Federal Court  Cour fédérale

Date: 20170130

Docket: IMM-2696-16

Citation: 2017 FC 112

Ottawa, Ontario, January 30, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ZOLTAN DANYI
VERONIKA MATYAS
ALEX DANYI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a family from Hungry. Zoltan Danyi and Veronika Matyas are the parents of their six year old son, Alex Danyi. They arrived in Canada on November 20, 2013 and claimed refugee protection, alleging persecution and discrimination due to their Roma ethnicity and threats of violence made by their former neighbour. On August 21, 2015, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] refused their claim, and

on December 9, 2015, the Refugee Appeal Division [RAD] of the IRB dismissed their appeal, finding that the Applicants were neither Convention refugees nor persons in need of protection. The Applicants then sought leave for judicial review of the RAD's decision, but this Court denied leave on April 8, 2016.

[2] On June 6, 2016, the Applicants were served with a direction to report for removal from Canada scheduled for June 27, 2016. On or about the same day, the Applicants applied for permanent resident status based on humanitarian and compassionate [H&C] considerations pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*]. By letter dated June 14, 2016, the Applicants requested that their removal from Canada be deferred until the H&C factors were appropriately assessed by an H&C officer, but an Inland Enforcement Officer [the Officer] refused to defer their removal in a letter dated June 22, 2016. Following this refusal, the Applicants sought and obtained from this Court a stay of their removal from Canada pending final disposition of this application for judicial review of the Officer's decision (see: *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 730, [2016] FCJ No 845 [*Danyi*]).

I. The Applicants' Deferral Request

[3] On June 14, 2016, the Applicants requested a deferral of their removal for six months, pending resolution of their H&C application, on the basis that their exigent personal circumstances warranted the deferral. The Applicants claimed that Alex's best interests warranted a deferral of his removal because he suffers from childhood post-traumatic stress disorder [PTSD] due to the discrimination and societal abuse he suffered and witnessed in

Hungary. They submitted to the Officer a psychiatrist's report dated May 24, 2016, concerning Alex; this report stated: "it is clear that the acceptance, safety and stability he and his parents have experienced in Canada, have helped him achieve remission from his symptoms of PTSD." The report also noted that Alex's recovery is "tenuous at best and any instability and stress will cause a relapse of his symptoms of PTSD." The report concluded that Alex's forced return to Hungary, where he and his parents had been traumatized, "will cause a relapse of his symptoms of PTSD as well as compromise his parents' ability to meet his emotional and physical needs."

[4] The Applicants further argued that, because return to Hungary would affect the psychological health of Alex's mother, Veronika, her ability to support Alex would be limited and not be in his best interests because she, too, suffers from PTSD with dissociative symptoms; and if she was forced to return to Hungary, her condition would deteriorate to the point where she would face a risk of suicide. In this regard, the Applicants directed the Officer's attention to this Court's decision in *Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146 at paras 11-12, [2015] FCJ No 1171, where, on a motion for a stay of a removal, the Court found that an officer's failure to assess whether removal itself would trigger suicide or cause psychological harm raised serious concerns with respect to the reasonableness of the officer's decision. The Applicants also submitted to the Officer that Alex's best short-term interests would be protected by deferring removal until after his overall best interests had been fully assessed in the context of the pending H&C application. In addition, the Applicants told the Officer that removal would cause an undue interruption in Alex's education and, unlike in Hungary where Alex was denied equal access to education because of his ethnicity, Alex has been thriving at school in Canada.

[5] The Applicants also presented to the Officer a psychologist's report dated December 21, 2013, which outlined the hardship Veronika would face if she was removed from Canada while her H&C application was under assessment. This report states that Veronika suffers from PTSD with dissociative symptoms and major depressive disorder of moderate severity, that she has a history of suicidal ideation, and that her condition would deteriorate and her risk of suicide would increase if she returns to Hungary. The psychologist concluded: "Ms. Matyas's condition will deteriorate…if refused permission to remain in Canada; suicide risk will increase."

[6] In addition to the PTSD suffered by both Alex and Veronika, the Applicants submitted to the Officer that interruption of Zoltan's medical appointments for his diabetes and testicular cancer was an additional exigent circumstance which warranted a deferral of removal, so as to allow him to manage his medical conditions and avoid any further harm pending resolution of the H&C application. The Applicants also submitted to the Officer that removal would diminish their chances of successfully obtaining permanent resident status on H&C grounds because statistics from Citizenship and Immigration Canada show that H&C applications are approved at an acceptance rate of 30 to 40 percent if the applicants are within Canada, while the acceptance rate is only four to five percent for applicants who have been removed.

II. The Officer's Decision

[7] In his letter dated June 22, 2016, the Officer outlined his role and obligation to enforce a removal order as soon as possible under subsection 48(2) of the *IRPA*, noting his limited discretion to defer removal. The Officer indicated that he had reviewed the Applicants' submissions, including the hardship the family would face if returned to Hungary and Alex's

best short-term interests. The Officer also noted that the Applicants' outstanding application for permanent resident status on H&C grounds does not automatically give rise to a stay of removal, and that their presence in Canada is not required in order for their H&C application to be processed. The Officer rejected the Applicants' argument that, because the acceptance rate is much higher for applicants within Canada than for those who have been removed, their removal would negatively affect their H&C application. The Officer also referred to an instruction guide and an inland processing manual in reaching his conclusion that each H&C application is decided on its own merits and that the pending H&C application would continue to be processed even after the Applicants' removal from Canada.

[8] Prior to consideration of the H&C factors presented by the Applicants and Alex's best short-term interests, the Officer noted that it was beyond his authority to perform "an adjunct H&C evaluation" and that he was not mandated to conduct an assessment of the merits of the pending H&C application. The Officer further noted that, in the context of a request to defer removal, his "limited discretion is centered on evidence of serious detrimental harm resulting from the enforcement of the removal order as scheduled."

[9] The Officer noted that he was "alert, alive and sensitive" to Alex's "best short term interests" and also noted the psychiatrist's assessment, stating that:

> Dr. Agarwal has diagnosed Alex from suffering from childhood Post-Traumatic Stress Disorder; it is stated that his time in Canada has helped in the remissions of his symptoms of PTSD, but he is at threat of being re- traumatized if returned to Hungary. I note that the psychiatric evaluation also notes that Alex's parents are very protective of him and have a need to protect him at all times. I note that the removal may cause a period of adjustment for Alex; however, at 5 years old, he is quite young and he will continue to

> have the love, support and protection of his parents upon the family's return to Hungary. I am confident that with the continued love and support of his parents, he will be raised to be emotionally well adjusted persons [*sic*]. I also note that insufficient evidence was presented to indicate that Alex would not be able to pursue his education in Hungary; I acknowledge that his educational experience and opportunities may be better in Canada, however, that is insufficient grounds to warrant a deferral of removal.

[10] In regard to Veronika's mental health, the Officer referenced the psychologist's assessment and noted her history of suicidal ideation and the potential risk caused if refused permission to remain in Canada. The Officer dismissed this evidence, however, noting that:

> the medical assessment is dated over two and a half years ago… insufficient medical evidence was presented to indicate that Veronika currently suffers from suicide ideation or that she is currently at risk for suicide. …insufficient medical evidence was presented to indicate that Veronika has sought or received mental health treatment, as recommended …Moreover, insufficient evidence was presented to indicate that Veronika could not pursue mental health treatment upon her return to Hungary.

[11] After reviewing Zoltan's medical conditions and scheduled appointments with specialists, the Officer found that "insufficient medical evidence was presented to indicate that the referrals to the specialists are urgently required for Ms. Zoltan's optimal health or that it would be detrimental to his health should he delay seeing the specialists by a few months." The Officer further found "insufficient medical evidence was presented to indicate that Zoltan will not be able to continue his care upon return to Hungary." The Officer determined that:

> Insufficient evidence was presented to indicate that Zoltan could not receive his medical results and or file from Hungary, or they could not be obtained from a medical doctor in Hungary, to ensure continuity of this treatment. Insufficient medical evidence was presented to indicate that Zoltan requires or is being scheduled for more medical appointments in the near future, beyond the three appointments identified in the deferral request. Moreover, I note

> insufficient medical evidence was presented that would indicate that Zoltan is medically unfit to travel by air. Thus, based on the medical evidence presented, I am not satisfied that Zoltan DANYI's health would suffer irreparable harm should he be removed from Canada at this time.

[12] The Officer noted that the family was then legislatively barred from applying for a pre-removal risk assessment, and that Hungary was not on the list of countries with a temporary suspension of removals. He concluded by stating: "based on all of the above, I find that insufficient evidence was presented that the family noted above will suffer from disproportionate or irreparable harm upon return to Hungary."

III. Issues

[13] In view of the parties' submissions, there are three issues to be addressed:

1. What is the appropriate standard of review?
2. Is the Officer's decision reasonable?
3. Did the Officer fetter his discretion?

IV. Analysis

A. *What is the appropriate standard of review?*

[14] An enforcement officer's decision whether to defer an individual's removal from Canada is afforded deference and reviewed on the standard of reasonableness (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25, [2010] 2 FCR 311 [*Baron*]; *Escalante v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 897 at para 13,

[2016] FCJ No 859; *Lilala v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 500 at para 18, [2016] FCJ No 466).

[15] Under the reasonableness standard, the Court is tasked with determining whether the decision-maker's decision is justifiable, transparent, and intelligible, and also "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, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

[16] The standard of review in respect of an allegation that an administrative decision-maker has fettered their discretion remains somewhat unsettled in the jurisprudence. In *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, 341 DLR (4th) 710 [*Stemijon*], Justice Stratas described how, traditionally, fettering of discretion constituted an automatic ground for setting aside an administrative decision; but now, post-*Dunsmuir*, an allegation that a decision-maker has fettered their discretion should be subsumed into the reasonableness analysis:

[21] The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.

[22] On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decision-making: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2 at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.

[23] This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19 (CanLII). But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.

[24] *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

[17] In *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27, 473 FTR 67, this Court followed the *Stemijon* approach, stating that:

> [24] With respect to the fettering of discretion issue that has been raised, it is not necessary to definitively determine whether the standard of review is correctness or reasonableness, since the result is the same: a decision that is the product of a fettered discretion must per se be unreasonable (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 (CanLII), at paras 20-24).

[18] More recently, in *Gordon v Canada (Attorney General)*, 2016 FC 643, 267 ACWS (3d) 738, the Court noted the unsettled question as to whether a correctness or a reasonableness standard of review applies to an allegation that an administrative decision-maker fettered their discretion, observing that:

> [25] Some confusion exists regarding the appropriate standard of review where the fettering of discretion is at issue.
>
> [26] Traditionally, the fettering of discretion has been reviewable on the correctness standard: *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198 at para 33, 366 NR 30.
>
> [27] However, the Federal Court of Appeal has recently posited that post-*Dunsmuir*, the fettering of discretion should be reviewed on the reasonableness standard, as it is a kind of substantive error. The Federal Court of Appeal has, however, also been careful to say that the fettering of discretion is always outside the range of possible, acceptable outcomes, and is therefore per se unreasonable: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paras 23-25, 425 NR 341.
>
> [28] It is sufficient to state in this case that the fettering of discretion is a reviewable error under either standard of review, and will result in the decision being quashed: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 at paras 71-73, 450 N.R. 91; see also *Stemijon Investments*, above, at para 23. Simply put, if the Minister's Delegate fettered her discretion, her decision should be set aside regardless of the standard of review applied.

[19] For the purposes of this case, it is sufficient to conclude that, regardless of the standard of review to be applied to the fettering of discretion issue raised by the Applicants, if the Officer fettered his discretion that would constitute a reviewable error under either standard of review and would require that the decision be set aside.

B. *Is the Officer's decision reasonable?*

(1) *The Applicants' Submissions*

[20] The Applicants argue that the Officer did not give due consideration to Alex's best interests because, in view of *Joarder v Canada (Minister of Citizenship and Immigration)*, 2006 FC 230 at para 3, 146 ACWS (3d) 305 [*Joarder*], "there is a requirement that the immediate interests of affected children be treated fairly and with sensitivity" by enforcement officers considering deferral requests and in this case the Officer failed to do so. The Applicants note, in view of *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 35, [2015] 3 SCR 909 [*Kanthasamy*], that the best interests of a child [BIOC] is highly contextual and must be assessed in a manner responsive to a child's particular age, capacity, needs and maturity since a "child's level of development will guide its precise application in the context of a particular case."

[21] According to the Applicants, recent decisions of this Court have applied the BIOC principles as stated in *Kanthasamy* beyond H&C applications, and in this case the Officer unreasonably assessed Alex's best interests through the lens of hardship contrary to *Kanthasamy*. The Applicants direct the Court's attention to *Matsubara v Canada (Public Safety and*

Emergency Preparedness), (19 Feb 2016), Ottawa, IMM-739-16, at para 10, where Justice Manson, in granting a request for a stay of removal, stated that: "the Officer does have a duty to adequately consider the short-term best interests of the child and not through a 'hardship' lens or serious detrimental harm lens, as the Officer did here."

[22] The Applicants contend that the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 3(1), requires an enforcement officer to assess the long-term BIOC, not just the short-term or immediate best interests. In addition, the Applicants say an enforcement officer's consideration of the BIOC cannot be limited to an assessment of detrimental harm or hardship. According to the Applicants, the Officer's focus on evidence of "serious detrimental harm" caused him to ignore factors such as discrimination, segregated schooling, and poverty faced by children of Roma ethnicity and he unreasonably concluded that a child such as Alex could suffer harm so long as it was not disproportionate or irreparable.

[23] The Applicants state that the Officer's assessment of Alex's best interests was unreasonable on several counts. First, the Officer accepted Alex's medical diagnosis, yet he distorted and minimized its importance by mischaracterizing Alex's risk of being re-traumatized if returned to Hungary as "a period of adjustment." Second, the Officer failed to appreciate that Alex would be traumatized if he returned to Hungary because his parents' ability to meet his emotional needs would be compromised. Third, by not considering the disruption to Alex's education, in particular the racial discrimination he would be subjected to in a Hungarian school, the Officer unreasonably provided only generic reasons which failed to engage with Alex's

particular circumstances, including how previous experiences of racial discrimination contributed to his PTSD.

[24] The Applicants also state that the Officer unreasonably assessed and misconstrued the evidence of psychological harm that would be caused if Veronika was removed from Canada. According to the Applicants, it was unreasonable for the Officer to discredit the psychological assessment about Veronika because it was outdated and did not speak to her current risks. The Applicants say that the Officer's assessment of the psychological evidence about Veronika was not reasonable for several reasons. First, the report clearly concluded that Veronika's risk of suicide would increase if she returned to Hungary. Second, the fact the report was more than two years old did not discredit its conclusions because there have been no significant changes in Veronika's life since it was written. Third, the Officer ignored the fact that Alex's psychiatric report concurred with the findings of Veronika's psychologist. Fourth, by requiring Veronika to adduce evidence as to mental health treatment as recommended in the psychological report and as to whether she could not obtain treatment in Hungary, the Officer unreasonably discounted the report contrary to *Kanthasamy*.

(2) *The Respondent's Submissions*

[25] The Respondent says *Kanthasamy* does not change the role of enforcement officers and does not import new or enhanced obligations on them since the jurisprudence has established that they are not required to conduct mini-H&C reviews. The Respondent challenges the Applicants' position that an enforcement officer should assess the long-term BIOC. According to the Respondent, based on *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016

FC 888 at para 29, [2016] FCJ No 852 [*Newman*], an enforcement officer's discretion to allow a deferral request when there are special considerations does not encompass the "strength or compelling nature of the underlying H&C application."

[26] The Respondent also says the Officer did not apply the wrong test in assessing Alex's short-term best interests. His statement that "I find that insufficient evidence was presented that the family … will suffer from disproportionate or irreparable harm upon return to Hungry" does not translate to the Officer finding it was acceptable for children to suffer harm. In the Respondent's view, the Officer thoroughly considered Alex's short-term best interests and arrived at a reasonable determination following consideration of Alex's psychiatric evaluation and threat of re-traumatization in Hungary. The Respondent states that it was reasonable for the Officer to conclude that these were insufficient grounds to exercise his limited discretion.

[27] According to the Respondent, the Officer did not fail to adequately consider the psychiatric evidence about Alex or the psychological evidence concerning Veronika. The Respondent submits that there is no precise formula to assess this sort of evidence, pointing to *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 31, [2015] FCJ No 304, where the Court, in the context of reviewing a RPD decision, stated that expert opinion reports "should not be given exalted status in administrative proceedings simply because they are prepared by a licensed professional", and also to *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149 at para 37, 235 ACWS (3d) 1054, where the Court remarked that: "decision-makers should be wary of reliance upon forensic expert evidence obtained for the purpose of litigation, unless it is subject to some form of validation." The Respondent says an

enforcement officer is entitled to ascribe low weight to such evidence if it advocates on an applicant's behalf in the guise of an opinion on the very issue before the officer.

(3) *Analysis*

(a) *The Scope of an Enforcement Officer's Discretion*

[28] An enforcement officer's discretion in permitting a deferral of removal is narrow. As stated by the Federal Court of Appeal in *Baron*: "It is trite law that an enforcement officer's discretion to defer removal is limited." In *Baron*, Justice Nadon cited *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FCR 682 at para 48, 2001 FCT 148 [*Wang*], where it was found that deferral of removal orders "should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances where deferral might result in the order becoming inoperative." Justice Nadon also adopted the reasons from *Wang*, outlining the boundaries of an enforcement officer's discretion to defer as follows (*Baron* at para 51):

> – There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
>
> – The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.

- In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

- Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

[29] An enforcement officer has a limited ability to address H&C grounds raised in the context of a request for deferral of a removal order. Both this Court and the Federal Court of Appeal have noted that an outstanding application for permanent residence on H&C grounds is, "absent special considerations," not a bar to execution of a valid removal order unless there is a threat to personal safety (see: *Baron* at para 50; *Wang* at para 45; *Arrechavala de Roman v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 478 at para 23, 432 FTR 176).

[30] Moreover, in *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 45, [2012] 2 FCR 133, the Court of Appeal stated that enforcement officers' "functions are limited, and deferrals are intended to be temporary. Enforcement officers are not intended to make, or to re-make, PRRAs or H&C decisions." In *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 at para 36, [2006] 2 FCR 664 [*Munar*], the Court observed that enforcement officers "cannot be required to undertake a full substantive review of the humanitarian circumstances that are to be considered as part of an H&C assessment. Not only

would that result in a 'pre-H&C' application,' to use the words of Justice Nadon in *Simoes*, but it would also duplicate to some extent the real H&C assessment."

[31] More recently, in *Newman* the Court stated that:

> [19] …. no matter how compelling or sympathetic an applicant's H&C application may be, CBSA enforcement officers are under no duty to investigate H&C factors put forth by an applicant as they are not meant to act as last minute H&C tribunals. The obligation to conduct an H&C assessment properly rests with an officer deciding an H&C application. It is well established that a removal officer is not required to conduct a preliminary or mini H&C analysis and to assess the merits of an H&C application (*Shpati v Canada (Minister of Public Safety& Emergency Preparedness)*, 2011 FCA 286 [*Shpati*] at para 45; *Munar v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1180 at para 36; *Prasad* at para 32).

[32] In view of the foregoing cases, it can be said that a pending H&C application may justify deferral if there are either "special considerations" or a threat to personal safety. As noted by the Court in *Newman*, "special considerations" are broader than a threat to personal safety, but do not "include the strength or compelling nature of the underlying H&C application" (at para 29); "special considerations must therefore be looked at bearing in mind the limited discretion granted to enforcement officers on requests for deferral of removal. …they must be other than simply the basis for the H&C claim, or else all H&C applications would have 'special considerations'" (*Newman* at para 30).

[33] The extent to which an enforcement officer must address the BIOC is also limited. In *Baron*, Justice Nadon stated (at para 57) that: "an enforcement officer has no obligation to substantially review the children's best interest before executing a removal order." In *Munar*,

Justice de Montigny found (at para 38) that the "obligation of a removal officer to consider the interests of Canadian born children must rest at the lower end of the spectrum" and, in contrast to an immigration officer who must weigh the long-term BIOC in the context of an H&C application, an enforcement officer only has to consider the short-term BIOC such as whether "to defer removal until a child has terminated his or her school year, if he or she is going with his or her parent" (para 40). Similarly, in *Canada (Minister of Citizenship and Immigration) v Varga*, 2006 FCA 394 at para 16, [2007] 4 FCR 3, Justice Evans stated: "Within the narrow scope of removals officers' duties, their obligation, if any, to consider the interests of affected children is at the low end of the spectrum, as contrasted with the full assessment which must be made on an H&C application under subsection 25(1)."

[34] More recently, in *Kampemana v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060 at para 34, [2015] FCJ No 1119 [*Kampemana*], the Court confirmed that while enforcement officers "must consider the immediate and short-term interests of the children and treat these fairly and with sensitivity", they "are not required to review the best interests of any children comprehensively before enforcing a removal order." Likewise, in *Ally v Canada (Citizenship and Immigration)*, 2015 FC 560 at para 21, [2015] FCJ No 547, the Court concluded that enforcement officers "lack jurisdiction to perform the full substantive analysis of the best interests of the child that is required in an application for permanent residence on H&C grounds" and they "should consider only the short-term best interests of the child."

[35] The jurisprudence has established that enforcement officers are required to consider the short-term best interests of a child in a fair and sensitive manner (see: *Joarder* at para 3;

Kampemana at para 34). It is also clear that: "while the best interests of the children are certainly a factor that must be considered in the context of a removal order, they are not an over-riding consideration" (*Pangallo v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 229 at para 25, 238 ACWS (3d) 711).

(b) *Did the Officer reasonably assess Alex's best interests?*

[36] In this case, the Officer's assessment of Alex's mental health condition is problematic. Because enforcement officers must assess the short-term BIOC, the Officer was required to reasonably consider the psychiatric evidence about Alex's short-term interests. The psychiatric assessment states that Alex's return to Hungary would deprive him of his current sense of safety and stability since his past experiences there were highly traumatizing and hostile. The assessment found that his return would cause a relapse of his PTSD symptoms and would compromise his parents' ability to meet his emotional and physical needs. Given the psychiatrist's findings, the Officer's conclusion that removal "may cause a period of adjustment" for Alex cannot be justified because it is not responsive to Alex's short-term and present emotional, social, and psychological interests.

