

Federal Court



Cour fédérale

**Date: 20220425**

**Docket: IMM-5984-20**

**Citation: 2022 FC 597**

**Ottawa, Ontario, April 25, 2022**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**SHAN KELSON LOCKHART**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Mr. Lockhart, came to Canada to work as an agricultural worker in Ontario in 2014. He was approved for a four-year work permit through the Temporary Foreign Worker Program, under which he would work in Canada for approximately 8 months of the year and then return to Dominica at the end of the harvest season. In 2017, while he was working in Canada, Dominica experienced a massive hurricane. Mr. Lockhart did not return to Dominica at

the end of the harvest season as he had been doing for the previous three years and instead remained in Canada. He eventually applied for permanent resident status through a humanitarian and compassionate application (“H & C Application”) in 2019. This application was refused by a Senior Immigration Officer (“Officer”) at Immigration, Refugees and Citizenship Canada [IRCC]. Mr. Lockhart is challenging the refusal in this judicial review.

[2] Mr. Lockhart raised a number of issues in challenging the decision. In my view, the key issue is whether the Officer considered all the relevant factors raised by his application. I find that the Officer failed to consider the core of Mr. Lockhart’s request for relief — the inability to return to his home country as planned in the aftermath of a major natural disaster.

[3] For the reasons set out below, I find that the decision is unreasonable and must be set aside.

## II. Background Facts

[4] Mr. Lockhart is a citizen of Dominica. He came to Canada in 2014 to work as an agricultural worker on Pardo’s Berrie Farm in Blenheim, Ontario, through the Temporary Foreign Worker Program. Mr. Lockhart was approved to come to work on the farm for a four-year period, working for eight months of the year on the farm, returning to Dominica at the end of the harvest season, and then coming back to Canada to work during the next growing season.

[5] Mr. Lockhart’s plans changed suddenly in September 2017, three years into his work through the Temporary Foreign Worker Program, when Hurricane Maria hit Dominica. Instead

of returning to Dominica as planned, Mr. Lockhart tried to remain in Canada by extending his work permit prior to its expiry in December 2017. He made this application in November 2017, without the assistance of counsel, thinking that the circumstances of the hurricane would be considered in his extension application. This application was refused in October 2018 because Mr. Lockhart did not meet the requirements for a work permit as he had no valid Labour Market Impact Assessment (“LMIA”).

[6] Mr. Lockhart attempted to obtain legal aid funding to obtain the assistance of a lawyer to make an H & C Application. In April 2019, legal aid approved his case for funding after a merit assessment was completed. At the end of June 2019, the Canada Border Services Agency [CBSA] learned that Mr. Lockhart was here without legal authorization when he was stopped at a road inspection. He was arrested, detained and released on conditions, which included reporting regularly to the CBSA. Mr. Lockhart advised the CBSA at that time that he was working with a lawyer on his H & C Application. The H & C Application was filed in early August 2019 and refused in September 2020.

[7] Mr. Lockhart also filed a Pre-Removal Risk Assessment (“PRRA”) application in October 2019. The results of that assessment are not evident in the record before me.

### III. Issues and Standard of Review

[8] The determinative issue in this judicial review is whether the Officer considered all the relevant factors. Mr. Lockhart also raised a procedural fairness argument with respect to the Officer’s reliance on his own research of open-source country conditions documents. It is not

necessary for me to consider the procedural fairness issue given my determination that the application needs to be reconsidered based on other grounds.

[9] In reviewing the decision of the Officer, I applied a reasonableness standard of review. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

#### IV. Analysis

##### A. *H & C Applications*

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

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

B. *Segmented and unresponsive approach to addressing impact of hurricane*

[12] Under the heading of establishment, the Officer gave “significant amount of negative weight” to the period of time that Mr. Lockhart was in Canada without status. I find the Officer’s assessment of Mr. Lockhart’s unlawful status in Canada to be unreasonable because it was factually inaccurate and failed to engage with the primary reason stated by Mr. Lockhart for remaining without status, namely, the September 2017 hurricane in Dominica.

[13] As noted by Justice Walker in *Mitchell v Canada (Minister of Citizenship and Immigration)*, 2019 FC 190, subsection 25(1) “presupposes that an applicant has failed to comply with one or more of the provisions of the IRPA. Therefore, a decision-maker must assess the nature of the non-compliance and its relevance and weight against the applicant’s H&C factors in each case” (at para 23). The Officer failed to consider the true nature of the non-compliance, and also failed to assess this non-compliance with respect to the key humanitarian factor raised by the application.

[14] The Officer determined that “there is insufficient evidence in front of me that the vast majority of the applicant’s length of time in Canada was not a result of circumstances beyond his control.” This determination is troubling in two respects.

[15] First, I do not agree with the Officer’s characterization that the “vast majority” of Mr. Lockhart’s time in Canada was without legal status to remain here. As the Officer acknowledged, Mr. Lockhart came to Canada as a temporary foreign worker in 2014, when he entered Canada for the harvest season on a valid work permit, after which he would exit and return again for further 8 month periods under the same work permit. He entered Canada four times in a four-year period to do this work — his last entry for his final harvest season was in April 2017. He then was on implied status when he applied to extend his work permit in November 2017 prior to its expiry; the refusal of this application took 11 months. Therefore, there was a period of approximately one year prior to Mr. Lockhart filing a PRRA application where he had no legal authorization to remain in Canada. Accordingly, it was inaccurate for the Officer to conclude that the vast majority of Mr. Lockhart’s time in Canada was without legal status. I also note that there was evidence before the Officer that during this period, Mr. Lockhart obtained legal aid and was working on completing his H & C Application.

[16] Second, the Officer failed to consider the primary reason that Mr. Lockhart asserted in his affidavit that he decided not to return to Dominica in December 2017, as he had done every other year — the impacts of Hurricane Maria on Dominica. The evidence in the record describes a massive natural disaster that resulted in 90 to 95 percent of Dominica’s infrastructure being damaged or destroyed, no running water for weeks, and no electricity on the island for

approximately a year. Mr. Lockhart's mother, in her letter dated July 18, 2019, noted that the roof of their family home, like many others, was lost after the hurricane, and that they were still in the process of rebuilding.

[17] It is puzzling that the Officer failed to address the hurricane in their assessment of whether there were circumstances beyond Mr. Lockhart's control in remaining in Canada without legal status. Mr. Lockhart's circumstances are described by the Officer in a way that suggests he remained beyond the period of his authorization for no reason; there is no consideration of the hurricane — the clearly stated reason for which Mr. Lockhart was making an H & C Application. This issue permeates Mr. Lockhart's request for relief. I do not find that the Officer's treatment of this issue is responsive to Mr. Lockhart's submissions (*Vavilov* at paras 127-128); nor do I find that the Officer considered all the relevant factors raised by the application (*Kanthasamy* at para 25; *Baker* at paras 74-75).

[18] The Respondent argued that the Officer considered the impact of the hurricane under the hardship section of the decision. However, the problem with the Officer's approach is that it considers the impact of the hurricane in a silo, only relevant to their assessment of the hardship Mr. Lockhart will face in returning to Dominica in 2020. This segmented approach is contrary to the Supreme Court of Canada's guidance in *Kanthasamy* that instructs decision-makers to consider an applicant's circumstances as a whole (at para 45).

[19] For these reasons, the application for judicial review is granted, the decision of the Officer is set aside and the matter is referred back for redetermination by a different officer. Neither party raised a question for certification and none arises.



**JUDGMENT IN IMM-5984-20**

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

1. This application for judicial review is granted and the matter is sent back to be redetermined by a different officer;
2. No question for certification was proposed and none arises.

**"Lobat Sadrehashemi"**

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Judge

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

**DOCKET:** IMM-5984-20

**STYLE OF CAUSE:** SHAN KELSON LOCKHART v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** OCTOBER 19, 2021

**JUDGMENT AND REASONS:** SADREHASHEMI J.

**DATED:** APRIL 25, 2022

**APPEARANCES:**

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