Federal Court Cour fédérale

Date: 20230612

Docket: IMM-20-22

Citation: 2023 FC 828

Ottawa, Ontario, June 12, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SURYA BAHADUR BHUJEL
YASHODA BHUJEL
YOGESH RANA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of a Senior Immigration Officer [Officer] refusing the Applicants' application for permanent residence. The application was based on humanitarian and compassionate [H&C] grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicants are Surya Bahadur Bhujel, his spouse Yashoda Bhujel and their 21-year-old son, Yogesh Rana. The Applicants are citizens of Nepal.

[3] Yogesh Rana entered Canada on October 8, 2015 and was issued a study visa shortly thereafter. His parents entered Canada on April 28, 2016 as visitors. In November 2016, the Applicants submitted a claim for refugee protection asserting a fear of persecution at the hands of Maoists should they be returned to Nepal. The Refugee Protection Division [RPD] rejected their claim in May 2017. The Applicants appealed to the Refugee Appeal Division [RAD], which dismissed their appeal by decision dated March 13, 2018. The Applicants then brought an Application for Leave and for Judicial Review of the RAD's decision, which was dismissed by this Court in July 2018. The Applicants submitted an H&C application in May 2021. The Officer refused the H&C application on July 19, 2021.

Decision Under Review

[4] The Officer considered the H&C factors of establishment in Canada, health and hardship.

[5] The Officer acknowledged that the Applicants have lived in Canada for between five-and-a-half and six years, and that they have created some friendships and attended church here. The Officer accepted that the Applicants are currently employed in Canada, have maintained valid work permits and a clean civil record, and have done some volunteer work. Further, that Yogesh completed secondary school in Canada as well as employment safety courses. The Officer found that these factors had a positive impact on the Applicants' establishment but many

of these characteristics are expected of all residents of Canada. The Officer assigned a moderate amount of positive weight to the Applicants' establishment.

[6] As to hardship, the Officer noted that the Applicants claimed they would face hardship in Nepal as they have previously been harassed and attacked by Maoists. The Officer noted that the Applicants had made this claim before the RPD, which had found that "the central allegations of this case are not true". While they were not bound by the RPD decision, the Officer gave considerable weight to its findings. The Officer acknowledged the Applicants' submission that Maoists are resurgent and continue to operate in Nepal but found that there was also evidence that the Nepalese government had taken steps to curb the activities of the Maoists. The Officer concluded that there was little evidence to suggest that the Applicants' hardship is forward-looking or personalized and assigned a very small amount of weight to the factor.

[7] The Officer acknowledged there could be some hardship associated with leaving friends made in Canada but found that the separation could be mitigated by maintaining communications. Nor was it suggested that the Applicants would not make friends upon returning to Nepal. They also have multiple family members there and reuniting could also help mitigate this hardship, which was assigned little weight.

[8] The Officer accepted that leaving their jobs in Canada would cause some hardship to the Applicants. However, the Officer found that the negative economic impacts of COVID-19 were also felt in Canada and unemployment estimates from 2020 suggested that unemployment rates were not worse in Nepal than in Canada. Further, the Applicants appear to be highly adaptable

and the skills gained by them in Canada could be used to find similar work in Nepal. The Officer assigned a very small amount of weight to this factor.

[9] As to the submission that Yogesh, now 21, hopes to become a pilot, there was little evidence that he had taken any steps towards achieving this while in Canada. And, although post-secondary education opportunities are better in Canada, Nepal's post-secondary system has significantly improved over the years and would be available to Yogesh should he seek it. This hardship was given a very small amount of weight.

[10] The other hardship factors submitted by the Applicants – scarcity of water supply, poor air quality, food insecurity, political insecurity, impact of a 2015 earthquake – were also addressed by the Officer who acknowledged that there is a lower standard of living in Nepal but found that the Applicants had not established that these concerns were linked to them personally. The fact that Canada generally has a better standard of living than Nepal did not serve to demonstrate hardship in the Applicants' personal situation. The Officer assigned minimal weight to adverse country conditions.

[11] Finally, with respect to health care, the Applicants submitted that access to health care in Nepal is poor and that the COVID-19 pandemic could overwhelm its health care system. However, the Officer found that the Applicants had not established how this constituted personalized and forward-looking hardship. They did not suggest that they were at heightened risk of serious complications due to COVID-19, nor that they were ever denied medical care in the past. The Officer assigned this factor minimal weight.

[12] The Officer concluded, having considered the circumstances of the Applicants and examined all of the submitted documentation, that they were not satisfied that the H&C considerations before them justified an exemption under s 25(1) of the *IRPA* and accordingly refused the application.

Issues and Standard of Review

[13] The issues in this matter can be framed as follows:

i. Did the Officer breach the duty of procedural fairness?

ii. Was the Officer's decision reasonable?

[14] Issues of procedural fairness are to be reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79 and in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] the Federal Court of Appeal held that although the required reviewing exercise may be best – albeit imperfectly – reflected in the correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances (*CPR* at paras 54-56; see also *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Ahousaht First Nation v Canada (Indian Affairs and Northern Development)*, 2021 FCA 135 at para 31).

[15] In assessing the merits of the decision of an administrative decision maker, there is a presumption that the reviewing Court will apply the reasonableness standard (*Canada (Minister*

of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). Here, none of the circumstances warrant a departure from that presumption. When applying the reasonableness standard on judicial review, the court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency, and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

No Breach of Procedural Fairness

[16] The Applicants submit that the Officer used employment data from the World Bank to show a higher rate of unemployment in Canada than in Nepal. However, that this information was not included in the H&C application and was used by the Officer to minimize the amount of hardship the Applicants would suffer if returned to Nepal. The Applicants submit that reliance on this extrinsic evidence by the Officer, which contradicted the evidence they presented, without affording the Applicants an opportunity to respond to it, breached procedural fairness (citing *Lopez Arteaga v. Canada (Citizenship and Immigration)*, 2013 FC 778 at para 24).

[17] The Respondent submits that, because the Applicants argued that they would have difficulty finding work in Nepal due to the poor economic situation in that country, the Officer needed to consider the current information pertaining to the unemployment situation there, particularly in light of the assertions as to the economic effects of the COVID-19 pandemic. The document published by the World Bank stated that the unemployment rate in Nepal in 2020 was

4.4% whereas the rate of unemployment in Canada for 2020 was 9.48%. The source was not obscure and the information was not controversial. Therefore, there was no obligation to advise the Applicants that the Officer was considering this evidence.

Analysis

[18] As the Respondent submits, the use of online extrinsic evidence by an officer does not automatically trigger a duty to provide the applicant with an opportunity to respond or result in a breach of procedural fairness. Rather, the Court must employ "a contextual approach to determine whether the duty of fairness requires disclosure with a view to the nature of the decision involved and the possible impact of the evidence at issue on the decision" (*Alves v. Canada (Citizenship and Immigration)*, 2022 FC 672 [*Alves*] at paras 29-30; *Majdalani v. Canada (Citizenship and Immigration)*, 2015 FC 294 [*Majdalani*] at para 31; *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 [*Shah*] at para 34-42). When applying a contextual approach, the relevant factors to be considered include: the source, including its reputability; the public availability of the documents and the extent to which the applicant could be reasonably expected to know of them; the novelty and significance of the information, including the extent to which it differs from other evidence; and, the nature of the decision, including the applicant's allegations and the evidentiary burden (*Alves* at para 30; *Rutayisire v Canada (Citizenship and Immigration)*, 2021 FC 970 at paras 80–88; *Shah* at paras 35–38; *Majdalani* at paras 29–37).

[19] Here, the source of the information, the World Bank, was well known and reputable. Indeed, the record includes documentation submitted by the Applicants which references World Bank findings. The information is not obscure and was easily accessible online and, therefore,

was widely available. And, while the Applicants assert that the information as to unemployment rates is controversial and contradicts evidence presented by the Applicants, they do not point to any other evidence that specifically addresses unemployment rates in Nepal and in Canada in 2020. The Applicants submitted articles concerning the negative impact of the COVID-19 pandemic on unemployment in Nepal – which pandemic was declared in 2020 – and asserted that its economic impact would affect their ability to find employment. However, the only unemployment figure for Nepal cited in the Applicants' materials was from 2016.

[20] In these circumstances, the Officer did not breach the duty of procedural fairness by conducting an open source search and not affording the Applicants the opportunity to respond to the World Bank unemployment data.

The Decision was Reasonable

[21] With respect to the Officer's hardship analysis, the Applicants make several submissions. I address each of these below.

i. RPD Decision

[22] First, the Applicants submit that the Officer gave significant weight to the RPD's finding that their central allegations were not true and thereby dismissed the hardships that the Applicants may face in returning to Nepal under the Maoists, even while recognizing the resurgence of the Maoists and that they are continuing to operate in Nepal. The Applicants submit that the Officer erred in relying on the RPD credibility findings. Further, given the

objective evidence of the Maoist resurgence which demonstrated growing political instability in Nepal, that the Officer also erred in finding that the Applicants have no forward-looking or personalized risk. This information, in combination with the Maoists' violent past, shows the potential of turbulent periods ahead as the Applicants are not Maoists themselves. The Officer unreasonably discredited this evidence.

[23] The Respondent submits that the crux of the Applicants' claim before the RPD was that they were being persecuted by Maoists. The Officer noted that the RPD had found that "the central allegations of this case are not true". Accordingly, the Applicants' assertion that the updated country condition evidence establishes a Maoist resurgence does not assist them because it does not change the fact that they were not previously the targets of Maoists. The Respondent submits that this Court has held that a PRRA officer can rely on previous adverse credibility findings made by administrative tribunals and that this principal should also apply in H&C context.

[24] I do not agree with the Applicants' position. The Officer acknowledged that a different test is used by the RPD in assessing hardship and stated that they had considered the Applicants' submission under the H&C lens. The Officer stated that they were not bound by the RPD's decision but that the RPD has expertise in credibility assessment and had found that the central allegations of the Applicants' case were not true. The Officer gave considerable weight to that finding. The Officer then considered the Applicants' country conditions evidence as to a Maoist resurgence and afforded this factor a small amount of hardship. However, the Officer stated that country conditions are to be assessed on a forward-looking and personalized basis and that the

Applicants' two letters of support submitted in this regard were dated prior to the RPD decision. Further, the Nepalese government had taken steps to curb the activities of the Maoists. The Officer concluded that there was little personalised evidence to suggest that the hardship was forward-looking or personalized and, therefore, assigned this factor very little weight.

[25] In my view, the Officer did not err in their consideration of the RPD's negative credibility finding. This Court has held that H&C officers may take into account adverse credibility findings made by the RPD and RAD regarding fear of removal to a country of origin (*Sanabria v Canada (Citizenship and Immigration)*, 2020 FC 1076 at para 14).

[26] As stated by Justice Grammond in *Zingoula v Canada (Citizenship and Immigration)*, 2019 FC 201 at paragraph 9, while the facts in a claim for refugee protection and an H&C application may overlap, they are not subject to the same legal criteria. However, if an applicant presents essentially the same story that had been found not to be credible as a whole by the RPD (or the RAD), the H&C officer is entitled to reject it:

> [10] For example, living conditions in the country of origin can be invoked in both types of applications. Under section 97 of the Act, such conditions are not legally relevant if they constitute a "generalized" risk, which is a risk faced by the entire population of the country. However, in the context of an H&C application, such conditions, even if generalized, may help to establish the hardship that the applicant would face upon removal: *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paragraph 21 [*Miyir*]; *Marafa v Canada (Citizenship and Immigration)*, 2018 FC 571 at paragraph 4.
>
> [11] It is therefore possible to invoke, in support of an H&C application, facts that had previously been invoked in support of a failed refugee protection claim. However, the RPD or the RAD must have found the evidence of these facts credible. It is well established that an H&C officer may reject evidence that has been found not to be credible by the RPD or the RAD: *Nwafidelie v*

> *Canada (Citizenship and Immigration)*, 2017 FC 144 at paragraph 22; *Jang v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 996 at paragraph 19. Obviously, if an applicant seeks to present essentially the same story that had been found not to be credible as a whole by the RPD or RAD, the H&C officer is entitled to reject it: *Miyir* at para 25.

(see also *Nkitabungi v Canada (Citizenship and Immigration)*, 2007 FC 331 [*Nkitabungi*] at para 8; *Kouka v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1236 at paragraph 27 [*Kouka*]). Further "[t]he RPD's decision may not simply be ignored, particularly where it speaks to the alleged hardship and has serious credibility concerns with the Applicants' allegations" (*Nwafidelie v Canada (Citizenship and Immigration)*, 2017 FC 144 at para 22). An H&C Officer also does not sit in appeal of the RPD's decision (*Nkitabungi* at para 8; *Kouka* at para 27; *Sanabria* at para 14.)

[27] Here, the Applicants did not take issue with the RPD's credibility finding. Instead, they submit that the Officer used the RPD decision to discredit their country condition evidence of a Maoist resurgence. However, the Officer did not do this. The Officer accepted that evidence. The Officer considered that the Applicants' claim of past persecution by Maoists was not credible; the lack of current evidence linking of potential hardship to the Applicants caused by Maoists if they were to return to Nepal (forward-looking hardship); and, that the Nepalese government is taking steps to address the resurgence. Based on the Officer's consideration of all of these points, they found that any hardship that the Applicants might incur upon return to Nepal as a result of the Maoists resurgence was to be afforded little weight. That is, the Officer balanced the evidence before them. In my view, the Officer did not err and this finding was reasonable.

ii. Personalized Hardship

[28] Further to the Officer's above hardship assessment, the Applicants also submit that the Officer erred by importing a requirement that they provide personalized evidence of hardship arising from political instability. The Officer similarly found that there was no personalized risk to the Applicants due to the scarce water supply, poor air quality, food insecurity and limited access to health care. The Applicants submit that hardship in H&C cases can arise from generalized country conditions, provided that such conditions have a direct negative impact on the applicants (citing *Caliskan v Canada (Citizenship and Immigration)*, 2012 FC 1190 [*Caliskan*] at para 26; *Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714 [*Aboubacar*] at paras 10-12). The Officer's focus should have been on whether the evidence established a link between the country conditions and the Applicants' personal circumstances that demonstrated a direct negative impact. There is no requirement that the Applicants demonstrate this by way of personalized evidence or past experiences of past direct negative impact. The Applicants assert that they submitted ample country conditions evidence to show that they would face hardship upon return to Nepal but that the Officer discounted this on the basis that the Applicants provided little information that they personally, or their family members or individuals in similar circumstances, experienced such treatment or discrimination in the past.

[29] The Respondent submits that the Applicants failed to tie their personal circumstances to the asserted poor general country conditions (citing *Webb v Canada (Citizenship and Immigration)*, 2012 FC 1060 at para 17).

[30] Under s 25(1) of the *IRPA*, the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible (other than under section 34, 35 or 37), or who does not meet the requirements of the *IRPA*, examine the circumstances concerning the foreign national. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of the *IRPA* if the Minister is of the opinion that it is justified by H&C considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[31] In this regard, the Supreme Court's decision in *Kanthasamy* and jurisprudence subsequent to that decision establishes that an H&C exemption is an exceptional and discretionary remedy, which is intended to provide a flexible and responsive exception to the ordinary operation of the *IRPA*, or, a discretion to mitigate the rigidity of the law in an appropriate case. There will inevitably be some hardship associated with being required to leave Canada, but this alone will not generally be sufficient to warrant relief on H&C grounds under s 25(1). Section 25(1) is not meant to duplicate refugee proceedings under s 96 or s 97(1) of the *IRPA*, which provisions assess whether the applicant has established a well-founded fear of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment. What does warrant H&C relief will vary depending on the facts and context of the case. Officers making H&C determinations must substantively consider and weigh all of the relevant facts and factors before them. Nor is s 25 an alternative immigration scheme. Rather, s 25 is intended to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at paras 13, 19, 21, 23-25, 51; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 12, 15,

16; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 31; *Del Pilar Capetillo Mendez v Canada (Citizenship and Immigration)*, 2022 FC 559 at para 49).

[32] In *Kanthasamy*, the Supreme Court, in the context of discrimination, stated:

> [56] As these passages suggest, applicants need only show that they would likely be affected by adverse conditions such as discrimination. Evidence of discrimination experienced by others who share the applicant's identity is therefore clearly relevant under s. 25(1), whether or not the applicant has evidence of being personally targeted, and reasonable inferences can be drawn from those experiences. Rennie J. persuasively explained the reasons for permitting reasonable inferences in such circumstances in *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714:
>
> > While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return …. This is not speculation, rather it is a reasoned inference, of a non-speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis.... [para. 12 (CanLII)]

[33] Thus, in their H&C analysis, the Officer was required to substantively consider and weigh all of the relevant facts and factors before them (*Kanthasamy* at para 25) and to "consider and give weight to all relevant humanitarian and compassionate considerations in a particular case" (*Kanthasamy* at para 33).

