Federal Court Cour fédérale

Date: 20111109

Docket: IMM-1725-11

Citation: 2011 FC 1286

Ottawa, Ontario, November 9, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JAI PRASHAD and PORBATI PRASHAD

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the Officer's Pre-Removal Risk Assessment decision, dated 8 February 2011 (Decision). In the Decision, the Officer refused the Applicants' application to be granted a permanent resident visa on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the Act.

BACKGROUND

[2] The Male Applicant, Jai Prashad, and his wife, Porbati Prashad, (Female Applicant), are Indo-Guyanese citizens of Guyana. They are 51 and 48 years old, respectively. The Applicants both have family members living in Canada who are Canadian citizens or permanent residents. The Male Applicant has one sister who has been a Canadian citizen since 2009. The Female Applicant has two sisters and two brothers in Canada; all are Canadian citizens. The Female Applicant's mother and biological daughter, who was adopted by the Female Applicant's mother at an early age, also live in Canada as citizens.

[3] The Applicants currently live in Canada with the Female Applicant's mother, sister, brother-in-law, niece, and four nephews. The Applicants' niece is seven years old and their nephews are eleven, thirteen, fifteen, and eighteen years old.

[4] The Applicants entered Canada on 2 August 2000 and filed an application for permanent residence on H&C grounds. That application was refused on 3 February 2003. On 13 February 2003, the Applicants claimed refugee protection. This claim was heard by the RPD in 2004 and refused on 25 November 2004. A removal order against them became effective on that date. The Applicants applied for permanent residence again, also on H&C grounds. This second H&C application was denied on 20 September 2006.

[5] The Applicants' daughter, who moved to Canada with them in 2000 and is a permanent resident, submitted an application to sponsor her parents as permanent residents (Sponsorship Application). This application was received by the Respondent on 2 October 2008.

[6] The Applicants applied for permanent residence on H&C grounds a third time by application dated 23 April 2007 (H&C Application). The Applicants also applied for a PRRA on 27 September 2011. Having been subject to a removal order since their refugee claim was denied in 2004, they were scheduled for removal on 22 April 2011. The Officer refused their PRRA application on 5 February 2011. The same Officer refused their H&C Application on 8 February 2011.

[7] On 19 April 2011, Justice James O'Reilly stayed the Applicants' removal, pending the outcome of their application for judicial review.

DECISION UNDER REVIEW

[8] The Officer rejected the Applicants' H&C application in a refusal letter with reasons dated 8 February 2011. She found that returning to Guyana would not present unusual and undeserved or disproportionate hardship for the Applicants.

[9] The Officer examined: hardships or sanctions upon return to Guyana; family or personal ties that would create hardship if severed; the Applicants' degree of establishment in Canada; establishment, ties or residency in any other country; and return to country of nationality.

Hardships or Sanctions Upon Return to Guyana

[10] The Officer found that the Applicants will have to abandon their family, friends, home and jobs in Canada which they have worked ten years to achieve. She noted that when the Applicants left Guyana, they left the Male Applicant's mother and their friends behind and sold their business. She noted that they left everything behind in order to make a life in Canada where they had never

lived before. She found that they had displayed determination and adaptability while in Canada. The Officer concluded that the evidence did not, however, show that the Applicants could not re-establish themselves on their return to Guyana. Though re-establishing themselves would be difficult, it would not amount to unusual, undeserved, or disproportionate hardship.

[11] The Officer also reviewed the Applicants' assertions that they were scared to return to Guyana because they would be subject to violence and harm. She noted that, although the Male Applicant had said at their hearing before the RPD in 2004 that there were killings and rapes in Guyana, he had also said that the violence was in a town adjacent to the town where the Applicants lived. The Officer also noted that the 2004 RPD panel had found that adequate state protection was available in Guyana. She concluded that the Applicants had failed to show how or why they would be specifically targeted or individually at risk of serious harm in Guyana.

[12] The Officer also considered country evidence on Guyana. She found that Guyana is a multi-party democracy with an independent judiciary. She also determined that, though the police in Guyana were often subject to budgetary constraints and there may be issues with their independence, adequate state protection in Guyana existed and it would not be a hardship for the Applicants to access that protection.

