Date: 20070706

Docket: IMM-4221-06

Citation: 2007 FC 727

Vancouver, British Columbia, July 6, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MAJID RAFIEYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of an immigration officer (H&C and PRRA officer) dated May 5, 2006, rejecting the applicant's application for a visa exemption based on humanitarian and compassionate considerations (the H&C application).

BACKGROUND FACTS

[2] The applicant, Majid Rafieyan, was born in 1964 and is a citizen of Iran. He and his family fled to Canada in 1995 using false passports and immediately claimed refugee status upon arrival at Vancouver airport. The family was granted refugee status without a hearing in October 1995, on the grounds that the applicant had hidden anti-government leaflets in his restaurant, which were discovered by the Iranian police. Shortly after, the family applied for permanent residence status under the Exemption for Protected Persons Class.

[3] In April 1996, soon after his arrival in Canada, the applicant was arrested and convicted of assault on his wife at the time. He received a suspended sentence and two years probation. While still on probation, the applicant violently stabbed his pregnant wife fourteen times and was convicted in October 1997 of attempted murder and possession of a dangerous weapon. He was sentenced to eight years in prison.

[4] After a determination that the applicant was inadmissible to Canada for serious criminality pursuant to s. 19(1)(c) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act) in October 1997, the applicant was given notice that immigration officials intended to seek the Minister's opinion that he was a danger to the public, pursuant to subsection 70(5) and paragraph 53(1)(a) of the former Act.

[5] In May 1998, a danger opinion was issued against the applicant and he was ordered deported in June 1999 by a decision of the Adjudication Division. This Court denied Mr. Rafieyan's

application for leave and judicial review of the danger opinion. In 2002, the applicant and his counsel at the time made a request for reconsideration of the danger opinion, which was considered by a Minister's delegate and denied.

[6] Immigration authorities had decided that the deportation order against the applicant would not be enforced until the applicant was released from prison, and until the applicant was able to provide Iranian identity documents sufficient for obtaining the required travel documents. The applicant was released from immigration detention with basic reporting conditions in 2001 after a detention review, whereby the adjudicator had found that the applicant was neither a danger to the public nor a flight risk.

[7] Once the deportation order became effective, the applicant and his counsel requested a pre-removal risk assessment (PRRA). However, because of the applicant's serious criminal background, immigration officials advised the Applicant that he was ineligible for a PRRA.

[8] While on parole, the applicant began volunteering with several community organizations, including the YMCA, where he met his second wife. The two were married on December 1, 2002. The applicant then submitted an application for permanent residence based on humanitarian and compassionate (H&C) considerations in May 2003, which included a sponsorship application by his current spouse. The couple was interviewed on November 12, 2004, and the H&C application was denied by an immigration officer in a decision dated November 26, 2004.

[9] The applicant applied to have this negative H&C decision judicially reviewed. Upon consent, an order setting aside the decision and returning it for re-determination was granted by the Court as the previous officer had failed to consider the risks amounting to hardship if the Applicant was removed to Iran.

THE DECISION UNDER REVIEW

[10] After the first H&C decision was set aside, the officer invited the applicant to make further submissions in support of his H&C application. The applicant requested disclosure of all of the evidence in the officer's possession and an interview, both of which were denied by the officer. The applicant filed additional submissions on March 29, 2006.

[11] On May 5, 2006, the officer rendered a negative H&C decision. He was not satisfied that the humanitarian and compassionate considerations advanced by the applicant were sufficient to justify the latter's request for exemption.

[12] Despite concluding that there was evidence of establishment in Canada, the officer was not satisfied that this factor alone should be determinative, and was not satisfied that the applicant and his family would suffer unusual and undeserved, or disproportionate hardship from removal. The officer was also not satisfied that sufficient time had passed since the end of the applicant's sentence to conclude that he had been rehabilitated.

[13] With regard to the applicant's risk if he returned to Iran, the officer considered the latter's religious and political situation. The officer concluded that the applicant had verily converted to Christianity while in prison. However, he was not satisfied that the applicant would, on the balance of probabilities, suffer serious harm for apostasy if returned to Iran. The officer also concluded that it was unlikely that the applicant would experience harm on political or religious grounds.

ISSUES

[14] This matter raises the following issues:

1. Are the affidavits filed after the H&C decision admissible on this application for judicial review?
2. Did the officer fail to consider substantial evidence?
3. Did the officer violate principles of procedural fairness?
4. Did the officer err in concluding that the applicant would not suffer unusual and undeserved or disproportionate hardship if removed to Iran?

ANALYSIS

The standard of review

[15] In *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, the Supreme Court concluded that the standard of review applicable to H&C decision rendered by immigration officers is that of reasonableness *simpliciter* (also see: *Khosa v. Canada (M.C.I.)*, [2007] F.C.J. No. 139 (C.A.)). The Court will not substitute its decision for that of the officer, but rather, will determine whether the decision is supported by any reasons that can stand up to a somewhat probing examination (*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 56).

[16] In *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC, the Supreme Court of Canada clearly articulated that a violation of procedural fairness or natural justice is not subject to any standard of review, concluding the following:

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations. (…)
>
> On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at considering the "standard of review" of the discretionary decision itself. (…)
>
> The point is that, while there are some common "factors", the object of the court's inquiry in each case is different.
>
> [*emphasis added*]

1. Are the affidavits filed after the H&C decision admissible on this application for judicial review?

[17] The applicant argues that new evidence can be submitted on judicial review where an allegation of reasonable apprehension of bias, infringement of natural justice or procedural fairness, or a constitutional challenge, is raised. As he advances such issues in the present application, he submits that the additional affidavit evidence should be considered by this Court, despite the fact that it post-dates the decision under review.

[18] The respondent argues that the material post-dating the H&C decision was not before the officer when the decision under review was made, and therefore cannot be considered by this Court

in the present matter. A party should not be permitted to avoid the rule against adducing new evidence on judicial review by merely recasting arguments as “constitutional issues” or allegations of bias.

[19] As stated by my colleague Justice Pierre Blais in *Kim v. Canada (Minister of Citizenship and Immigration*, 2005 FC 1357, [2005] F.C.J. No. 1656 (QL) at paragraph 5, a judicial review is not the appropriate venue for adducing information to bolster a failed application. This is precisely what the applicant is attempting to accomplish in the present case, by simply reformulating his prior submissions in the further memorandums as constitutional issues or allegations of bias.

[20] It is trite law that only material that was before the original decision-maker may be considered on judicial review (*Smith v. Canada*, 2001 FCA 86 at paragraph 7; *Lemiecha (Litigation guardian of)* v. *Canada (M.E.I.)*, 1993 F.C.J. No. 1333 (QL) at paras. 3-4). While post-decision materials may be exceptionally considered where there are validly raised constitutional, procedural fairness issues or legitimate allegations of reasonable apprehension of bias, such is not the case here. The applicant simply advances such issues at a later stage in the judicial review in an attempt to circumvent the proscription against adducing new evidence. He had the opportunity to submit the affidavits at issue to the H&C officer before the decision was rendered, and the present judicial review is not the appropriate venue to attempt to correct this failure. Thus, the applicant’s further affidavits post-dating the H&C Decision will not be considered by the Court.

2. Did the officer fail to consider substantial evidence?

[21] It is trite law that an officer is presumed to have considered all of the evidence before him or her, and that the assessment of weight to be given is a matter within his or her discretion and expertise (*Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.), [1992] F.C.J. No. 946 (QL); *Shah v. Canada (Minister of Public Security and Emergency Preparedness*, 2007 FC 132, [2007] F.C.J. No. 185 (QL).

[22] The applicant argues that the officer failed to consider expert opinions on his rehabilitation, and risk in Iran due to his apostasy, instead relying on his own opinions. He claims that the evidence provided to the officer regarding his apostasy is substantial and was ignored. The applicant provided documents on the torture of apostates in Iran, an opinion by a professor, a letter written by the applicant's brother stating that the applicant's actions can be considered to be "against Islam", which is considered to be a serious criminal offence in Iran. The applicant also alleges that by virtue of actions of the Canadian government, he was successfully rehabilitated by becoming a Christian.

[23] In considering the officer's reasons and the evidence, I am satisfied that in addition to considering the applicant's entire immigration file, he duly considered all of the documents and materials provided by the applicant, including all the H&C and risk allegation submissions. Not only does the officer benefit from the presumption that he considered the totality of the evidence before him (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.J. No. 158 (QL)), but his reasons make specific reference to all of the evidence put before him by the applicant. No other extrinsic evidence was considered.

[24] With respect to his establishment in Canada, the officer recognized his employment history, his assets in Canada, his completion of “English as a Second Language” training and other adult education, volunteer work and community references, but was not satisfied that this factor should be determinative of his request.

[25] In terms of the officer’s conclusions on criminality and rehabilitation, he referred to the NPB report qualifying the applicant’s spousal abuse history as “lengthy and severe” and noting his struggle to take responsibility for his serious criminal behaviour. He also referred to a report of Dr. Monkhouse, as well as Parole Officer Cottrell, and acknowledges that the applicant was categorized as a low-risk to re-offend and as having made progress in addressing the factors contributing to his criminality. The officer noted the applicant’s positive strides towards rehabilitation and behavioural adjustment**;** but in view of the relatively short period of time since the end of the applicant’s sentence (including parole) in October 2005, he was not sufficiently persuaded that the applicant was rehabilitated.

[26] The applicant submits that the officer’s emphasis on the elapsed time is not relevant to his conclusion on the former’s rehabilitation. I do not agree, as the Act and its associated regulations expressly refer to the time elapsed since a sentence was completed as a relevant factor when considering rehabilitation in the immigration context (see subsection 36(1) and regulation 18.1 specifically). Further, I find that it is not unreasonable that the officer considered the relatively limited time that had passed since the completion of the applicant’s sentence, through the lens of the seriousness of the offences, in concluding as he did with regard to the rehabilitation issue.

[27] Similarly, the officer drew reasonable conclusions on the basis of the evidence before him with regard to the impact of the applicant’s removal on his families, both from his previous and current marriages.

[28] The applicant essentially challenges the weight the officer assigned to all of this evidence, which is beyond the scope of the present judicial review. There is no reason to believe that the officer ignored, or improperly considered, any evidence in making the H&C decision under review.

3. Did the officer violate principles of procedural fairness?

[29] As held by the Supreme Court in *Baker*, above, at paragraph 21, the concept of procedural fairness is highly variable and its content must be determined in the specific context of each case, in view of all of the facts and circumstances. The content of the duty of procedural fairness depends on a number of factors, including: the "nature of the decision being made and the process followed in making it"; the "nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'"; the "importance of the decision to the individual or individuals affected"; the "legitimate expectations of the person challenging the decision"; and the requirement to "respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (*Baker*, above, at paras. 22-27).

[30] The applicant alleges a breach of procedural fairness as he was not provided with full disclosure of the evidence against him, and was not interviewed, relying heavily on *Suresh* v. *Canada*, [2002] 1 S.C.R. 3.

[31] However, I find that *Suresh* is to be distinguished from the present matter, as it dealt with the duty of procedural fairness in the specific context of a danger opinion. Unlike a danger opinion, in an H&C application there is no allegation made against an applicant. Rather, the H&C process is initiated by an applicant seeking an exemption from the normal statutory requirements, and who bears the onus of adducing evidence to justify his request. Also, in this context, unlike that of the danger opinion, there is no corresponding duty on the Minister to disclose and no "case to meet", as the applicant is responsible for adducing the evidence to support his request.

[32] In *Baker*, above, the leading case on the requirements of procedural fairness in the context of H&C application, the Supreme Court of Canada does not impose a duty on immigration officials to disclose the evidence they intend to rely on in making their decisions or to inform an applicant of his or her "case to meet".

[33] In the context of an H&C application, there is no duty to disclose documents where an officer does not rely on extrinsic evidence prepared by a third party; correspondingly, there is no obligation to provide the affected individual with an opportunity to respond (*Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.); see also *Jayasinghe v. Canada*

(M.C.I), 2007 FC 193, [2007] F.C.J. No. 275 (QL) at para. 26; *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407, [2000] F.C.J. No. 854 (QL) (C.A.) at para. 26).

[34] In the present case, the officer relied solely on the applicant's immigration file and the evidence he provided. Nowhere in his submissions to the H&C officer does the applicant qualify, or question the veracity of, the content of the National Parole Board's (NPB) pre-release decision describing his history of spousal abuse as "severe and lengthy". In addition to providing the officer with this report, the applicant did not challenge its findings until after the H&C decision was made. Being presumably aware of the content of the NPB report he submitted, the applicant had the opportunity to submit affidavits or other evidence to the H& C officer challenging the report's qualification of his spousal abuse history, prior to the rendering of the H&C decision. The time to do so was at the H&C application stage, not after receiving a negative decision. Therefore, I find that there was no duty to disclose documents to the applicant prior to rendering the decision, and the officer did not err in this regard.

[35] Further, the right to an interview is not automatic. In *Owusu*, above, the Federal Court of Appeal clearly stated the following:

> H & C Applicants have no right or legitimate expectation that they will be interviewed. And, since Applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril. (…)
>
> [See also: *Shah*, above, at para. 37.)

[36] Since *Baker*, above, courts have repeatedly held that in the context of H&C applications there is neither a right to, nor a legitimate expectation of, an interview; it is sufficient that applicants have a meaningful opportunity to make written submissions and adduce evidence in support of their request for an exemption.

[37] The applicant received two letters in June 2006 from immigration officers stating that the purpose of any interview was to deliver the H&C decision in person, and that normally documentation is not provided before an interview, but rather is provided in person at the time that the decision is delivered. This is not a case where the applicant could have had a legitimate expectation that he would be interviewed. A legitimate expectation of an interview in these circumstances would have to be based on a clear, unambiguous and unqualified representation. I am satisfied that there was no clear representation to the applicant that he would be interviewed, only that he might be, depending on the nature of the case presented.

[38] The officer clearly stated in the decision that he relied on all of the materials provided by the applicant, including the updated materials that he submitted for the re-determination of his H&C application. In carefully reviewing the decision and the totality of the evidence before the officer, I am not convinced that he was unreasonable in his analysis, nor that he showed grounds that would lead the reasonable informed person, viewing the matter realistically and practically, to believe that there was bias.

[39] Therefore, I find that the applicant has not established an apprehension of bias, or that the officer breached any principle of procedural fairness or natural justice, or contravened section 7 of the *Charter*.

4. Did the officer err in concluding that the applicant would not suffer unusual or disproportionate hardship if the applicant was removed to Iran?

[40] The role of an officer in an H&C application is to determine if an individual would experience unusual and undeserved, or disproportionate hardship if required to return to his country of origin to apply for a permanent resident visa. The onus rests on the applicant to satisfy the officer that, in his personal and particular circumstances, the hardship of having to obtain a permanent resident visa outside of Canada in the normal manner would either be unusual and undeserved, or disproportionate. (*Owusu*, above; *Pinter v. Canada (M.C.I.)*, 2005 FC 296, [2005] F.C.J. No. 366 (QL) at paras. 3-4; *Shah*, above, at para. 14).

[41] Furthermore, I agree with Justice Shore's conclusions in *Hamzai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108, [2006] F.C.J. No. 1408 (QL), where he stated the following at paragraph 24:

> This Court is not to lightly interfere with the discretion given to an H&C officer. The H&C decision is not a simple application of legal principles but rather a fact-specific weighing of many factors. As long as the H&C officer considers the relevant, appropriate factors from an H&C perspective, the Court cannot interfere with the weight the H&C officer gives to the different factors, even if it would have weighed the factors differently…

[42] The applicant alleges that he and his family would suffer unusual and undeserved, or disproportionate hardship if he were to be returned to Iran. While separation unquestionably

imposes hardship, it is well established that family separation alone is insufficient to justify an H&C exemption (for example, see: *Rettegi v. Canada (M.C.I.)*, [2002] F.C.J. No. 194 (QL) at para. 16; *Adomako v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 1384, 2006 FC 1100 at para. 17). In this case, the officer concluded that as the applicant has no contact with his former wife and biological children, that his current marital relationship was unstable and involved at least two periods of separation, that his wife is financially self-supporting, that the couple were aware of his uncertain immigration status from the beginning of their relationship, and that he has only been involved in his step-children's lives for a relatively short time, his removal would not cause unusual and undeserved, or disproportionate hardship.

[43] With regard to the applicant's risks if returned to Iran, the officer considered both the religious and political factors particular to the applicant. The officer noted that the applicant was granted refugee status in Canada on political grounds in 1995, and that he now claims that he is at risk in Iran on religious grounds as well, as a result of his conversion to Christianity while in Canada.

[44] With regard to the appropriate risk analysis of an H&C decision, I adopt the following conclusions of Justice Johanne Gauthier in *Monemi v. Canada (Solicitor General)*, 2004 FC 1648, [2004] F.C.J. No. 2004 (QL) at paragraph 39 that the concept of risk:

> (…) encompasses much more than the narrow requirements relevant to a PRRA application, namely, those set out in sections 96 and 97 of IRPA. Not only does unusual, undeserved, or disproportionate hardship include non-risk elements but it also includes risk elements that may not qualify under sections 96 and 97, such as for example, discrimination that may not amount to persecution

[45] In the present matter, the officer did not question the applicant's positive refugee claim determination on political grounds in 1995. However, he was not convinced that the applicant would still be of interest to the Iranian authorities over a decade later. The officer concluded that the applicant had not provided sufficient evidence to persuade him that he was currently at risk if returned to Iran.

[46] While the applicant evidently disagrees with the weight the officer gave to his brother's letter and a statement reportedly made by Iranian authorities to his mother in 1999, this does not mean that the officer's conclusions are unreasonable. The officer clearly considered the applicant's evidence but was not persuaded by it. I am satisfied that the officer's conclusion with regard to the risk to the applicant in relation to his political beliefs can stand up to the somewhat probing examination required by the standard of reasonableness (*Baker*, above, para. 63).

[47] With regard to the religious grounds, the officer accepted that the applicant had converted to Christianity while in prison. The officer referred to the documentary evidence showing that a Muslim who commits apostasy in Iran may face serious consequences, such as the death sentence or torture. Other documentary evidence expressly considered by the officer shows that Christians are a recognized religious minority in Iran, and generally those Christians at risk of serious harm in Iran belong to evangelical denominations or those who openly proselytize; in the absence of proselytization or other overt religious activity, they do not face a serious risk of persecution.

[48] While expressly considering the evidence of the professor submitted by the applicant that he would be at risk of serious harm for apostasy, the officer relied on the evidence that nobody has been persecuted for the crime of apostasy in Iran since 1994. The applicant submits that the officer ignored the opinions of experts, replacing it with his own opinions and speculation. I do not agree; while the officer is obliged to consider the evidence before him, including that of experts, he is not bound to necessarily accept these opinions as conclusions of fact. It is within the competence of the officer to weigh the evidence according to his own assessment of it, and there is no reason to believe that he did not properly consider the evidence on this issue.

[49] I am satisfied that the officer did not err in a manner justifying the intervention of this Court in finding that while penalties prescribed by law may be indicative of risk, they are not determinative of the issue where there is evidence that these laws are not being enforced. Similarly, in the absence of evidence that the applicant fell within any of the Christian groups likely to be targeted for punishment, it was not unreasonable for the officer to conclude that he had not established a personal risk of serious harm amounting to hardship.

[50] For these reasons, the application for judicial review of the H&C decision is dismissed.

JUDGMENT

The application for judicial review is dismissed.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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