Federal Court  Cour fédérale

Date: 20181024

Docket: IMM-4605-17

Citation: 2018 FC 1070

Ottawa, Ontario, October 24, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CARRIFT KENTON JONES

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of a senior immigration officer ("Officer") refusing the Applicant's application for permanent residence, which was brought on humanitarian and compassionate ("H&C") grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

Background

[2] The Applicant is citizen of Jamaica. He was born on July 8, 1983. As a child he was largely raised by his grandmother. In 1999, having been adopted by his aunt, he came to Canada as a permanent resident when he was 16 years old. He was unable to adjust to the rules of his adoptive family and was soon required to leave his new home. He then lived as a homeless person. He began a relationship with his current spouse in 2001. They began living together in 2004, had a daughter in 2006, were married in 2015, and had a son in 2017.

[3] In 2003, an inadmissibility report was prepared pursuant to s 44 of the IRPA based on the Applicant's criminal conviction in 2002 for assault with a weapon. Following an admissibility hearing, a deportation order was issued in 2003. In 2008, the Applicant was charged with manslaughter in connection with a death that occurred in 2006, he was convicted of this charge in 2011.

[4] The Applicant's H&C application was refused on October 6, 2017. This decision is the one now under review before me. On February 16, 2016, Justice Diner issued an order staying the execution of the deportation order made against the Applicant for removal on February 18, 2018.

Decision under review

[5] The Officer stated that the Applicant based his H&C application on considerations concerning the best interests of his daughter Tamara; his familial ties to Canada; his fear of returning to Jamaica as a deportee with criminal convictions; and, of country conditions there.

[6] The Officer noted the psychological assessment of the Applicant's 11 year old daughter, Tamara. The Officer accepted that Tamara may miss the Applicant if he returns to Jamaica and that the Applicant had maintained his relationship with his wife and daughter during his incarceration. However, the Officer found that Tamara had the love and support of her mother and grandparents, and concluded that there was insufficient evidence to indicate that she could not adapt to the Applicant's absence, or that her physical or mental well-being could be adversely affected if the Applicant departed Canada. Further, while Tamara may face challenges if she moves to Jamaica, she has the love and support of her parents to assist her. Additionally, as a Canadian citizen, with a right to remain in Canada, where Tamara resides would ultimately be a parental decision.

[7] As to the financial hardship that the Applicant's wife would suffer if the Applicant were removed to Jamaica, the Officer noted that the Applicant's wife was hard working, received financial assistance from government sources, and had family in Canada, including her parents with whom Tamara was very close. The Officer found that there was insufficient evidence to indicate that the Applicant's wife would not continue to benefit from the same sources. The Officer also found that there was insufficient information to explain why the Applicant could not utilize the skills he had acquired in Canada to mitigate challenges he would face in obtaining employment in Jamaica, and to reduce the need for financial support from his wife. Further, as to hardships that the Applicant's wife feared if she was to accompany the Applicant to Jamaica, the Officer stated that the Applicant's wife was not under a removal order, and the decision of whether to accompany the Applicant would be her own or a familial decision.

[8] The Officer noted the Applicant's concerns for his safety in Jamaica as a deportee with a criminal conviction, but found there was insufficient information to indicate that Canadian authorities identified returnees to Jamaica as criminals or deportees. Thus, the Applicant's concerns on this basis were speculative. Further, while the Applicant had submitted a report in support of this position, other documentary sources did not identify hardships in Jamaica associated with a returnee's profile as a deportee or as an individual with a criminal conviction. However, these reports did indicate the availability of support services for returnees provided by non-government organizations ("NGO").

[9] The Officer also referenced letters from the Applicant's brother and sister in Canada and accepted them as letters of recommendation, but found there was a scarcity of details relating to familial interdependency. The Officer also referenced positive character-reference letters submitted from friends, relatives, and acquaintances, as well as the Applicant's remorse for his past activities. However, the Officer noted the gravity of the Applicant's manslaughter offence and found that neither his remorsefulness nor his upbringing could excuse him from his offending. The Officer also noted that the Applicant was convicted of manslaughter subsequent to his previous conviction and while he was under a removal order, and gave those factors considerable weight.

[10] The Officer found that although the Applicant had resided in Canada for more than eighteen years, he had provided little evidence to suggest that he was well-established. Therefore, the Officer gave this factor little weight. The Officer stated that he or she weighed the H&C factors against the Applicant's unlawful behaviour. The Officer found that this behaviour did not provide a positive endorsement of the Applicant's character and drew a

negative inference from it. The Officer concluded that the Applicant's personal circumstances did not warrant approval of his H&C request.

Issues and standard of review

[11] The Applicant raises only one issue, being whether the Officer's decision was reasonable.

[12] The H&C findings of an officer are reviewed on the standard of reasonableness. In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*"); *Kanathasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 42 ("*Kanathsamy*").

Best interests of the child

[13] The Applicant submits that the Officer's analysis of the best interests of the children was unreasonable. The Officer merely paid lip service to the children's best interests and failed to take into account *Kanthasamy*, as well as this Court's jurisprudence, when making his or her assessment. Instead of conducting an analysis of the factors relevant to the children's best interests, the Officer engaged in generic analysis that failed to take into account their particular circumstances. The Officer's conclusion that there was no reason why Tamara could not cope with permanent separation from her father ignores the psychiatrist's report from Dr. Parul Agarwal. In effect, the Officer engaged in a hardship analysis that assessed whether the children would be unable to cope with removal. Further, the Officer failed to consider that the

Applicant's circumstances were such that his removal may be permanent. If removed, the Applicant cannot re-enter Canada until he applies for and is granted a record suspension under the *Criminal Records Act*, RSC 1985, c C-47, which he cannot apply for until 10 years after the expiration of a sentence of imprisonment, a period of probation and the payment of any fines (s 4(1)(a) *Criminal Records Act*).

[14] I note first that s 25(1) of the IRPA states that the Minister may grant a foreign national permanent resident status or an exemption from any applicable criteria or obligations of the IRPA if the Minister is of the opinion that it is justified by H&C considerations relating to the foreign national, taking into account the best interests of a child directly affected. Here, the Applicant seeks this exceptional remedy because he is inadmissible to Canada for serious criminality.

[15] In *Kanthasamy*, when discussing s 25 generally, the Supreme Court of Canada stated that there will inevitably be some hardship associated with being required to leave Canada but that this alone will generally not be sufficient to warrant relief on H&C grounds (at para 23). What will warrant relief will vary depending on the facts and context of the case, but officers making H&C determinations must substantively consider and weigh all of the relevant facts and factors before them (*Kanthasamy* at para 25).

[16] As to the requirement under s 25(1) to take into account the best interests of a child directly affected, the Supreme Court of Canada stated that the best interests principle is highly contextual and must be applied in a manner responsive to each child's particular age, capacity,

needs and maturity (*Kanthasamy* at para 35). And, as identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*"Baker"*), for the exercise of an officer's discretion to fall within the standard of reasonableness, they should consider the children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them (*Kanthasamy* at para 38). This does not mean that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying a H&C claim even when children's interests are given this consideration (*Kanthasamy* at para 38 citing *Baker* at paras 74–75). A decision under s 25(1) will be found to be unreasonable if the interests of the children affected by the decision are not sufficiently considered (*Kanthasamy* at para 39 citing *Baker* at para 75). Those interests must be well identified and defined and examined with a great deal of attention in light of all the evidence (*Kanthasamy* at para 39 citing *Legault v Canada (Minister of Citizenship and Immigration)*, [2002] 4 FC 358 (CA) at paras 12, 31; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 323 FTR 181 at paras 9–12). And since children will rarely, if ever, be deserving of any hardship, the concept of "unusual or undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by or in relation to a child to support an application for humanitarian and compassionate relief (*Kanathasamy* at para 41 citing *Hawthorne v Canada (Minister of Citizenship and Immigration*), 2002 FCA 475 at para 9).

[17] However, as stated by Justice Gascon in *Semana v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 (*"Semana"*), there is no rigid test to be followed in conducting a best interest of the child analysis. To demonstrate that a decision-maker is alert, alive, and sensitive to the best interest of the child, it is necessary for the analysis in issue to address the

unique and personal consequences that removal from Canada would have for the children affected by the decision (*Semana* at paras 25–26; also see *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 25).

[18] Accordingly, based on the jurisprudence, the Officer was required to be alert, alive and sensitive to the best interests of the children, afford these interests significant weight, examine them with care and attention in light of all of the evidence, and to take into account the children's personal circumstances. In my view, the Officer did not err in his or her assessment of the best interests the children in this matter.

[19] The Officer referred to the psychiatrist's assessment of Tamara, albeit briefly. A review of that report shows that Dr. Agarwal stated that he met with Tamara once on April 24, 2017 to assess the impact of her father's absence due to imprisonment on her emotional functioning, and to assess the possible impact of her father's deportation on her mental health and overall growth and development. The report describes Tamara's behaviour, as reported by her mother, when separated from her father when she was a toddler and then again when she was four years old. This is described in the clinical assessment portion of the report, which goes on to state that it is well established in child development research that the first few years of a child's life are very important in their overall growth and development and that the presence of emotionally attuned and responsible care providers is necessary for development. Dr. Agarwal stated that while Tamara had suffered two separations from her father, the mitigating factors were her daily phone contact and regular extended weekend visits with him. These factors helped maintain their bond

and helped Tamara not to develop any overt symptoms of a mental disorder despite her emotional distress at her father's physical absence from her life.

[20] The report goes on to state that it is well established in mental health literature that one of the risk factors for the development of depression and anxiety in adolescence and adulthood is permanent separation from a sensitively attuned parent or caregiver before entry into adolescence. Dr. Agarwal stated that if the Applicant is not permitted to live in Canada, this will bring about a geographic separation that will make it hard for him and Tamara to remain in frequent contact. This separation, in turn, will cause another rupture in their relationship and will place Tamara at a high risk of developing the conditions described.

[21] The report also states that Tamara is an innocent young girl who deserves to be with both of her parents; that she, her mother and the baby need the Applicant in their lives to thrive as a family; that as a Canadian child Tamara deserves the opportunities that other children growing up here are entitled to; and that, therefore, reunification of the family in Jamaica is not in her best interests. Further, such a disruption in her life will itself become a big risk factor for her to develop mental health conditions in the future. The report concludes that it was the author's opinion that the only way Tamara's emotional distress can be alleviated is by allowing her father to remain in Canada.

[22] The Respondent submits and I agree that Dr. Agarwal's report does not provide a diagnosis or recommended course of treatment for Tamara. Thus, unlike *Kanathasamy*, the Officer did not accept a diagnosis and then err by seeking further evidence of treatment for the

diagnosed condition. Rather, the report outlines the symptoms of emotional distress Tamara previously experienced when separated from her father - such as needing to sleep in her mother's room, nightmares, crying, falling behind at school, and occasional bed wetting - and states that one of the risk factors for children in similar circumstances when they become teenagers is depression and anxiety and that Tamara is at high risk of developing those conditions if her father is geographically separated from her.

[23] In this regard, the Officer acknowledged these reported behaviours, but pointed out that it had been over seven years since the Applicant was imprisoned and found that there was insufficient evidence that any medical treatment had been recommended or sought.

[24] I note that, in fact, there was no evidence in the record of any treatment or recommendation for treatment for Tamara. Nor was any documentary evidence submitted to substantiate that she had fallen behind in school either when her father was incarcerated when she was 4 years old or otherwise. Dr. Agarwal's report does not suggest any form of counselling or that any medication is required to manage Tamara's distress, which Dr. Agarwal found to have been mitigated by her continued contact with her father. Moreover, as submitted by the Respondent, the risk of developing depression and anxiety is attributed to geographical separation, however, the future risk is speculative.

[25] The Officer's finding was that there was insufficient evidence to indicate that Tamara's physical or mental well-being could be adversely affected if the Applicant were removed from Canada, nor that she could not adapt with the support of her family. In my view, this conclusion

was reasonably open to the Officer. Although there were letters in the record from Tamara and others concerning the impact of the Applicant's removal on her and her family, these do not establish circumstances beyond the usual difficulties of separation on removal.

[26] The Officer also considered Tamara's age and that she will face adjustments if she remains in Canada without her father, but that she will have her mother and grandparents to love and support her. If she moves to Jamaica, she will be supported by both of her parents. The Officer cannot be faulted for not providing an analysis of the best interests of the Applicant's unborn son as the Applicant had not made submissions regarding his son's interests. And, while the Officer did not specifically reference the *Criminal Records Act*, this is not fatal as it is apparent from the decision that the Officer was aware of the impact of removal.

[27] Viewed in whole, and given the materials that were in the record before the Officer, I am not persuaded that he or she failed to take Tamara's particular circumstances into account, misconstrued the evidence, or was not alert, alive and sensitive to the best interest of the children.

[28] As an additional observation, and while not commented on by the Officer, I note that Dr. Agarwal's report goes well beyond providing a psychological opinion. Dr. Agarwal has clearly strayed into the role of advocate by making statements such as: Tamara is an innocent young girl who deserves to have both of her parents; that as a Canadian she deserves all of the opportunities available to her here; and - without any supporting psychological basis or analysis -

that even if the family moves together to Jamaica, Tamara will be at risk because of the disruption of leaving a familiar place.

Hardship on return to Jamaica

[29] The Applicant also submits that the Officer ignored or misconstrued evidence the Applicant submitted that demonstrates the stigmatization and marginalization that deportees to Jamaica face. He asserts that the decision ran contrary to all of the evidence before the Officer and that no explanation was given as to why these documents were not considered. Moreover, a recent article by Mr. Luke de Noronha ("de Noronha") confirmed that negative associations with deportees are widespread in Jamaica.

[30] Conversely, the Respondent submits that the Officer considered objective documentary evidence on country conditions and reasonably concluded there was no indication of hardship in Jamaica associated with a returnee's profile as a deportee or an individual with a criminal conviction. The Officer considered services offered by NGO's to assist returnees to resettle and found there was insufficient evidence to demonstrate why the Applicant could not use these services to assist him in resettling in Jamaica. The Respondent submits the Officer referenced and considered the documentary evidence submitted by the Applicant, but weighed it against other documentary evidence that did not support the Applicant's submissions.

[31] I agree with the Respondent on this point. The Officer specifically referenced the letter of the Applicant's father and noted that it states that he fears his son will be killed because most deportees are murdered and that he is aware of the hardships the Applicant will face as he

himself was deported to Jamaica from the United States. The Officer noted that while the Applicant's father stated that there are limited jobs, no programs to help people in need and no housing or supports, little information was advanced based on hardships due to the Applicant's profile as a deportee. Further, the father's experience related to circumstances 20 years ago and the Officer had reviewed more current country documents. The Officer also referred to an article that speaks of deportees not being greeted with open arms, presumably this reference was to an online article, Bernard Headley and Dragon Milovanovic, "Rebuilding Self and Country: Deportee Reintegration in Jamaica", *Migration Policy Institute* (16 August, 2016) ("MPI Article"), which was submitted by the Applicant. This article notes that over 45,000 Jamaicans were deported from abroad between 2000 and 2014 and that deportees are not greeted with open arms in part due to the widely-held, but unfounded view in Jamaica that deportees are to blame for the region's public-safety troubles. The article goes on to describe the efforts of the National Organization of Deported Migrants ("NODM"), and other agencies, which facilitate reintegration services for deportees.

[32] The Officer seems to suggest, incorrectly, that the MPI Article was written by Mr. de Noronha, who is in fact the author of another document submitted by the Applicant and titled "Expert Report – Deportees to Jamaica", which was, apparently, prepared as a generic document concerning Jamaican deportees from the United Kingdom. Regardless, in the decision, the Officer identified hardship and risk arising from a lack of family support in Jamaica, difficulty in communication because deportees no longer speak the local dialect, and a high frequency of living in poverty because of a lack of employment opportunity and resources - all topics raised in the de Noronha report - but concluded that there was insufficient evidence to indicate why the

Applicant could not utilize his skills obtained in Canada and the available services in Jamaica to assist him with reintegration.

[33] Given this, I am not persuaded that the Officer ignored the Applicant's documentary submissions. The Officer engaged with the analysis in the de Noronha report and also stated that he or she had consulted other documentary sources that speak of country conditions in Jamaica, but was unable to ascertain from those documentary sources information that spoke of hardship in Jamaica associated with a returnee's profile as a deportee and/or an individual with a criminal conviction. As country condition reports typically identify hardships, including those faced by returnees, it was not unreasonable for the Officer to expect to find verification of the de Noronha report in those documents. It was also open to the Officer to prefer the documentary evidence of the Home Office and the MPI Article over the de Noronha report.

Evidence on rehabilitation and establishment

[34] The Applicant submits that the Officer failed to take into account the evidence of his rehabilitation and level of establishment. Further, the Officer's analysis unreasonably focused on the grounds of his inadmissibility, which is contrary to this Court's jurisprudence, and failed to give effect to the purpose of s 25 of the IRPA. The Applicant points out that he has worked hard to turn his life around since 2006 when the death that resulted in the manslaughter conviction occurred. He highlights the numerous letters of support from friends and family, prison officials, supervisors, co-workers, and the Imams at his mosque, all of which support this change. He also points to his involvement in the community, and his remorse.

[35] The Respondent submits that the Applicant is merely disagreeing with the Officer's finding and is asking this Court to reweigh the evidence (*Chaudhary v Canada (Citizenship and Immigration)*, 2018 FC 128 at para 25 (*"Chaudhary"*)).

[36] I agree with the Applicant that the Officer unreasonably discounted the very significant body of evidence that spoke to the Applicant's rehabilitation and establishment. The Officer mentioned the numerous positive character references, but failed to engage with the information they contain, instead focusing on the gravity of the offence and stating that the Applicant's remorsefulness or his upbringing "cannot excuse him from his offending". However, the Applicant was convicted by a court of law and had served the sentences that were imposed on him for the offences he committed. The Officer's role was to assess the evidence the Applicant presented, to determine if it warranted the exceptional relief that can be afforded by s 25 of the IRPA. In my view, he or she failed to do this.

[37] As stated by Justice Grammond in *Sivalingham v Canada (Citizenship and Immigration)*, 2017 FC 1185 ("*Sivalingham*"):

> [9] First, the Officer's analysis unreasonably focused on the grounds that resulted in Mr. Sivalingam's inadmissibility. In doing so, the Officer did not give effect to the purpose of section 25 of IRPA, which is to allow for the mitigation of "the rigidity of the law in an appropriate case" (*Kanthasamy* at para 19). An interpretation of section 25 that focuses unduly on the reason that made the applicant inadmissible under a provision of IRPA reinforces, rather than mitigates, the rigidity of the law and defeats the purpose of section 25 (*Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 at para. 29). The interpretation of a statutory provision may be unreasonable if it defeats the purpose of the legislature in enacting the provision: *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 SCR 427, at para 42.

(Also see *Gregory v Canada (Citizenship and Immigration)*, 2018 FC 585 at paras 68–71).

[38] Here, the evidence that was before the Officer included the following:

- While in prison, the Applicant had finished high school and had received his Ontario Secondary School Diploma;

- A June 6, 2017 letter from Mr. Craig Chinnery, Operations Manager, CORCAN – Collins Bay Institution (Medium Unit), indicating that the Applicant worked at the CORCAN Fabrication shop from November 4, 2013, to August 31, 2015 when he was transferred to CBI Minimum Unit. He was punctual, had an excellent attendance record, a keen interest in his work and a solid work ethic. Even after he was transferred to the CBI Minimum Unit, he continued to attend the CBI Medium Unit on a weekly basis in order to complete his apprenticeship program and earn additional welding certifications. He successfully completed the Level 1 Welder Apprenticeship program and, at time of writing, was enrolled in the Level 2 program. It was anticipated that he would continue with the program and complete Level 3 of the apprenticeship, which was the final classroom component of the program. The certification programs are recognized by the Ministry of Advanced Education and Skills Development ("MAESD"). The Applicant had also registered as a welder apprentice with the Ontario College of Trades in conjunction with his participation in the program. Once he attained sufficient production hours, along with completion of the Level 3 apprenticeship program, the Applicant would have an opportunity to write the Red Seal Welder test though MAESD. This designation would make him highly employable and would allow him to seek employment Canada wide as a Journeyman Welder. In addition to the apprenticeship program, the Applicant earned a number of welding certifications through the Canadian Welding Bureau in a variety of alloys. Mr Chinney stated that it should be noted that the Applicant had shown excellent initiative by continuing with the apprenticeship program though his attendance at a higher security level;

- A July 12, 2017 letter from Mr. Ken Wilkenson, Supervisor Utility Services, Collins Bay Institution, which stated that over the prior 17 months he had supervised the Applicant as an employee within the Central Heating Plant at Collins Bay Institution in the position of Engineer Assistant, which work was described. Mr. Wilkinson stated that the Applicant had shown an outstanding work ethic, had consistently attended work and was punctual. He had a willingness to work hard

whether it was a job asked of him or maintenance that he took on of his own accord. Mr. Wilkinson stated that he believed that the Applicant would have a positive impact to the society and workforce in Canada in whatever field that he chose to help support his family;

- A May 11, 2017 letter from Mr. DeVoe Dyette, a corrections officer at Collins Bay Institution, Minimum Unit, stating that during the Applicant's time there he had a positive attitude, showed respect and behavioural commitment to the rules of the institution and an ability to function without incident, and conducted himself appropriately;

- A May 19, 2017 letter from Islam Ali, Chaplain at CBI Minimum Unit, indicating that he had been chaplin since April 2016 during which time he came to know the Applicant, and describing him as a pleasant young man who is committed to his family and committed to his faith;

- An affidavit from the Applicant's wife describing her commitment to the marriage and attesting to the fact that despite his incarceration, the Applicant had never stopped being Tamara's father; that she and Tamara visited him regularly and participated in Private Family Visits; and, that they also maintained contact through daily telephone calls and by letter writing. She described his life as a child in Jamaica where he was left on his own for long periods; his struggle to adapt when adopted by his aunt in Canada; his drift into trouble with the law; and her belief that her husband has learned a harsh lesson and has seen the consequences reckless actions can have on families, most obviously for the family of the victim;

- Two letters from the Applicant's former employers who stated they would be willing to rehire him after he was released;

- A May 31, 2017 letter of support from the Applicant's brother, Neville Soloman, a Pastor with Siloam World Wide Ministries for 8 years and a full time employee with the Durham Children's Aid Society for 11 years;

- An undated letter from the Applicant's his sister describing the Applicant's background and the positive changes she has observed in him;

- The Applicant's September 20, 2016 letter describing his background, admitting his mistakes, expressing his remorse and explaining the steps he has taken to make positive changes in his life.

[39] In short, this evidence indicated that the Applicant had worked hard to change his life and had been successful in doing so. While incarcerated, he completed high school, improved his skills, and maintained his marriage and his role as father to Tamara. However, the Officer failed to properly engage with and assess this evidence and instead focused primarily on the factors that gave rise to the Applicant's inadmissibility.

[40] The Officer also found that although the Applicant had resided in Canada for more than eighteen years, he had provided little evidence to suggest that he was well-established. Consequently, establishment was given little weight in the Officer's assessment of the application. However, the Officer did not address the fact that the Applicant came to Canada when he was 16 years old and that many of the other support letters from family and friends attest to his establishment prior to and during his incarceration. These include a letter from Juliza Saunders discussing the mentorship role the Applicant has played in her life and how much he is missed at family events; a letter from Rohan Jones stating he has always had and still has a close relationship with his cousin, the Applicant, and his family; a letter from Danisha Jack stating that she has known the Applicant since her arrival in Canada in 2011 and that he has been like an uncle to her; a letter from Sarah Ramcharan stating that she has known the Applicant since he and his wife began a relationship and that she has maintained her relationship with him through telephone contact; a letter from Yasmin Burt writing that he has known the Applicant for 15 years and that the Applicant has been accepted into his family as their own; a letter from Afzal Hawaldar stating that he has known the Applicant for 17 years and has maintained his relationship with the Applicant through regular telephone contact; and, a letter from Jannet Da Rocha writing that the Applicant will have a full support system in place to ensure that his

integration back into a positive life is seamless and that he will be well supported by family and a close circle of friends.

[41] The Officer was aware of these letters but concluded that the Applicant had little establishment in Canada, without explaining why this evidence was insufficient, and instead discounted the evidence of establishment on the basis of the gravity of the Applicant's offences.

[42] The Respondent relies on *Chaudary* to support that the Officer was entitled to focus on the Applicant's criminal history and to find it outweighed any H&C considerations. However, as pointed out by the Applicant, the factual basis of that matter is distinguishable. In *Chaudary* there was little evidence of the Applicant's role in the development of the lives of her children, and she did not accept responsibility for her crimes. Further, in *Chaudary* this Court found that the officer had reasonably assessed the evidence, which is not the circumstance in this matter.

[43] Finally, I find the Officer's concluding statement, that he had weighed the best interests of the child, establishment and hardship upon return factors, "against the applicant's unlawful behaviour, which I find does not provide a positive endorsement of his character and from which I draw a negative inference", to be troubling. There is no question that it was open to the Officer to find that the Applicant's criminal history outweighed the H&C factors, including rehabilitation. However, the Applicant's criminal past was admitted. All of the evidence before the Officer indicated the highly positive rehabilitative steps the Applicant had taken since his incarceration and his remorse for his actions. Nothing in the record could support a negative endorsement of his character since his incarceration. Further, the whole purpose of the

Applicant's H&C application was to try to overcome his inadmissibility due to serious criminality. Thus, how this negative inference as to the Applicant's character fits into the H&C analysis required of the Officer, is entirely unclear to me. This is unintelligible and again suggests that the Officer misunderstood his role or misapplied the evidence.

[44] Accordingly, the decision was unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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