Family or Personal Ties That Would Create Hardship if Severed

[13] The Officer found that the letters of support from the Applicants family, friends and employers indicated that the Applicants have built and maintained relationships in their community in Canada. She noted that the letters from family members expressed the view that the Applicants would be targeted on their return because they would be perceived as wealthy. She concluded,

however, that there was no evidence to support these assertions and that the Applicants would be able to access state protection.

[14] The Officer referred to a letter from Norma Reid, a teacher who had taught the Applicants' nephew, Reon Singh (Reon), in 2007. In that letter, written in 2007 when Reon was 14, Ms. Reid said he would not have done as well in school if the Female Applicant had not been there to help. The Officer found that the letter was written when the Applicants lived with Reon and his family, nearly three years before she considered the H&C application. She said the Applicants had since moved and had not provided updated submissions as to whether they continue to help their niece and nephews.

[15] The Officer also noted that the Applicants' daughter and her spouse, as well as the Female Applicant's sister and her husband, had completed separate Application to Sponsor and Undertaking forms on behalf of the Applicants. The Officer held that while it would be a hardship for the Applicants to continue their relationship with their Canadian family members from Guyana, the evidence did not indicate that severing these relationships would constitute an unusual and undeserved or disproportionate hardship.

Degree of Establishment in Canada

[16] The Applicants presented evidence to indicate that they had established themselves in Canada since they arrived in August 2000. The Officer noted that they have received due process in the refugee protection system. She found that a measure of establishment is to be expected when applicants spend a significant amount of time in Canada. Although it was unclear to the Officer how the Applicants had supported themselves between 2000 and 2003, she found that they had both been

continuously employed from 2004 to the present with the Male Applicant having been employed since February 2003. She also noted that submissions showed that they owned two vehicles, had purchased property, and had savings of approximately $60,000.

[17] The Officer concluded that, while leaving Canada after nearly ten years may be difficult, the Applicants' prolonged stay in Canada had been within their control. She quoted from *Serda v Canada (Minister of Citizenship and Immigration)* 2006 FC 356, at paragraph 21, in which Justice Yves de Montigny held that

> It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident.

[18] The Officer said that because they knew they could be required to leave and apply outside of Canada, the Applicants could not now say that the hardship they would face on leaving would be unusual and undeserved or disproportionate. The evidence did not show that the Applicants have become established in Canada to such an extent that severing their ties here would amount to an unusual and undeserved, or disproportionate hardship.

Establishment, Ties or Residency in Any Other Country

[19] The Officer found that the Applicants had resided as citizens in Guyana prior to coming to Canada. She noted that they had some education and that they had operated their own grocery stores in Guyana for ten years.

[20] The Officer found that the Applicants would not have difficulty readjusting to Guyanese society and culture. She also found that the Applicants had been independent and self-sufficient in

the past and had a network of relatives and friends in Guyana who could assist with their reintegration there.

Return to Country of Nationality

[21] The Officer found that it was feasible for the Applicants to return to Guyana. There were no medical impediments to their return. Further, the Applicants had learned transferable skills while in Canada which would allow them to pursue employment on their return to Guyana. The Officer noted that there are anti-discrimination measures in place in Guyana. Further, she said that evidence before her showed an increase in old-aged pensions, that programs were in place to pay pensioners' water rates, and that a program to provide free spectacles to senior citizens was in place.

Conclusion

[22] The Officer concluded that, while Canada may be a more desirable place to live than Guyana, this was not determinative of the H&C application. The H&C process is not designed to eliminate hardship, but rather to provide relief from unusual, undeserved, or disproportionate hardship. In the Applicants' case, the hardship from removal was neither unanticipated nor beyond their control because they have been subject to a removal order since 2004. The Officer said she has considered all the issues presented by the Applicants and that the evidence before her did not show that returning to Guyana would cause unusual and undeserved or disproportionate hardship for them.