[34] The Applicants appear to be arguing, based on *Caliskan* and *Aboubacar*, that they established hardship under the H&C lens because there are generalized adverse country

conditions that support this, these general conditions would have a direct negative impact on the Applicants, and that the Officer erred in requiring "personalized evidence" of past experiences of a direct negative impact.

[35] I note in passing here that the phrase "direct, negative impact", utilized by the Applicants and as found in *Caliskan*, is also found on the IRCC website, under operational instructions and guidelines, "*Humanitarian and compassionate assessment: Hardship and the H&C assessment*". While guidelines are neither legally binding nor intended to be either exhaustive, restrictive or determinative, they are instructive for officers (*Douglas v Canada (Citizenship and Immigration)*, 2017 FC 703 at para 22). Among other things, the guidelines indicate that, pursuant to s 25(1.3) of the *IRPA*, H&C officers do not determine whether a well-founded fear of persecution, risk to life, danger of torture and risk of cruel and unusual treatment or punishment has been established, but they may take the underlying facts into account in determining whether the applicant will face hardship if returned to their country of origin. As to adverse country conditions:

> When an applicant submits information claiming that there are conditions in the country of origin that would result in hardship if they were not granted the exemption requested, decision makers must consider the conditions in that country and balance these factors into the hardship assessment. Adverse country conditions could include factors having a direct, negative impact on the applicant such as war, natural disasters, unfair treatment of minorities, political instability, lack of employment, widespread violence etc.

[36] To my mind, there is little difference between this stated approach and the Respondent's submission that applicants must tie their personal circumstances to the asserted adverse general country conditions when assessing hardship. In other words, the parties do not really disagree on

what the Officer was required to consider, but rather, whether or not the Officer properly did so. Specifically, from the Applicants' perspective, whether the Officer required, and erred in requiring, the Applicants to provide personalized evidence of hardship arising from political instability and in finding that there was no personalized risk to the Applicants due to the political instability, scarce water supply, poor air quality, food insecurity and limited access to health care.

[37] While I would agree that the Officer's language may be less than ideal, including referencing "personalized evidence", viewed in whole, it is apparent that the Officer considered the country conditions and whether they supported a reasoned inference as to the hardships the Applicants claimed they would face on return (*Aboubacar* at para 12; *Kanthasamy* at para 56), as well as whether the Applicants otherwise linked those hardships to their personal circumstances. The Officer did not import a s 97 risk analysis or apply the wrong test.

[38] As discussed above, the Officer found that the Applicants had been found to be not credible in their claim that they had previously been at risk from Maoists in Nepal. Additionally, that the country condition evidence established that the Nepalese government was taking steps to curb the activities of the Maoists. Thus, based on the evidence before the Officer, a generalized risk to the population of Nepal as a whole from the Maoists had not been established, which by inference, could be found to cause hardship to the Applicants. Further, the letters of support submitted by the Applicants did not establish a link between the Applicants' current circumstances and the Maoist resurgence. Therefore, the Applicants also had not established that

in their particular or personal circumstances they would likely suffer this hardship if they were to return. On this basis, the Officer reasonably afforded this factor a small amount of weight.

[39] The Officer also considered the Applicants' submission as to the scarcity of water. In that regard, they had submitted an article from 2017 indicating that the demand for water was higher than the supply in Kathmandu. However, the Officer noted that the Applicants did not live in Kathmandu prior to coming to Canada. Nor had they suggested that they had had any issues with water supply prior to leaving Nepal or that their family members currently living there are experiencing issues with water supply. While the Applicants characterise this as importing a requirement of past hardship, I do not agree. The Officer considered the country condition evidence but found the water supply concern was location-specific and that there was also no evidence of a connection, or link, to the Applicants' personal circumstances. That is, the country conditions evidence did not establish either that there was a generalized adverse country condition or that the Applicants personally were likely to suffer hardship upon return because of the asserted scarcity of water. The Officer also considered that there was no evidence suggesting that the Applicants had endured the problem while living in Nepal or that their family members currently living there are suffering from a lack of water supply in the area of Nepal where they live. In other words, there was no evidence establishing that this hardship had, and therefore likely would again, or would upon return, impact the Applicants given their particular circumstances.

[40] The Officer also considered the Applicants' argument that Nepal is continuing to struggle to recover from a 2015 earthquake. The Officer found that while the country conditions evidence

established a lower standard of living in Nepal than in Canada, the Applicants had not otherwise linked the impact of the earthquake “to themselves personally”. They had lived in Nepal in 2015 and 2016 but did not explain how they were impacted by the earthquake at that time, or by any other natural disasters, prior to coming to Canada. That is, given that they had not established that they had previously been adversely affected and in the absence of any evidence establishing how in their particular circumstances this hardship would now impact them, such as homelessness or displacement, it was not likely that they would be impacted by the earthquake seven years later. The Officer utilized similar reasoning with respect to the Applicants’ food insecurity and poor air quality submissions. The Officer concluded that overall, Canada generally has better standards of living than Nepal, but the Applicants’ simply pointing this out was not demonstrative of hardship in their personal situation and that the purpose of H&C relief is not to make up the difference in the standard of living between Canada and other countries. Based on this, and the fact that the Applicants had not linked the country conditions to themselves personally, the Officer assigned minimal weight to the adverse country conditions.

[41] The Applicants also submit, for example, that they provided country conditions documentation demonstrating that the air quality in Nepal is lower than in Canada. Further, because air quality is tested for the whole nation of Nepal, it was therefore unreasonable for the Officer to find that the Applicants would not be affected by this general condition and to have required them to expressly demonstrate this personalized risk. However, in my view, the mere fact that air quality is lower in Nepal than in Canada does not necessarily mean that the Applicants will suffer hardship if returned there. The onus was on the Applicants to establish that they would suffer hardship because of the air quality. They could do this by showing that the

entire population is seriously impacted by the adverse country condition. I would add, however, that this would be a highly exceptional circumstance and also keeping in mind that Canada has an administrative process in place whereby the return of failed refugee claimants to their country of origin is delayed when Canada has determined country conditions exist that could seriously endanger the lives or safety of the entire civilian population of that country. For example, a Temporary Suspension of Removal interrupts removals to a country or place when general conditions, such as armed conflict or an environmental disaster, pose a risk to the entire civilian population.

[42] The Applicants could also establish that they would suffer hardship because of the poor air quality by demonstrating that in their circumstances there was a link to the adverse country condition that would cause them to be impacted personally. For example, due to asthma or another medical condition; past air quality impact to themselves which is likely to recur; or, present impact to their family in Nepal that the Applicants would also incur if returned. As the Officer found, they failed to provide any evidence to support that they would personally likely suffer such hardship.

[43] Again, while the Officer's terminology is certainly not ideal, ultimately, I am not persuaded that the Officer imported a requirement of past hardship or required personalized evidence of hardship. Based on the evidence before them, the Officer could reasonably afford the adverse country conditions claims of hardship little weight.

[44] The Applicants also submit that the Officer's hardship analysis is unreasonable because the Officer used positive aspects of their establishment – their resourcefulness and adaptability – as a negative factor in assessing hardship, since those same qualities would assist them in re-establishing themselves in Nepal, thus mitigating the hardship they would face upon return. They submit that this is not in keeping with the jurisprudence, citing *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*] at para 26.

[45] The Respondent submits that the Officer reasonably looked to the Applicants' actions in Canada for an indication of how they might fare upon return to Nepal. The skills and attributes that helped them in Canada could also help them in Nepal.

[46] In *Sousa Bettencourt v Canada (Citizenship and Immigration)*, 2023 FC 225 at paragraphs 79-87 I reviewed the jurisprudence, including *Lauture*, *Singh v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1633, *Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163 pertaining to this issue and concluded that it established that officers cannot use an applicant's resourcefulness and adaptability – which helped them to become established in Canada and may have enhanced the degree of that establishment – to diminish the weight to be afforded to that positive factor (establishment) or to turn a positive factor into a negative one. However, I was not persuaded that officers cannot consider those same attributes when separately assessing whether they will serve to mitigate an applicant's hardship on return (see also *Ollivierre v Canada (Citizenship and Immigration)*, 2023 FC 599 at paras 52-56; *Wang v Canada (Minister of Citizenship and Immigration)*, 2022 FC 368 at para 33). Stated differently, it is not unreasonable for certain traits – in this case adaptability – to impact establishment and

hardship differently in a way that maintains the distinctiveness of the two factors. It is not that a positive finding under establishment necessarily resulted in a negative finding under hardship. Rather, traits that contributed to the Applicants' establishment in Canada will also help them to minimize the hardship they will face upon return to Nepal.

[47] In this matter, the Officer first considered the Applicants' establishment in Canada, assigning it moderate positive weight. The Officer then assessed hardship. In discussing employment, the Officer made a concluding statement that the Applicants also appeared to be highly adaptable people who came to Canada with minimal connections and were able to make friends and find employment. Based on the Officer's full employment hardship analysis, they afforded this factor a small amount of weight.

[48] Contrary to the Applicants' submissions, the Officer did not consistently rely on their establishment to conclude that they are adaptable and resourceful and therefore capable of re-establishing themselves in Nepal. In my view, the Officer also did not co-mingle or conflate the establishment and hardship analyses; use the Applicants' degree of establishment to undermine hardship faced on removal; or, place undue weight on the Applicants adaptability and resourcefulness while failing to adequately assess other evidence of hardship.

[49] Accordingly, the Applicants have not identified a reviewable error with respect to the Officer's hardship analysis.

iii. Establishment

[50] The Applicants assert that the Officer made three errors in their establishment assessment.

[51] First, that the Officer erred by restricting their H&C considerations to search for unusual and disproportionate hardship. By looking at the H&C application solely through the hardship lens, the Officer failed to apply the broader more equitable approach established by *Kanthasamy* and fettered their discretion.

[52] Second, the Officer unreasonably compared the Applicants' level of establishment to that of other Canadian residents living in Canada for the same amount of time, which approach has been criticized by the Federal Court, citing: *Stuurman v Canada (Citizenship and Immigration)* [*Stuurman*], 2018 FC 194 at paras 23-24) This was done without explanation concerning the expected level of establishment of either the Applicants or the other residents to whom they were compared. The Officer should at least have pointed to what was lacking in the Applicants' establishment. Further, the comparison of the Applicants to other residents has been consistently held to be unreasonable, citing *Jamrich v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804 at para 29).

[53] Third, the Officer erroneously looked for "exceptional" establishment as a result of the comparison made. The Officer should only have considered whether the Applicants'

circumstances operated as an exception to the general rule (citing *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at para 28).

[54] The Respondent submits that the Officer did not discern any characteristic of the Applicants' H&C application in general, or their level of establishment in particular, that set it apart from the myriad of other H&C application that are submitted for consideration. There must be some positive atypical aspect of an H&C application in order for it to warrant being given special consideration. If granting permanent residence status via the H&C process is not reserved for exceptional cases then it would simply become an alternative stream of immigration (citing *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212 at para 11; *Meniuk v. Canada (Citizenship and Immigration)*, 2021 FC 1374 at para 43).

[55] In my view, the Officer's reasons do not support the Applicants' submission that the Officer viewed their application through a hardship lens. The Applicants point to nothing in the Officer's reasons to support this submission. Rather, the Officer considered the H&C factors submitted by the Applicant – including hardship – in the context of their overall assessment of whether those factors warranted an exemption under s 25(1) if the *IRPA*.

[56] As to the Applicants' assertion that the Officer sought an exceptional level of establishment, at issue is the Officer's statement, concerning the Applicants making of friends, being employed during some of their time in Canada, and maintaining a clean civil record, which were factors that had a positive impact on their establishment, but "[a]t the same time, I note that

many of these characteristics are expected of all residents in Canada, and I assign a moderate amount of positive weight on the applicants' establishment".

[57] Unlike *Zhang*, relied upon by the Applicants, here the Officer did not make a finding that the Applicants' level of establishment was not "exceptional" and their reasons do not demonstrate that the Officer was operating with an understanding that the Applicants were required to demonstrate "exceptional" establishment or hardship (*Zhang* at para 28). Thus, while the Applicants construe this to be a requirement by the Officer that they demonstrate an exceptional level of establishment, I do not agree. And, significantly, the Officer afforded the Applicants' establishment a moderate amount of positive weight. Thus, it is not apparent that the Officer discounted the Applicants' degree of establishment based on this finding, as was the case in *Stuurman*.

Conclusion

[58] For the reasons above, I am not persuaded that a reviewable error rises from the Officer's reasons. Ultimately, the Officer must weigh and balance all of the factors in making the determination of whether the Applicant's circumstances warrant an exemption under s 25(1) of the *IRPA* and did so in this case.

JUDGMENT IN IMM-20-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-20-22
STYLE OF CAUSE:	SURYA BAHADUR BHUJEL, YASHODA BHUJEL, AND, YOGESH RANA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 25, 2023
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 12, 2023

APPEARANCES:

Anna Davtyan	FOR THE APPLICANTS
Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT