Federal Court  Cour fédérale

**Date: 20150209**

**Docket: IMM-5189-14**

**Citation: 2015 FC 166**

**Vancouver, British Columbia, February 9, 2015**

**PRESENT: The Honourable Mr. Justice S. Noël**

**BETWEEN:**

**REZA BASAKI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of Citizenship and Immigration Officer Terri-Lynn Steffler [H&C Officer], dated June 13, 2014, denying Reza Basaki's [the Applicant] request for permanent residency based on humanitarian and compassionate considerations [H&C application] under subsection 25(1) of IRPA.

## II. Facts

[2] The Applicant is a 47-year-old Iranian citizen, born in Aligoodarz, Lorestan, Iran. He lived in Iraq at Camp Ashraf from 1990 to 2008.

[3] He arrived in Canada on January 9, 2010, and made a refugee claim upon his arrival. His claim was however suspended as he was found inadmissible pursuant to paragraph 34(1)(f) of IRPA. The Applicant was found to be a member of a terrorist organization, the Mujahedeen-e-Khalq e Iran [MEK]. The decision was upheld by this Court. A removal order was issued against the Applicant in November 2011.

[4] The Applicant initiated a Pre-Removal Risk Assessment [PRRA] on August 30, 2012, which was denied on February 22, 2013. An application for leave and for judicial review to this Court was denied in November 2013.

[5] The Applicant made a H&C application on May 1, 2013. The application was denied on June 13, 2014. That is the decision under review.

## III. Contested Decision

[6] The H&C Officer states from the outset that the Applicant bears the onus of satisfying the decision-maker that his personal circumstances are such that the hardship of having to apply for a permanent resident visa from outside Canada in the normal manner would cause unusual and underserved or disproportionate hardships.

[7] The H&C Officer first notes that although the Applicant has established a good civil record since his arrival in 2010, his establishment in Canada is modest. With regard to the Applicant's relationship with his common-law partner, the H&C Officer writes that the Applicant entered this relationship after the CBSA initiated the removal order. The Applicant's family in Iran would mitigate the Applicant's hardship separation from his partner and friends in Canada.

[8] In terms of the risk factors evaluation, the H&C Officer takes into consideration the Amnesty International [AI] opinion submitted by the Applicant. The H&C Officer does not, however, afford much weight to the AI opinion because it does not cite the source on which the opinion is based. The H&C Officer also takes into consideration the Applicant's PRRA decision and affords it high weight. Based on the evidence presented, the H&C Officer is not convinced that the Iranian authorities have knowledge of the Applicant's stay at Camp Ashraf or that they perceive him to be a supporter of MEK. The Applicant would thus not face hardship by returning to Iran on account of the time he spent at Camp Ashraf.

[9] Finally, after affording moderate weight to the psychological report confirming a Post-Traumatic-Stress-Disorder [PTSD] diagnosis for the Applicant, the H&C Officer concludes that the Applicant would not face unusual and undeserved, or disproportionate hardship if he was required to apply for a permanent resident visa from Iran.

## IV. Parties' Submissions

[10] The Applicant submits that the H&C Officer breached procedural fairness by importing a PRRA decision into its H&C decision because the evidence before the PRRA decision-maker was not before the H&C Officer. The Respondent retorts by arguing that the PRRA decision is not extrinsic information unknown to the Applicant. The Applicant could therefore reasonably expect that the H&C Officer would consider the PRRA decision in its H&C decision.

[11] The Applicant also submits that the H&C Officer's decision is unreasonable because the H&C Officer did not make a subjective evaluation of hardship with regard to his relationship with his wife. In the alternative, it is submitted that the subjective analysis was not conducted from the Applicant's perspective and that the H&C Officer's decision fails to properly consider the Applicant's psychological profile. The Applicant also argues that the H&C Officer's decision is unreasonable in its consideration of the AI assessment of the Applicant. The Respondent, on the other hand, responds by stating that the H&C decision was reasonable because the Federal Court of Appeal [FCA] rejected the "subjective" view test for H&C determination in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 60 [*Kathasamy*]. The Applicant simply disagrees with the decision and is asking the Court to reweigh the factors.

V. Applicant's reply

[12] In its reply, the Applicant states that the Respondent did not address the issue of the H&C Officer importing in its H&C decision a previously held decision of a different officer. By importing the PRRA decision in its H&C decision, the H&C Officer violated the Applicant's right to a fair and impartial decision-making process.

[13] In reply to the Respondent's submission that the Applicant makes "bald assertions but fails to make any reference to any evidence ignored or not considered", the Applicant states that this is illogical since the material in question is not part of the record considered for the H&C application and the Applicant cannot introduce new evidence at the present judicial review. The Applicant can thus not make references to the material ignored and not considered by the H&C Officer in its decision.

[14] Moreover, in reply to the Respondent's argument that the H&C Officer considered the Applicant's PRRA submissions along with the PRRA decision, the Applicant submits that the Officer never states that the Applicant's PRRA submissions were considered.

VI. Issues

[15] The Applicant submits the following issues:

- Did the H&C Officer breach the Applicant's procedural rights and the rules of natural justice because of importing into the H&C decision a previous PRRA decision?
- Is the decision reasonable?

[16] The Respondent submits that the Applicant does not have an arguable case for two reasons:

- There was no breach of procedural fairness in referring to the PRRA decision;
- The H&C decision is reasonable as the H&C Officer properly weighted and considered all of the relevant circumstances and evidence.

[17] I have reviewed the parties' submissions and the issues submitted and I frame the issues as follows:

- Is the H&C decision reasonable?
- Did the H&C Officer breach procedural fairness in referring to the Applicant's negative PRRA decision in its H&C decision?

## VII. Standard of Review

[18] The question as to whether or not the H&C Officer's negative H&C decision is reasonable raises questions of mixed fact and law. The applicable standard of review is thus that of reasonableness. "Considerable deference should be given to immigration officers exercising the powers conferred by legislation, given the fact specific nature of the inquiry, it's role [subsection 25(1) of the IRPA] within the statutory scheme as an exception, the fact that the

decision maker is the Minister, and the considerable discretion evidenced by the statutory language" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 at para 62). This standard was confirmed by the FCA in *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18 and more recently in *Kanthasamy, supra* at paras 82-84 and *Lemus v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 at para 18). More specifically, the FCA, in *Kanthasamy, supra*, explained that under subsection 25(1) of IRPA, H&C Officers have a "broad range of acceptable and defensible outcomes available to them" (para 84). The Court therefore has to be vigilant in making sure that the outcome the H&C Officer reaches is truly within the range (*Ibid*; see also *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47 [*Dunsmuir*]).

[19] The question as to whether or not the H&C Officer breached procedural fairness in referring to the Applicant's negative PRRA decision in its H&C decision raises the standard of review of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Nadesan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1325 at para 8). As such, the Court will show no deference "to the decision maker's reasoning process; it will rather undertake its own analysis of the question" (*Dunsmuir*, *supra* at para 50).

## VIII. Analysis

### A. *Is the H&C decision reasonable?*

[20] The test to be applied in a H&C application is if at the time the H&C application is made, the Applicant's personal circumstances are such that the hardship of having to apply for

a permanent resident visa from outside Canada in the normal manner would cause unusual and undeserved or disproportionate hardship. The onus is on the Applicant to meet that test (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8 [*Owusu*]; *Kanthasamy, supra* at para 48).

[21] In the case at bar, the H&C Officer stated the appropriate test right at the outset of the decision and recognized that the H&C application was based on two grounds: the establishment of the Applicant in Canada and risk factors. In terms of the Applicant's establishment, the H&C Officer properly noted the good civil record of the Applicant in Canada along with all the letters submitted in support of the Applicant's H&C application. The H&C Officer also properly noted the ties the Applicant has in Canada, including his relationship with his partner, a relationship in which the Applicant entered after the CBSA initiated the removal process. The H&C Officer also noted the Applicant's ties in Iran and wrote that those mitigate the hardship of the separation of the Applicant from his partner and friends in Canada. Moreover, the H&C Officer properly evaluated the PTSD report provided in support of the Applicant's H&C application and properly stated that there is no evidence of follow-up treatment or that follow-up sessions took place. The H&C Officer's conclusion regarding the Applicant's modest establishment in Canada is thus reasonable. Moreover, contrary to Applicant's argument that the H&C Officer is required to make both an objective and subjective evaluation of hardship in assessing H&C factors, the FCA held, in *Kanthasamy, supra* at para 60, that there is no "subjective view" test in a H&C determination since doing so would go beyond the role of subsection 25(1) within the scheme of IRPA. Again, the H&C decision is reasonable.

B. *Did the H&C Officer breach procedural fairness in referring to the Applicant's negative PRRA decision in its H&C decision?*

[22] With regard to the evaluation of the risk factors, the Applicant submits that the H&C Officer breached procedural fairness because "instead of exercising his jurisdiction and fully assessing the evidence before him, the H&C Officer simply adopts the PRRA decision and fails to conduct and independent assessment of the material before the PRRA Officer with respect to the issue of risk" (Applicant's Record [AR], page 157 at para 30). I disagree with the Applicant's submission. First, the jurisprudence the Applicant refers to in its submissions on this point, *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300 [*Sosi*] and *Giron v Canada (Minister of Citizenship and Immigration)*, 2013 FC 114 [*Giron*], concerns PRRA and H&C decisions decided jointly, by the same decision-maker. In that context, the decision-maker is "required to have full knowledge of all the evidence tendered on both issues, and factual findings across both applications must be based on knowledge of the complete record" (*Sosi*, *supra* at para 12). It is in that context that the Applicant should expect that the relevant evidence supplied in support of his PRRA be taken into account in an H&C application (*Giron*, *supra* at para 17).

[23] In the case at bar, however, the PRRA and the H&C applications were decided by two different decision-makers at different points in time. Moreover, in H&C matters, "immigration officers are likely to give "decisive weight" to the opinions of risk assessment officers, as a result of their relative expertise in assessing risk" (*Singh v Canada (Minister of Citizenship and Immigration)*, 2004 FC 187 at paras 34; see also *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407; [2000] FCJ No 854 at para 36). Here, the Applicant initiated a PRRA in August 2012 and received a negative PRRA decision sometime after February 2013.

His application for leave and judicial review of this decision was denied in November 2013. The Applicant became aware of the PRRA decision and its content before the H&C decision was rendered. Also noteworthy, the Applicant's submissions in his H&C application referred to the PRRA application and the submissions made. Moreover, the AI opinion upon which the Applicant relies also refers to the PRRA decision (AR page 145). The H&C Officer therefore properly considered the PRRA decision in her analysis of the risk factors. If the Applicant wanted the submissions of the PRRA application before the H&C Officer, he had the burden to do so. To pretend now that the H&C Officer should have asked for them is not justified. Also, contrary to the Applicant's allegations, the H&C Officer conducted an independent analysis of the Applicant's risk factors, where the PRRA decision was one of the elements considered. In its assessment of the risk factors, the H&C Officer took into account the AI opinion submitted by the Applicant. It is based on those elements that the H&C Officer concluded that there was not enough evidence that not all persons at Camp Ashraf are of interest to the Iranian authorities. Thus, the H&C Officer did not err when she considered the PRRA decision in her analysis of the H&C application of the Applicant. The intervention of this Court is not warranted.

## IX. Conclusion

[24] The H&C Officer's assessment of the Applicant's establishment in Canada and of the risk factors in Iran is reasonable. The H&C Officer properly considered the PRRA decision in her assessment of the risk factors of the Applicant in returning to Iran in order to apply for a permanent residence visa in the normal manner. The intervention of this Court is not warranted.

[25] The parties were asked to suggest a certified question but declined.

## JUDGMENT

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

1. This application for judicial review of the H&C Officer's decision dated June 13, 2014 is dismissed.

2. No question is certified.

"Simon Noël"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5189-14 |
| **STYLE OF CAUSE:** | REZA BASAKI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | FEBRUARY 4, 2015 |
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| **DATED:** | FEBRUARY 9, 2015 |

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