RELEVANT LEGISLATION

[23] The following provisions of the Act are applicable in this proceeding:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11. (1)** L’étranger doit, préalablement à son entrée au Canada, demander à l’agent les visa et autres documents requis par règlement. L’agent peut les délivrer sur preuve, à la suite d’un contrôle, que l’étranger n’est pas interdit de territoire et se conforme à la présente loi.
…	…
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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) Le ministre doit, sur demande d’un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d’un étranger se trouvant hors du Canada, 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.

ISSUES

[24] The Applicants raise the following issues:

a. Whether the Officer failed to consider the pending parental sponsorship application;

b. Whether the Officer failed to address the best interests of the Applicants' niece and nephews;

c. Whether the Officer made improper inferences as to the Applicants' ability to establish themselves in Guyana;

d. Whether the Office ignored evidence;

e. Whether the Officer applied the wrong legal test for an H&C application.

STANDARD OF REVIEW

[25] The Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] SCJ 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[26] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No. 39, the Supreme Court of Canada held that the appropriate standard of review for an H&C exemption is reasonableness. Further, in *Mikhno v Canada (Minister of Citizenship and Immigration)* 2010 FC 386, Justice John O'Keefe held that a heavy burden rests on the Applicants to satisfy the Court that a decision under section 25 requires the intervention of the Court. The standard of review on the first four issues in this case is reasonableness.

[27] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-

making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[28] In *Herman v Canada (Minister of Citizenship and Immigration)* 2010 FC 629, Justice Paul Crampton held at paragraph 12 that the Standard of Review on the question of whether an officer applied the correct test in assessing an H&C application was correctness. Justice Michael Kelen made a similar finding in *Ebonka v Canada (Minister of Citizenship and Immigration)* 2009 FC 80 at paragraph 16, as did Justice Michel Beaudry in *Mooker v Canada (Minister of Citizenship and Immigration)* 2008 FC 518 at paragraph 15. The standard of review on the fifth issue in this case is correctness.

[29] As the Supreme Court of Canada held in *Dunsmuir*, above, at paragraph 50

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

ARGUMENTS

The Applicants

The Officer Failed to Consider the Pending Parental Sponsorship Application

[30] The Applicants argue that the Officer erred when she failed to consider the Sponsorship Application filed by their daughter and son-in-law. They say that, while the Officer did mention this application in the Decision, she failed to consider the hardship that would result from the Applicants being returned to Guyana if the sponsorship application is approved. Approval of their Sponsorship Application, after they had been removed from Canada, would mean that they would have to uproot themselves from Guyana and return to Canada, which would result in lost time and money.

[31] The Applicants say that the pending application was before the Officer when she made the Decision. Though the Respondent only confirmed receipt of the Sponsorship Application in February 2009 – after the Applicants' H&C application had been in process for nearly two years – the Applicants say that it was in the FOSS at that time. The Officer effectively had constructive notice of the pending application. Further, the Applicants say that evidence of the harm that a failure to consider the pending application would cause was before the Officer in the submissions they made in November 2010 in support of their H&C application. Rather than looking at the hardship that this temporary removal would cause, the Officer unreasonably focused on their ability to adapt to life in Guyana.

[32] The Applicants rely on *Ramotar v Canada (Minister of Citizenship and Immigration)* 2009 FC 362 [*Ramotar*] to support their argument. They say that an officer must take into consideration the status and likelihood of success of an applicant's outstanding sponsorship application. This is to

ensure that the Respondent does not impose unnecessary hardship on applicants by deporting them, only to tell them they can come back to Canada as permanent residents a short time later.

[33] In *Ramotar*, Justice Kelen considered whether it was an error for an H&C officer to ignore the hardship that will result from removal if return occurs shortly thereafter on the approval of a sponsorship application.

[34] The Applicants say that their case is on all fours with *Ramotar*, so the result should be the same.

The Officer Failed to Adequately Address the Best Interests of the Children

[35] The Applicants argue that the Decision was also unreasonable because the Officer failed to take into account the best interests of their niece and nephews. They say she based her conclusion as to the best interests of these children on erroneous facts. They rely on Justice Michael Shore's summary of the duty to consider the best interests of affected children in *Diakité v Canada (Minister of Citizenship and Immigration)* 2009 FC 165 at paragraphs 2 and 3.

[36] In her Decision, the Officer said that the Applicants no longer live with their extended family and that there were no updated submissions as to whether they continue to help with their niece and nephews. The Applicants say this is factually wrong because they have not moved and continue to live with their extended family. They note that in the November 2010 submissions they said that

> they have considerable equity in the two properties which they own. One of which is an investment property and on the other they are presently erecting a new residential building.

They must be living with their extended family because the residential property they own is being put to other uses.

[37] The Applicants also say that the Officer failed to consider evidence of the impact their removal would have on their niece and nephews. They point to the letter from their nephew, in which he writes that "My auntie and uncle love me a lot, they always think of me and bring things home for me when they come home from work." This letter was before the Officer, so she erred when she did not consider it.

[38] The Applicants further say that, though these are not their own biological children, the direction in subsection 25(1) of the Act to "[take] into account the best interests of a child directly affected" is broad enough to capture nieces and nephews. They rely on *Momcilovic v Canada (Minister of Citizenship and Immigration)* 2005 FC 79 where Justice O'Keefe said at paragraph 45 that

> A plain reading of subsection 25(1) indicates that subsection 25(1) is broader than the best interests of a parent's own child. The section does not use wording such as "child of the marriage" or "the applicant's child". It refers to the best interests of a "child directly affected".

[39] The Applicants' niece and nephews will be directly affected by their removal, so it was a reviewable error for the Officer not to be alert, alive or sensitive to their best interests.

The Officer Made Improper Inferences as to the Applicants' Ability to Establish Themselves in Guyana

[40] The Applicants say that the Officer made a number of incorrect inferences as to their ability to re-establish themselves in Guyana. These inferences were unreasonable because they were not based on the factual record and failed to consider important facts and circumstances.

[41] The Applicants note that the Officer concluded that, since they left everything in Guyana to come to Canada, they can do the same and return to Guyana. However, there are significant differences between the Applicants' move to Canada and any relocation back to Guyana. Most importantly, they would not be travelling back with their daughter who is now a permanent resident of Canada, though they initially arrived with her.

[42] The Applicants also say that, when they arrived in Canada, they encountered a supportive family and were taken into a home with their extended family. They enjoyed the support of their extended family while they searched for jobs in Canada. They will not have this safety net if they are forced to return to Guyana. The only family member who still lives in Guyana is the Male Applicant's mother, who is in the process of being sponsored to Canada by her daughter.

[43] The Applicants say they will have no home in Guyana while they seek employment and will have no financial, physical and emotional support. Though the Officer found that they could re-integrate into Guyanese society because they had "a network of relatives and friends who could assist with their reintegration into Guyana," there is simply no evidence that a network of family and friends exists to assist them in the way the Officer suggests.

[44] The Applicants note that the Officer, in concluding that they would have a support network to return to, relied on a letter from an Edward V and another letter from a Hasrajie Ramojah, both residents of Guyana. The Applicants say that neither of these letters shows the author is a friend of theirs. They say that the Officer's inference that they will have a support network from these two letters is unreasonable.

[45] The Applicants also question the Officer's reliance on the availability of old-age pensions and programs for senior-citizens in Guyana. They note that they are young and have not paid in to any pension scheme in Guyana while they have been in Canada. For the Officer to rely on these programs was unreasonable.

The Officer Employed the Wrong Legal Test for an H&C Application by Focusing on Risk Instead of Hardship

[46] The same Officer rejected both the Applicants' PRRA application and their H&C application. The Applicants say that, when the Officer reviewed the RPD's Decision in their claim from 2004, she committed an error. The Applicants also note that she reviewed materials indicating that: Guyana was a democracy; that there was an independent judicial system; that there is a police force in which public confidence is low; and that there was a mechanism to report police corruption and misconduct. Though these considerations are clearly relevant within an RPD hearing and within a PRRA, they inappropriately informed the Officer's assessment of the hardship or sanctions the Applicants face if they are returned to Guyana. They note that in *Ramirez v Canada (Minister of Citizenship and Immigration)* 2006 FC 1404, Justice de Montigny said at paragraph 48 that

> [When] deciding a PRRA, immigration officers are conducting a risk assessment. While it is true that H&C applications may also raise "risk factors," that does not change the fact that an H&C application is about assessing hardship. That an application may involve issues

> of risk does not convert the application into a second risk analysis. Rather, other issues, like the best interests of the children, and risk factors, are to be assessed as parts, or subsets, of this global hardship analysis.

[47] The Applicants also say that hardship upon return to Guyana involves consideration of: where the Applicants will live; how they will support themselves; crime rates; racial tensions; employment possibilities; general living conditions; the fact that relocation to Guyana will likely only be temporary; and, most significantly, the effect of their relocation on them and their family members. Rather than looking at the broader issue of hardship in the context of all these factors, the Officer focussed on the risk to the Applicants and the availability of state protection.

[48] The Applicants further say that the Officer did not appreciate the unusual closeness their family has. They note that with eleven family members living under the same roof, they have a degree of closeness that is unusual in Canada. Separation would constitute unusual hardship because they are unusually close to one another.

The Respondent

[49] The Respondent says that the Applicants are simply asking the Court to reweigh the facts and evidence considered by the Officer in her Decision. The Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, held at paragraph 38 that

> The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold her decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.

[50] The Respondent also says that H&C decisions are discretionary and guarantee no particular outcome. The Officer's Decision should not be subject to review because she exercised her discretion reasonably and within the parameters of procedural fairness.

The Officer's Analysis of the Best Interests of the Child was Reasonable

[51] The Respondent says that little evidence was adduced by the Applicants on the best interests of their niece and nephews. The only evidence provided was two brief letters, one from their nephew's middle school teacher written in 2007 and one from their nephew, written in 2010. The Respondent notes that Justice Eleanor Dawson said in *Ahmad v Canada (Minister of Citizenship and Immigration)* 2008 FC 646 at paragraphs 37 and 38 that

> In my view, this submission is not consistent with the fact that it is the applicants who had the burden of specifying that their application was based, at least in part, upon the best interests of the children and the burden of adducing proof of any claim on which their humanitarian and compassionate application was based. It was incumbent upon the applicants to raise, and support with evidence, any specific issue a family member would face that was said to give rise not just to hardship, but to hardship which is unusual and undeserved or disproportionate.
>
> Because the applicants failed to directly raise the best interests of the children as a basis of their humanitarian and compassionate application, and because they failed to raise any specific factors relating to the children, I find no error in the officer's treatment of the best interests of the children.

[52] The Applicants also failed to mention any hardship that may result to their niece and nephews. The Officer considered all the evidence put forth by the Applicants regarding the best interests of the children and made a reasonable decision.

[53] The Respondent also reminds the Court that the best interests of the child do not mandate a specific result. As the Federal Court of Appeal held in *Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 at paragraph 12,

> The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada

In this case, the Officer did what she was required to do: she determined the likely hardship that the Applicants' niece and nephews would experience and balanced it against the other considerations in the H&C application.

The Officer Applied the Correct Test

[54] The Respondent also says that the Officer applied the proper test when assessing risk. The Officer could not have been more clear that she was aware of the different tests to be used in RPD decisions, PRRAs and H&C applications. The Respondent points out that the Officer's reasons contain numerous references to the proper threshold and how she was aware that this was a different assessment from that under sections 96 or 97 of the Act.

The Officer Reasonably Considered Establishment

[55] The Officer properly considered establishment in Canada in her analysis of hardship. Her reasons identified the factors referred to by the Applicants and she reasonably determined that the

level of establishment in Canada would not cause an unusual and undeserved or disproportionate hardship if they were removed. The Officer looked at their work experience, integration into the community, duration of time in Canada, and financial assets in Canada.

[56] The Respondent also says that establishment in Canada is only one of the factors to be considered and balanced by H&C officers. This Court has repeatedly held that the mere fact applicants have taken the risk of establishing themselves to some extent in Canada, while their immigration status remains uncertain, and knowing that they could be required to leave at anytime, does not give rise to unusual and undeserved or disproportionate hardship. As Justice Denis Pelletier held in *Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906 at paragraph 26

> I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test is to make the H&C process an ex post facto screening device which supplants the screening process contained in the Immigration Act and Regulations. This would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. The H&C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship. There is no doubt that the refusal of the applicants' H&C application will cause hardship but, given the circumstances of the applicants' presence in Canada and the state of the record, it is not unusual, undeserved or disproportionate hardship.

The Officer Reasonably Considered the Parental Sponsorship Application

[57] Finally, the Respondent says that the Applicants have not shown a reviewable error in the Officer's consideration of their return to Guyana while waiting for their daughter's parental sponsorship application to be processed. The Applicants have provided insufficient evidence to

demonstrate undue hardship. The fact that they will experience hardship from having to move twice, if the sponsorship is approved, does not mean that they meet the threshold for an H&C exemption. Even if it does cause hardship, the Officer explicitly considered the pending sponsorship application before making her Decision.

The Applicants' Further Memorandum

[58] The Applicants say that the Officer ignored evidence in assessing hardship. They point to a number of articles they submitted which they say show that, as Indo-Guyanese people, they are at increased risk of violence if they are returned to Guyana. They say that the Officer's conclusion that these articles do not concern people similarly situated to them was unreasonable. The events in the articles are about events which occurred near to where they lived, so the Officer's conclusion was unreasonable. They also say it was unreasonable for the Officer to expect that they would be personally named in the articles, when they had been in Canada for ten years and the articles were written during that period.

ANALYSIS

[59] The Applicants have raised a variety of grounds for reviewable error. The Court does not accept all of them. It is apparent from a reading of the Decision that the Officer did not apply the wrong test or incorrectly assessed hardship when assessing risk. She is careful to consistently distinguish between risk and hardship and, in my view, there is no indication that risk became the test on particular points.

[60] However, I believe that the Decision contains several reviewable errors that require the matter be returned for reconsideration.

[61] First of all, I agree with the Applicants that the Officer failed to consider the hardship that could result as a consequence of the outstanding Sponsorship Application.

[62] It is true that the Officer referred to the Sponsorship Application in the reasons, but the issue was glossed over and there is no meaningful analysis of the hardship that could arise if the Applicants were removed only to be invited to return a short time later. Counsel made clear and extensive submissions on this point to the Officer, and it was obviously an important issue for her to consider. Instead of addressing these submissions, the Officer emphasized the Applicants' adaptability to Guyana and, in my view, neglected to deal with the hardship issue that arises from the parental sponsorship.

[63] I understand that the pending sponsorship applications present a very difficult issue for officers to assess in this context. Respondent's counsel advises the Court that it is not possible to predict the timing of such an application. This may be so, but it places the Applicants in an equally difficult position. They have no way of ascertaining when the Sponsorship Application will be decided. They did all they could in this case: they informed the Officer of the length of time it had been pending and invited the Officer to consider that there were no impediments to a positive sponsorship decision.

[64] The fact that timing may be difficult to assess in this context does not remove a pending sponsorship application as an important factor when assessing hardship. The problem is undoubtedly caused by complex bureaucratic considerations. However, the solution is entirely in the

Respondent’s hands. In my view, it is not sufficient for the Respondent to say, in effect, that because timing is uncertain, a pending sponsorship application can be left out of account, or carry little weight, when hardship is being assessed. We are dealing with real people and massive disruption to their lives which may be entirely unnecessary if a positive sponsorship decision is forthcoming. The Court has wrestled with this problem before.

[65] In *Ramotar*, above, Justice Kelen provided significant guidance as to how this issue should be addressed at paragraphs 40 to 43:

> It may be an “unusual, undeserved or disproportionate hardship” for the applicants to return to Guyana pending processing of the sponsorship application by the daughter due to the delay of the respondent's Mississauga office caused by the lack of bureaucratic resources. In other words, it may be a “disproportionate hardship” for the applicants to give up their house, give up their jobs, give up their Canadian community and resettle in Guyana, all for a period of time which may be a matter of months, or possibly one or two years, while the respondent’s bureaucracy processes their application. The respondent can quickly and easily determine, on a “paper screening basis”, whether the sponsorship application will likely be approved, and if on a “paper screening” it is likely that the sponsorship application will be approved, then the H&C Officer may decide that it is an “unusual, undeserved and disproportionate hardship” for the applicants to have to uproot themselves from Canada only to return to Canada again soon thereafter.
>
> In *Benjamin v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 750, Mr. Justice Konrad von Finckenstein (as he then was) stated, in *obiter*, on a judicial review of a H&C decision that he could see no benefit in removing the applicant to Nigeria, while his application sponsored by his wife was being considered, only to bring him back to Canada in an expedited fashion should the application be successful. Justice von Finckenstein held at paragraph 18:
>
>> Such a procedure totally fails to take into account the pain, dislocation and emotional toil entailed in any removal. The Respondent should keep the aforementioned factors in mind before attempting a

> > removal while the Applicant's "spouse in Canada application" is pending.
>
> The same rationale applies to the sponsorship of the applicant by their daughter. Perhaps this is a consideration for a removal Officer who is being asked to defer removal. Perhaps it is a legitimate consideration for an H&C Officer. In any event, it is important that the right hand of the respondent know what the left hand is doing. Since this issue has come before an H&C Officer for decision, it is incumbent upon the H&C Officer to take into account the status and likelihood of success of the daughter's sponsorship application of the applicant to ensure that the respondent does not impose an unnecessary hardship on the applicants by deporting them one month only to tell the applicants they can come back to Canada as permanent residents a few months later.
>
> For this reason, this application will be allowed and the matter remitted to another immigration Officer for redetermination with a direction from the Court that the immigration Officer determine the status and likelihood of success, on a paper-screening basis, of the sponsorship application for the applicants to become permanent residents.

[66] The present case appears to me to present issues similar to those in *Ramotar* and Justice Kelen's judgment in that case.

[67] Even if I do not accept Justice Kelen's solution to the problem, I still have to say that, on the facts of the present case, I do not think that this issue was reasonably dealt with. It is simply conflated with adaptability issues and then tagged with a general conclusion. The end result is that the Applicants and the Court cannot really determine how this important factor was taken into account and why the Officer did not believe it would contribute to a sufficient level of hardship to support an H&C exemption in this case.

[68] It is also my view that the Officer committed reviewable errors in her assessment of the Applicants' ability to re-establish themselves in Guyana. One of the reasons why the Officer

concluded that the Applicants would not "have difficulties readjusting to Guyanees society and culture" is that they "have a network of relatives and friends who could assist with their reintegration in Guyana." There was no cogent evidence before the Officer of any such network, and no evidence upon which such an inference could be reasonably based. The Officer appears to be making inappropriate use of comments related to how the Applicants know about the risks they face in Guyana. In the past there is an indication that they have received news through relatives and friends, but we do not know where these people are situated and we do not know anything about their closeness to the Applicants or the kind of support they might be able, or willing, to provide. The only relative remaining in Guyana is the Male Applicant's mother, and there was no evidence of her situation. There was also a letter from a former neighbour, but no indication that he was a friend. These two people do not constitute anything that could be called a network and the Officer's inference and/or conclusion is unreasonable. It is not possible to say if the Officer's Decision would have been different if this unreasonable error had not occurred. The availability of relatives and friends seems to me to be a highly material point to the Officer who refers to it. This unreasonable mistake shows the need for reconsideration in this case.

[69] I also believe that the Officer made a serious mistake of fact that leads her into an unreasonable assessment of the best interests of the children. The Officer drew inferences and concluded that the Applicants are no longer living at the same address and interacting with their niece and nephews. However, the Applicants stated clearly on the record (p. 311 of the CTR) that they are at the same address and the Officer did not question them on this issue. There is evidence of the Applicants playing an important role in the children's lives and that, although the extended family has bought property, the Applicants continue to interact with the children in a way that required a full assessment by the Officer.

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

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1725-11
STYLE OF CAUSE:	JAI PRASHAD and PROBATI PRASHAD
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 5, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 9, 2011

APPEARANCES:

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