[37] Although the Officer stated that his limited discretion was centered on evidence of "serious detrimental harm", the Officer unreasonably minimized and discounted the serious detrimental harm evidenced and identified by the psychiatrist whose report concerning Alex clearly and unequivocally stated that: "…return to an environment that he and his parents have experienced as highly traumatizing and hostile…will cause a relapse of his symptoms of PTSD as well as compromise his parents' ability to meet his emotional and physical needs." In the face

of this psychiatric evidence, it cannot be said that Alex would suffer merely a period of adjustment upon return to Hungary. In this case, the Officer did not reasonably consider or adequately assess the fact that removal itself would trigger or cause psychological harm to Alex.

(c) *Did the Officer reasonably assess the medical evidence concerning Veronika?*

[38] The Officer's approach to the medical evidence concerning Veronika runs afoul of the teachings from *Kanthasamy*, where the Supreme Court stated as follows with respect to a psychologist's report submitted to an H&C officer:

> [46] In discussing the effect removal would have on Jeyakannan Kanthasamy's mental health… the Officer said she "[did] not dispute the psychological report" and "accept[ed] the diagnosis". The report concluded that he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood resulting from his experiences in Sri Lanka, and that his condition would deteriorate if he was removed from Canada. The Officer nonetheless inexplicably discounted the report:
>
> > … the applicant has provided insufficient evidence that he has been or is currently in treatment regarding the aforementioned issues or that he could not obtain treatment if required in his native Sri Lanka or that in doing so it would amount to hardship that is unusual and undeserved or disproportionate.
>
> [47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.

> [48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition* to medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)* (2011), 96 Imm. L.R. (3d) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)* (2012), 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthasamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthasamy's health problems in her analysis.

[39] Although *Kanthasamy* involved an H&C application, unlike the present case which concerns a request to defer removal, in my view the Supreme Court's foregoing comments are equally applicable in the context of this case. The Officer in this case, like the officer in *Kanthasamy*, unreasonably discounted the psychologist's finding concerning Veronika's mental health. The Officer faulted the psychologist's report for being dated and not stating whether Veronika currently suffers from suicide ideation or is currently at risk for suicide. The Officer in this case, much like the officer in *Kanthasamy*, also found "insufficient medical evidence … to indicate that Veronika has sought or received mental health treatment, as recommended" and that "insufficient evidence was presented to indicate that Veronika could not pursue mental health treatment upon her return to Hungary." The Officer did not reasonably consider or adequately assess the fact that removal itself would trigger or cause further psychological harm to Veronika,

and his treatment of the medical evidence concerning Veronika, in view of *Kanthasamy*, is unreasonable.

[40] To summarize with respect to this issue, the Officer's decision is unreasonable and must be set aside because his assessment and treatment of the medical evidence concerning Alex and his mother unreasonably discounted such evidence, especially in view of the fact that removal itself would trigger or cause psychological harm to each of them.

C. *Did the Officer fetter his discretion?*

[41] It is unnecessary to address this issue in view of my finding above that the Officer's decision is unreasonable because of the manner in which the medical evidence concerning Alex and Veronika was assessed.

V. Conclusion

[42] Subsequent to the hearing of this matter, the Applicant proposed a question to be certified in the event the Officer's decision was found to be reasonable. The Respondent opposed certification of the proposed question because it did not fall within the principles as stated by the Federal Court of Appeal in *Liyanagamage v Canada (MCI)* (1974), 176 NR 4 at paras 4-6, 51 ACWS (3d) 910, and because it was hypothetical. Since the Officer's decision has been found to be unreasonable, there is no need to consider this issue further.

[43] The Applicants' application for judicial review is allowed and their request for deferral must be directed to another enforcement officer for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned for redetermination by a different inland enforcement officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2696-16
STYLE OF CAUSE:	ZOLTAN DANYI, VERONIKA MATYAS, ALEX DANYI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 19, 2016
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JANUARY 30, 2017

APPEARANCES:

Richard Wazana	FOR THE APPLICANTS
Tamrat Gebeheyu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wazana Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT