Date: 20080205

Docket: IMM-2563-07

Citation: 2008 FC 136

Ottawa, Ontario, February 5, 2008

Present: The Honourable Mr. Justice Shore

BETWEEN:

ALEX POTIKHA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] When a matter is sent to the Pre-removal Risk Assessment (PRRA) unit, it does not amount to a refusal to exercise jurisdiction under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), since the PRRA officer also proceeds to analyse the matter from the perspective of humanitarian and compassionate considerations.

[2] The Court has already held that PRRA officers have the jurisdiction to assess applications based on humanitarian and compassionate considerations, in *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274, [2003] F.C.J. No. 1596 (QL):

> [18] **Did the PRRA Officer [breach] the principles of natural justice by not providing the applicant with an opportunity to respond to his reasons?**
>
> [Emphasis added.]

(See also *Zolotareva*, *supra*, at paragraphs 12 to 17; *Krotov v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 438, [2005] F.C.J. No. 541 (QL), paragraph 8; *Ageel v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1498, [2006] F.C.J. No. 1895 (QL), paragraph 9).

[3] The applicant was entitled to a thorough and complete assessment of his file, in regard to the risks as well as the humanitarian and compassionate considerations, and this could not have caused him any prejudice.

JUDICIAL PROCEEDING

[4] This is an application for leave and for judicial review of a decision dated June 5, 2007, dismissing the application for permanent residence based on humanitarian and compassionate considerations (HC).

FACTS

[5] The applicant, Alex Potikha, a citizen of Ukraine, chose to immigrate to Israel in 1995.

[6] Military service is mandatory in Israel and Mr. Potikha alleges that he refused to do his military service, managing to evade the army and the military police for several years.

[7] Mr. Potikha left Israel on August 23, 2003, and came to Canada. He claimed refugee protection five months later, on January 19, 2004.

[8] His refugee claim was refused on July 13, 2004, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. On November 22, 2004, the Court dismissed the application for leave and for judicial review of this decision.

[9] Mr. Potikha requested an exemption from the obligation to file his permanent residence application from outside Canada, based on humanitarian and compassionate grounds.

[10] The HC application was refused on June 5, 2007, and is now the subject of this application for leave and for judicial review.

ISSUE

[11] Does the officer's decision contain errors of law and is it patently unreasonable on the facts?

ANALYSIS

Legislative provisions

[12] Subsection 11(1) of the IRPA provides that visa and permanent residence applications must be made from outside Canada.

[13] Allowing a person to apply for permanent residence application from within Canada is an exceptional remedy (section 25 of the IRPA; *Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, [2006] F.C.J. No. 425 (QL), paragraph 20).

[14] Persons seeking authorization to apply from within Canada bear the onus of establishing that requiring them to file their application from outside Canada would cause them unusual and undeserved or disproportionate hardship (paragraphs 6.5 to 6.8 of Manual IP-5 of Citizenship and Immigration Canada (CIC), "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" (Manual IP-5); *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 (QL), paragraph 20).

[15] Mr. Justice James Russell, in *Pashulya v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1275, [2004] F.C.J. No. 1527 (QL), explains:

> [43] An applicant has a high threshold to meet when requesting an exemption from the application of s. 11(1) of *IRPA*. This Court has repeatedly held that the H&C process is designed not to eliminate the hardship inherent in being asked to leave after one has been in place for a period of time, but to provide relief from "unusual, undeserved and disproportionate hardship" caused if an applicant is required to leave Canada and apply from abroad in the normal fashion . . .

[16] The officer's role is to determine whether the applicant, who has the burden of proof, has established that the obligation to apply from outside Canada would cause him unusual and undeserved or disproportionate hardship.

Jurisdiction of the PRRA officer over an application based on humanitarian and compassionate reasons

[17] Considering that the application based on humanitarian and compassionate reasons included an allegation of risk of return, the matter was sent to the PPRA Unit on April 6, 2006 (Applicant's Record (DD), CIC Communication dated July 28, 2006, page 64).

[18] Mr. Potikha submitted that he had filed an application based on humanitarian and compassionate reasons and not an application for protection under sections 97, 112 or 113 of the IRPA, and therefore considered that his application should not have been transferred to the PPRA Unit for a risk assessment (DD, Applicant's Memorandum, page 88).

[19] In his application based on humanitarian and compassionate reasons, Mr. Potikha alleged, *inter alia*, in regard to Israel:

> … I WENT INTO HIDING, MOVING FROM ONE PLACE TO ANOTHER, UNTIL I WAS ABLE TO LEAVE ISRAEL WITH THE HELP OF SOME FRIENDS …
>
> … I SUFFERED IN ISRAEL, BEFORE MY DEPARTURE… I WAS BEATEN BY NATIVE ISRAELIS AND I LIVED MY TIME IN ISRAEL MOSTLY AS A FUGITIVE …
>
> … I WAS FORCED TO BECOME A CITIZEN UPON MY ARRIVAL WITHOUT MY OPINION…I DON'T EVER WANT TO RELIVE THE NIGHTMARE (sic) THAT I WENT THROUGH IN ISRAEL. I DON'T WANT TO BE SENT TO PRISON FOR REFUSING TO SERVE IN THE MILITARY OF A COUNTRY THAT I NEVER WANTED TO BELONG TO …

(DD, Supplementary Information – Humanitarian & Compassionate Cases, "3. Reasons for seeking exceptional consideration", page 30).

[20] Although not bound by the guidelines, the officer who referred the matter to the PPRA Unit, cannot be criticized for complying with the recommendations of the guidelines in Manual IP-5:

13.4. Referral to PPRA Unit	**13.4. Renvoi à l'unité ERAR**
Where, on the basis of the preliminary screening, or on the basis of the assessment of non-risk factors by the H&C officer, there are insufficient non-risk grounds for approval by the H&C Unit, and the applicant has claimed personal risk factors, the application is referred to the PPRA Unit.	Si, sur la base de l'examen préliminaire, ou sur la base de l'évaluation des facteurs autres que le risque par l'agent ERAR, on estime que les motifs autres que le risque ne sont pas suffisants pour justifier l'approbation par la section CH, and que le demandeur a présenté des facteurs détaillés de risque.

[21] The fact that Mr. Potikha qualified the allegations differently in his application based on humanitarian and compassionate reasons does not mean that they could not reasonably be considered to be allegations of risk.

[22] As Mr. Justice Simon Noël stated in *El Doukhi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1464, [2006] F.C.J. No. 1843 (QL):

> [26] Taking into account the **Applicant's own submissions** as to his risk of persecution, in my view **it is logical that the Officer would undertake an analysis as to whether the Applicant would face persecution** if returned to Lebanon . . .
>
> [Emphasis added.]

[23] The Court does not understand why Mr. Potikha would insist on limiting the risk assessment to only risk to life and criticize the respondent and his officers for wanting to ensure that the

application based on humanitarian and compassionate reasons be addressed as comprehensively as possible.

[24] Considering the excerpts of his application based on humanitarian and compassionate reasons, referred to above, as well as Mr. Potikha's clear submissions that any prison sentence for refusing to perform his military service would be persecutory, failing to refer the applicant's matter to the PPRA Unit could have been considered an error.

The respondent and his officers exercised their jurisdiction under section 25 of the IRPA

[25] When a matter is sent to the PPRA Unit, this does not amount to a refusal to exercise jurisdiction under section 25 of the IRPA, since the PRRA officer also proceeds with an analysis of the matter from the perspective of humanitarian and compassionate considerations.

[26] The Court has already held that the PRRA officers had the jurisdiction to assess applications based on humanitarian and compassionate considerations in *Zolotareva*, *supra*:

> [18] **In light of the above, it is clear that the PRRA Officer has jurisdiction to make a determination under subsection 25(1) of the Act.**
>
> [Emphasis added.]

(See also *Zolotareva*, *supra*, at paragraphs 12 to 17; *Krotov*, *supra*, paragraph 8; *Ageel*, *supra*, paragraph 9).

[27] Mr. Potikha was entitled to a thorough and complete assessment of his application, on the risks as well as on the humanitarian and compassionate considerations, and this could not have caused him any prejudice.

The applicant did not establish that he had not already performed his military service and did not file any evidence

[28] The PRRA officer assessed Mr. Potikha's allegations and determined that he had not established that he would be obliged to conform to military service (Reasons, "Section 3 Decisions and reasons" - "a. Risk Factors" - "Assessment", page 3).

[29] Mr. Potikha alleged that the PRRA officer should have given him the opportunity to file new evidence which was not available when his refugee claim was dismissed.

[30] First, Mr. Potikha did not state which documents he thought he could have submitted and did not.

[31] Indeed, it is clear that Mr. Potikha, although he disagreed, had known since July 2006, that the application based on humanitarian and compassionate reasons would be assessed by a PRRA officer because of the risks alleged.

[32] The fact that Mr. Potikha considers that his application should have been assessed by an officer solely on the basis of an application based on humanitarian and compassionate reasons

without allegations of risk does not change anything. He had to adduce evidence of the elements on which his allegations were based.

[33] At the heart of the hardships or risks in Israel alleged by Mr. Potikha is his refusal to perform his military service and the risk of having to serve a prison sentence.

[34] These hardships were alleged for the first time in a refugee claim which was refused, *inter alia*, because Mr. Potikha failed to establish that he had not already performed his military service (Reasons, *supra*).

[35] Mr. Potikha was aware that the lack of documents supporting his allegation to the effect that he had not performed his military service was significant, since it was one of the key factors of the RPD's negative finding.

[36] Mr. Potikha received a letter from a PRRA clerk dated May 15, 2007, informing him that he had to submit a new update and file the required documents (DD, pages 66 and 67).

[37] In the list of documents thus required, the statement "Any other document or information you may deem pertinent for your application" is marked with ☒, printed in bold letters, underlined and in a font size that is larger than the font of the rest of the document (DD, page 68).

[38] Mr. Potikha's situation is similar, *mutatis mutandis*, to the one described in *John v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 468, [2007] F.C.J. No. 634 (QL):

> [30] When dealing with the initial H&C application, the officer, who was not satisfied with the evidence submitted, specifically asked the applicant for the following additional information:
>
> > Please indicate what role you play in your daughter's life and how it is that you are supporting her. What role does her mother play in her life? It is imperative that you outline in detail the risk or hardship you will encounter if you had to go back to Grenada with supportive evidence. Please ensure that and all information you wish considered is provided.
>
> [31] Furthermore, when dealing with the second H&C application in question, the officer **asked the applicant to submit any document or information which could be relevant to his case. At that point, he could not ignore the specific request made on the occasion of the initial H&C application.**
>
> [Emphasis added.]

[39] Mr. Potikha was aware, following the RPD's decision in July 2004, that the documents establishing his military service situation were necessary to support his allegations. Also, he was given the opportunity to submit any document or information which could be relevant to his application based on humanitarian and compassionate reasons.

[40] The Federal Court of Appeal in *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.J. No. 158 (QL) states:

> [5] . . . Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. **Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.**
>
> [Emphasis added.]

[41] Mr. Potikha could not disregard the importance of establishing his military service status. Mr. Potikha has been alleging that he is fearful because of his military service since his refugee claim in January 2004, and has not, to date, filed any evidence in support of his allegation to the effect that he has not performed his military service.

The applicant has not established that he will face a prison sentence

[42] Mr. Potikha alleged that the officer refused to exercise his jurisdiction by [TRANSLATION] "refusing to assess the prison sentence that the applicant would face".

[43] This argument is unfounded. On reviewing the decision, it is clear that the officer assessed the issue of the prison sentence.

[44] Nevertheless, it is important to point out that **the officer determined that Mr. Potikha had not established that he would be obliged to perform his military service:**

> Assessment
>
> **It is still not a known if the applicant did or did not carry out his obligatory military service in Israel** …
>
> The allegations presented by the applicant in the present request for Examination from Immigrant Visa Requirement are the same than the ones presented before the IRB (i.e. please refer to the history of facts presented before the IRB). **Although the applicant was confronted by the IRB on the lack of proof regarding military service and employment, he did not provide any documents to support his allegation. Therefore, he did not establish that he will have to comply with military service** …
>
> Since the applicant did not provide documents establishing his allegations regarding the military service, I conclude that **he did not support his risks by liable and personal evidence**.

[Emphasis added.]

(Reasons, *supra*, pages 3 and 4).

[45] As Mr. Potikha did not establish the allegation at the basis of the alleged hardship or risks, the PRRA officer did not have to assess the issue of the prison sentence.

[46] Nevertheless, the PRRA officer continued his analysis and assessed Mr. Potikha's situation in the event that he were to have to complete his service and were to refuse to do so:

> . . . if the applicant did in fact have to accomplish his military service, the consequent hardship would not qualify as unusual and undeserved. It consists in a law of general application, for which the omission present himself would engendered a penalty that is not disproportionate in comparison to International standards.

(Reasons, *supra*, page 3).

[47] The Court notes that Mr. Potikha only refers to the first part of the paragraph from the reasons, but does not mention the last part which clearly states that the PRRA officer considered the possible refusal to perform military service, but determined that the prison sentence would result from a law of general application and that the sentence was not disproportionate in regard to international standards.

[48] The PRRA officer’s finding to the effect that Mr. Potikha did not establish a risk because he had not established that he had not performed his military service is based on the facts and is not unreasonable.

The officer did not rely on the RPD's decision

[49] Mr. Potikha alleged that the PRRA officer relied on the RPD's decision refusing his refugee claim.

[50] As specified in *Hussain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751 (QL), an application based on humanitarian and compassionate reasons is not an appeal of the RPD's decision:

> [12] . . . In my view, that is a mistaken view because **the officer who hears an H&C application does not sit in appeal or review of either the Refugee Board** or the PDRCC Officer's decision. Thus, on the H&C application, Mr. St. Vincent could not proceed on the basis that Mr. Hussain was an MQM member, given the Refugee Board's findings in that respect. **In short, the purpose of the H&C application is not to re-argue the facts which were originally before the Refugee Board, or to do indirectly what cannot be done directly -- i.e., contest the findings of the Refugee Board.**
>
> [Emphasis added.]

(See also: *Kouka v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1236, [2006] F.C.J. No. 1561 (QL), paragraph 26 to 28; *Nkitabungi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 331, [2007] F.C.J. No. 449 (QL), paragraph 8; *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2001] 189 F.T.R. 118, [2000] F.C.J. No. 1365 (QL), paragraph 27; *Herrada v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1003, [2006] F.C.J. No. 1274 (QL), paragraph 38).

[51] Further, in *Nkitabungi*, *supra*, the Court recognized that the PRRA officer could refer to the RPD's findings:

> [8] The Officer could also have referred to the Board's earlier findings concerning the applicant's credibility. . . . Moreover, **an immigration officer who reviews an application on humanitarian and compassionate grounds does not sit in appeal or review of the Board** (*Hussain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751 (F.C. Trial Division) (QL) at para. 12; *Kouka v. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2006 FC 1236 at para. 27).
>
> [Emphasis added.]

[52] The PRRA officer noted that Mr. Potikha's allegations of risk were the same as those that he had submitted before the RPD (Reasons, *supra*).

[53] The PRRA officer then stated that Mr. Potikha had still not submitted any evidence in support of his allegations and therefore had not established that he would be faced with the obligation to perform his military service.

[54] In other words, Mr. Potikha did not provide the RPD or the PRRA officer with any evidence establishing that he had not performed his military service. It is therefore reasonable that, under the circumstances, the PRRA officer independently arrived at the same finding as the RPD.

Assessment of humanitarian and compassionate considerations

[55] As factors for humanitarian and compassionate considerations, aside from the issue of military service and all that results therefrom, Mr. Potikha only mentions the fact that he does not have any family in Israel (DD, Supplementary Information, above, page 30).

[56] Mr. Potikha does not specify, in his allegation, how the PRRA officer improperly assessed the application in accordance with PRRA requirements rather than those applicable to an application based on humanitarian and compassionate reasons.

[57] The PRRA officer, having determined that Mr. Potikha had not established that he would have the obligation to perform his military service, therefore determined that Mr. Potikha had simply not established that the unusual and undeserved or disproportionate hardship (or risks) that he was alleging existed in regard to the military service.

[58] Indeed, under the heading “Links and integration”, the PRRA officer assessed the integration factors and Mr. Potikha’s links with Canada (Reasons, “Section 3 Decisions and reasons” - “b. Links and integration” page 5).

[59] The officer considered the fact that Mr. Potikha had salaried employment and that the documents filed indicated that he was financially independent.

[60] While considering that this was a positive factor, the PRRA officer determined that Mr. Potikha had not established that these circumstances were such that he would face unusual and undeserved or disproportionate hardship if he were to apply for residence from outside Canada.

[61] Further, the officer considered as a negative element the fact that Mr. Potikha had continued to work despite the fact that his employment authorization had expired on March 31, 2007, and that he had not applied to renew it, violating the IRPA.

[62] Indeed, the PRRA officer noted that, while Mr. Potikha did not have any family in Israel, he did not have family in Canada, either.

[63] Mr. Potikha did not meet his burden of proof of establishing that there were humanitarian and compassionate considerations justifying this exemption from the obligation to apply from outside Canada.

[64] Mr. Potikha did not establish how the PRRA officer's decision on the humanitarian and compassionate considerations was unreasonable.

CONCLUSION

[65] For all of these reasons, this application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serous question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2563-07
STYLE OF CAUSE:	ALEX POTIKHA v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 22, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATE OF REASONS:	February 5, 2008

APPEARANCES:

Lucrèce M. Joseph	FOR THE APPLICANT
Patricial Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LUCRÈCE M. JOSEPH, avocat Montréal, Quebec	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT