidence that can be relevant to a risk assessment, is also relevant to a hardship assessment? In my view, the answer to that question depends on whether the evidence is <u>clear intrinsic risk evidence</u>. This is evidence which is <u>not</u> what I would describe as scalable, meaning that the character of the harmful conduct does not exhibit varying degrees of harm, but is a more bright-line factual conclusion of an either-or outcome.

[63] Torture, kidnapping, violent assaults, threats of violent assaults, or unjustified imprisonment would, for example, be characterized as clear intrinsic risk evidence that can only have a life under sections 96 or 97 of the Act. It is not as though there is a lesser form of kidnapping as a risk of harm that might be differentiated as hardship under section 25 from the risk assessed under sections 96 and 97. It is a bright-line fact and is, intrinsically, only capable of being assessed under sections 96 and 97. Thus, if for whatever reason the RPD concludes that an applicant could not demonstrate sufficient risk in a refugee protection claim where allegations of kidnapping are advanced, it is frankly contrary to common sense that the same evidence is relevant to an assessment against the lower threshold of hardship.

[64] Conversely, evidence such as repeated acts of discrimination or non-violent harassment, may support a conclusion of persecution, either alone or when considered

cumulatively in certain circumstances. However, such evidence does not fall into the category of clear intrinsic risk evidence. Thus, if the RPD concludes that no persecution occurred, this evidence would be relevant for consideration as demonstrating a finding of unusual and undeserved, or disproportionate hardship pursuant to section 25.

[65] In other words, discrimination is scalable and may comprise both clear intrinsic risk evidence and lesser harm. It comprises objectionable conduct ranging from high risk of serious harm, to harassment, to annoyance. Only the latter two forms of evidence should be considered under section 25, as they do not clearly involve a risk of harm of the type assessable under a refugee protection application.

[66] When an H&C applicant introduces a smorgasbord of country condition evidence that includes clearly intrinsic risk evidence (e.g. kidnapping or related violent criminal activity), along with other evidence that might be relevant to both a refugee determination process and an H&C application, the officer must analyze the character of the evidence for the purpose of excising that which is clear intrinsic risk evidence. The remaining relevant evidence is then assessed under the lens of hardship.

[67] In this matter the Officer failed to analyze the evidence introduced by the applicant, noting instead that his "concerns [about kidnapping etc. upon return], although legitimate, do not demonstrate a personal risk, but rather a reality common to all the people of Haiti." In my view, the Officer ought to have concluded in the first instance that evidence of risk of kidnapping and other threats of violence associated with returning to Haiti was clear intrinsic

risk evidence and as such, was not relevant to an assessment of hardship under section 25 of the Act.

[68] Obviously, the Officer cannot be criticized for failing to apply this distinction, which has not previously been described as an interpretation of a requirement arising from the *Kanthasamy* decision. The failure to reject the evidence of kidnapping as relevant does not affect the Officer's conclusion which was not unreasonable for otherwise rejecting the country condition evidence of the applicant.

VIII. Conclusion

[69] On the basis of the grounds described above, the application is rejected. The Officer's decision falls within the range of reasonable acceptable outcomes and is justified by transparent and intelligible reasons based on the facts and law.

IX. Certified Questions

[70] The issue of the Officer's rejection of the state protection argument on generalized conditions arose out of jurisprudence that was only provided at the hearing. Similarly, the issue of demonstrating hardship by inferences based on general country conditions in *Aboubacar* was also raised for the first time at the hearing.

[71] Due to the Court's concerns that these issues had not been fully considered by the parties, a Direction was issued providing them with an opportunity to respond further on these questions, including whether exposure to violent crimes could be considered a "hardship" within the meaning of section 25(1.3) of IRPA. In addition, they were provided with an opportunity to certify questions with respect to these issues.

[72] The applicant submits that if the Court does not apply the cases referred to and relied upon by him that restrict reference to generalized country conditions without requiring that the applicant establish that they are not faced by others in the country of origin, then this issue is determinative of the case in the sense that it may affect the outcome of the Officer's exercise of discretion. He also argues that such an issue is of clear general importance to the interpretation of section 25. Accordingly, the question should be certified.

[73] The applicant similarly argues that the issue of evidence on kidnapping not being relevant to a hardship analysis under section 25, is similarly clearly of general importance and determinative of the outcome in the exercise of the Officer's discretion and should also be certified.

[74] I agree that both issues could be determinative of the results depending on the Officer's conclusions applying the cases relied upon by the applicant and are highly relevant to the interpretation of section 25 of the Act. Therefore, the following questions are certified for appeal:

1) Is evidence of kidnapping and similar violent criminal conduct relevant to a hardship analysis under section 25 of the IRPA?

2) Is it incorrect or unreasonable to require, as part of an H&C, analysis that an applicant establish that the circumstances of hardship that he or she will face on removal are not those generally faced by others in their country of origin?

3) If the answer to question 2) is no, can the conditions in the country of origin support a reasoned inference as to the challenges any applicant would face on return to his or her country of origin, and thereby provide an evidentiary foundation for a meaningful, individualized analysis of hardships that will affect the applicant personally and directly as required by *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, 459 NR 367, leave to appeal to the SCC granted, [2014] SCCA No 309?

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and the following questions are certified for appeal with respect to an H&C application:

1) Is evidence of kidnapping and similar violent criminal conduct relevant to a hardship analysis under section 25 of the IRPA?

2) Is it incorrect or unreasonable to require, as part of an H&C, analysis that an applicant establish that the circumstances of hardship that he or she will face on removal are not those generally faced by others in their country of origin?

3) If the answer to question 2) is no, can the conditions in the country of origin support a reasoned inference as to the challenges any applicant would face on return to his or her country of origin, and thereby provide an evidentiary foundation for a meaningful, individualized analysis of hardships that will affect the applicant personally and directly as required by *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, 459 NR 367, leave to appeal to the SCC granted, [2014] SCCA No 309?

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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