

Federal Court



Cour fédérale

**Date: 20240514**

**Docket: IMM-6282-23**

**Citation: 2024 FC 737**

**Ottawa, Ontario, May 14, 2024**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**NASRATULLAH MOMAND**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Nasratullah Momand, applied for permanent residence in Canada based on humanitarian and compassionate factors [H & C Application]. An officer at Immigration, Refugees and Citizenship Canada [IRCC] refused his application. Mr. Momand challenges this refusal on judicial review.

[2] On judicial review, Mr. Momand raises a number of issues. In my view, the determinative one is the Officer's consideration of the conditions in Afghanistan and their impact on Mr. Momand. I am satisfied that the Officer's failure to meaningfully grapple with a relevant factor in the application is a sufficient basis upon which to set aside the decision and send it back for redetermination.

## II. Procedural History

[3] Mr. Momand is a citizen of Afghanistan. After the Taliban came to power in 2021, Mr. Momand fled Afghanistan and travelled through a number of countries before reaching the United States in June 2022. The following month, he arrived in Canada and made a refugee claim. He withdrew his claim that same day because he would be ineligible due to the *Safe Third Country Agreement* between Canada and the United States. He was then issued an exclusion order. This meant that Mr. Momand would be ineligible to make a refugee claim before the Immigration and Refugee Board.

[4] Mr. Momand returned to the United States, then re-entered Canada two days later on July 29, 2022, and has remained in Canada since. Mr. Momand has not been provided with an opportunity to file a Pre-Removal Risk Assessment because the Canada Border Services Agency does not consider him to be "removal ready." This is due to the existence of a Temporary Suspension of Removals [TSR] currently in place by the Minister, suspending removals to Afghanistan under section 230(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[5] On May 1, 2023, Mr. Momand filed the H & C Application that is the subject of this judicial review. Mr. Momand primarily sought relief based on the hardship he would face in having to return to Afghanistan in order to apply for permanent residence. The H & C Application was refused nine days later on May 10, 2023.

### III. Analysis

[6] Foreign nationals applying for permanent residence in Canada can ask the Minister to exercise ministerial discretion to relieve them from requirements under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because of humanitarian and compassionate factors (IRPA, s 25(1)). The Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Chirwa v Canada (Minister of Citizenship and Immigration) (1970)*, 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion is “to offer equitable relief in circumstances that ‘would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another’” (*Kanthasamy* at para 21).

[7] Given that the purpose of humanitarian and compassionate discretion is to “mitigate the rigidity of the law in an appropriate case,” there is no limited set of factors that warrants relief (*Kanthasamy* at para 19). The factors warranting relief will vary depending on the circumstances, but “officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them” (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 74–75).

[8] A key issue raised by Mr. Momand on judicial review is the Officer's statements that section 25(1.3) of IRPA limited them to "only look into consideration for the hardships that would not be considered under section 96 or 97(1)", and that Mr. Momand "provided little evidence on what hardships that he would face outside of the 96 or 97(1) if he were to return to Afghanistan."

[9] Subsection 25(1.3) of IRPA states:

In examining the request of a foreign national in Canada, the Minister may not consider the factors that are 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 the elements related to the hardships that affect the foreign national.

[10] The Supreme Court of Canada in *Kanthisamy* confirmed that the restriction in section 25(1.3) does not preclude H & C officers from considering evidence filed in relation to section 96 or 97(1) risk; the facts and circumstances related to a risk claim could be considered but through the lens of a hardship assessment (paras 91–92, citing the Federal Court of Appeal's decision in *Kanthisamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paras 66, 73-74 with approval).

[11] The Respondent argued that the Officer's treatment of the restriction in section 25(1.3) is akin to the circumstances in *Nyabuzana v Canada (Citizenship and Immigration)*, 2021 FC 1484 [*Nyabuzana*], another case where the applicant had not had a risk assessment prior to the H & C Application. I do not find that *Nyabuzana* assists the Respondent's position. Unlike in this case,

there is no indication in *Nyabuzana* that the Officer explicitly limited their scope of review and found that they could only consider hardships outside of sections 96 or 97(1) of IRPA.

[12] Ultimately, it is difficult to understand from the Officer's brief reasons what elements of Mr. Momand's hardship were considered and how. Mr. Momand's counsel provided submissions setting out Mr. Momand's personal history in Afghanistan and the reasons he fears for his safety. There were also submissions on how the country conditions, with references and links to numerous articles, would impact Mr. Momand on his return. The Officer does not explain, with reference to Mr. Momand's application, which elements were considered and which they found could not be considered because of their interpretation of section 25(1.3) of IRPA. The Officer's reasons are hard to follow on this critical part of the application.

[13] The Respondent also argued that while the Officer could have better worded their consideration of the section 25(1.3) restriction, the Officer ultimately did consider the conditions in Afghanistan and found, given the limited evidence provided that they could not give this factor "much positive weight."

[14] I do not agree that the Officer's reasons demonstrate that they grappled with Mr. Momand's submissions on the hardship of return. The Officer's reasons on the conditions in Afghanistan were limited to the following sentence: "I acknowledge there are political and economic instabilities in Afghanistan since the Taliban took over." A significant part of Mr. Momand's submissions to the Officer referenced the dire conditions in the country, citing a

number of United Nations reports relating to widespread poverty and difficulty in accessing humanitarian aid.

[15] Moreover, other than acknowledging that a TSR is in place for Afghanistan, the Officer does not address the significance of this designation, i.e., that the Minister has found that conditions in Afghanistan “pose a generalized risk to the entire civilian population” (s 230(1) of IRPR) in their evaluation of Mr. Momand’s hardship if required to apply for permanent residence from Afghanistan. Similar to the Court’s finding in *Alajnf v Canada (Citizenship and Immigration)*, 2023 FC 151 [*Alajnf*], given this compelling evidence about the significant hardships an individual would face in returning to Afghanistan, there had to be some further explanation for how the Officer arrived at their conclusion that they could not give the hardship factor “much positive weight” (*Alajnf* at para 23).

[16] I agree with the Applicant that the Officer failed to address a central part of his application: the hardship he would face upon having to apply for permanent residence from Afghanistan. It is on this basis that I find that the judicial review is allowed and the matter must be redetermined. Neither party raised a question for certification and I agree none arises.

**JUDGMENT in IMM-6282-23**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed;
2. The IRCC decision dated May 10, 2023, is set aside and sent back to be redetermined by a different decision-maker; and
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"

---

Judge

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

**DOCKET:** IMM-6282-23

**STYLE OF CAUSE:** NASRATULLAH MOMAND v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** JANUARY 31, 2024

**JUDGMENT AND REASONS:** SADREHASHEMI J.

**DATED:** MAY 14, 2024

**APPEARANCES:**

Gurpreet Badh FOR THE APPLICANT

Richard Li FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Badh and Rejminiak LLP FOR THE APPLICANT  
Barristers and Solicitors  
Surrey, BC

Attorney General of Canada FOR THE RESPONDENT  
Vancouver, BC