Federal Court  Cour fédérale

Date: 20091103

Docket: IMM-1044-09

Citation: 2009 FC 1125

Ottawa, Ontario, November 3, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PREMNAUTH PREMNAUTH
NALENE PREMNAUTH, and
ANDENA PREMNAUTH

Applicants

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 (Act) for judicial review of the negative decision of an Immigration Officer (Officer), dated February 6, 2009 (Decision), which refused the Applicants' application for permanent residence within Canada on humanitarian or compassionate grounds pursuant to section 25(1) of the Act.

BACKGROUND

[2] The Applicants are a husband and wife, and their daughter. They are citizens of Guyana. They came to Canada from Guyana and claimed refugee status in 2002. Their claim was based on attacks and threats experienced by Premnauth, the Principal Applicant, in the course of his work. An oral hearing took place before the Refugee Protection Division (RPD) on April 28, 2004. The RPD rendered a negative decision on June 18, 2004, finding that state protection was available to the Applicants in Guyana. The Applicants say they did not file an application for leave and judicial review of the RPD decision because their counsel at the time did not advise them of this possibility. The Applicants retained the same counsel to file an H&C application in 2004, which was not filed until 2007.

[3] In 2007, the Applicants filed a PRRA application with different counsel. This application was refused on January 21, 2009, and their application for leave and judicial review is in progress in Court File IMM-1039-09.

[4] The Applicants then retained their current counsel and filed further submissions and evidence pertaining to their 2007 H&C application. The Applicants' H&C application was based on their establishment in Canada and the hardship they would experience if returned to Guyana. The H&C application was rejected on February 9, 2009.

DECISION UNDER REVIEW

[5] The negative H&C Decision determined that the Applicants would not suffer unusual and undeserved or disproportionate hardship if they returned to Guyana to file their application for permanent residence.

[6] The Officer in this instance is the same officer who considered the Applicants' PRRA application. The Officer distinguishes between the H&C application and the PRRA application by determining that the Applicants' risk in a section 25(1) application is considered in the context of hardship.

[7] The Officer accepts the Applicants' account that Premnauth, the Principal Applicant, was a truck driver who was assaulted by criminals when he refused to follow their orders to deliver a package. When he went to report this incident at the local police station, he found bandits shooting at the police. Premnauth returned to the police station to report the incident, but was informed by the police that they were unable to investigate due to their limited means. The Applicant later received numerous threatening phone calls.

[8] In addition to the story recounted by the Applicant, the Officer considered the country conditions in Guyana. The Officer noted that crime, corruption, and racial tensions are rampant in Guyana. However, she found that the Applicants had not proven this risk to be personal.

[9] The Officer conducted independent research into the country conditions of Guyana and found that the government had adopted numerous measures to combat crime and corruption.

[10] The Officer recognized that the Applicants have maintained steady employment in Canada. They have been financially successful and have established their own business. The Officer noted the Applicants' financial independence but found that "the applicants have received due process in the refugee program and therefore a measure of establishment and integration is expected." The Officer found that the Applicants had not shown that they could not achieve similar financial success upon returning to Guyana.

[11] The Officer determined that the risk of loss of assets is common to all who are in Canada without permanent resident status. Furthermore, the Applicants assumed this risk when they chose to buy assets prior to obtaining status.

[12] The Officer was not unconvinced that the Applicants' stay in Canada was due to "circumstances beyond their control," since they could have left Canada after the denial of their 2004 refugee claim.

[13] The Officer acknowledged the letters of support provided by the Applicant's family and friends. She also noted the existence of close family in Canada, including the Female Applicant's mother who depends on the Applicants for transportation and support.

[14] The Officer found that the Applicants had already left family and friends when leaving Guyana. Consequently, they had "already experienced the emotions surrounding familial separation."

[15] The Officer recognized that the Applicants had made many friends in Canada, but was not convinced that similar relationships could not be established in Guyana. As such, she did not believe that the Applicants would experience unusual and undeserved or disproportionate hardship by severing their community and employment ties in Canada.

ISSUES

[16] The Applicant submits the following issues on this application:

1. Whether the Officer incorrectly conflated the legal tests for PRRA and H&C applications, and so ignored evidence of risk and associated hardship;
2. Whether the Officer rendered an unreasonable determination and breached natural justice with respect to the hardship to Nalene Premnauth's mother;
3. Whether the Officer failed to assess the Applicants' establishment or, alternatively, unreasonably characterized the Applicants' establishment as insufficient;
4. Whether the Officer rendered an unreasonable decision and applied the wrong legal test by rejecting the hardship of the Applicants as being "not beyond their control."

STATUTORY PROVISIONS

[17] The following provision of the Act is applicable in these proceedings:

Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

STANDARD OF REVIEW

[18] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness

standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[19] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] The question of whether an officer applied the correct test in assessing risk in an H&C application is a question of law, and is reviewable on the standard of correctness: *Zambrano v. Canada (Minister of Citizenship and Immigration),* 2008 FC 481. Accordingly, when deciding whether the Officer conflated the legal tests for the PRRA and H&C applications, the appropriate standard of review is correctness.

[21] In reviewing the Officer’s application of the legal test to the facts of the present case, the proper standard is reasonableness. See *Dunsmuir* at paragraph 164.

[22] A standard of correctness is the appropriate standard for the review of issues involving procedural fairness and natural justice. See *Lak v. Canada Minister of Citizenship and Immigration*, 2007 FC 350 at paragraphs 5 and 6. As such, in considering whether the Officer breached procedural fairness in her consideration of the hardship experienced by the Applicants' mother, the appropriate standard is one of correctness.

[23] The last two issues of this case will be examined on a standard of reasonableness, as they are discretionary decisions based on the particular facts of the case: *Dunsmuir* at paragraph 51. Accordingly, a standard of reasonableness is appropriate in considering whether the Officer erred in determining the Applicants' establishment in Canada, and in considering whether or not the Applicants' hardship was beyond their control.

[24] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

[25] The Applicants submit that the Officer incorrectly fused the legal tests for the PRRA and the H&C applications. This resulted in an insufficient consideration of the Applicants' risk and related hardship. The Applicants say they established an evidential basis for both an individual and a generalized risk, and both of these risks must be assessed for a reasonable H&C result. The Applicants' individual risk is based on the past assaults and threats experienced by the Principal Applicant and the continued threats to him. The Applicants' general risk is demonstrated by the Applicants' fear of the volume of crime in Guyana. This risk is exacerbated by racial tensions.

General risk

[26] The Officer failed to consider the general risk the Applicants would face upon their return to Guyana. Instead, the Officer demanded that this risk be individualized as required by a PRRA. The Applicants contend that exposure to generalized risk may fulfill the requirements for an exemption under 25(1). The Officer erred by failing to adequately assess this risk. While poor country conditions may not be a determinative factor in an H&C application, they may still be a relevant factor to consider. See *Mooker v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 518.

[27] The Officer acknowledged that “crime and corruption is rampant in Guyana.” Consequently, the Applicants submit the Officer should have considered whether exposure to rampant crime constitutes an unusual and undeserved or disproportionate hardship.

Individualized risk

[28] The Applicants’ fear of returning to Guyana is based on the ongoing threats they face. The Officer dismissed this risk because of a recognition that Guyana has implemented initiatives to reduce crime.

[29] The Applicants contend that a finding of state protection was not sufficient to counter the hardship they would face upon return to Guyana. The Officer erred by denying the H&C application without considering whether the Applicants’ fear constitutes an unusual and undeserved or disproportionate hardship.

[30] The Applicants rely on *Pacia v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 804, which determined that a finding of state protection does not absolve an officer of the duty to determine whether an applicant faces unusual and undeserved or disproportionate hardship. In the case at hand, the Officer made a finding of state protection and ended the analysis at this point. Based on *Pacia*, this constitutes a legal error.

State Protection

[31] The Officer's finding of state protection did not address the Applicants' individualized risk. The Applicants contend that state protection is a "function of the risk feared" and must be applied to their personalized risk. *R.M.P v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 83 at paragraph 21) (*Pech*) determined that in the context of the threat faced by an applicant, "no amount of police protection may be able to stop this Colonel from his fanatical and psychopathic pursuit of the applicant" (*Pech* at paragraph 32). Accordingly, the Officer must undertake an examination of the extent to which the available protection will actually reduce the risk of harm, and hence hardship, to the Applicants.

[32] The Officer's determination of state protection was made without regard to the totality of the evidence. For instance, the Officer cited and relied on the United States Department of State Report for Guyana for 2007 which concluded that police corruption, human rights abuses, and unlawful killing by the police remain significant problems in Guyana. The Applicants submit that the Officer ignored their evidence of risk and associated hardship and focused instead on the few pieces of evidence that supported her conclusion.

Breach of procedural fairness and natural justice

[33] In determining an H&C application, an officer must consider not only an applicant's hardship, but also the hardship that may arise for any other affected person. See, for example,

Malekzai v. Canada Minister of Citizenship and Immigration, 2004 FC 1099 and *Fernandez v. Canada Minister of Citizenship and Immigration*, 2005 FC 899. Moreover, the IP 5 — Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds Manual (IP5 Guidelines) states at section 12.4 that an H&C officer ought to consider the "impact on family members…if the applicant is removed."

[34] The Applicants provided evidence that both they and their extended family would experience serious hardship upon their departure due to emotional and social inter-dependence. Specifically, the Applicants were concerned about seeing their mother, a Canadian citizen with numerous illnesses, on a regular basis.

[35] The Officer erred by improperly relying on the Applicants' previous separation from family in Guyana to mitigate the impact of this new separation. It was an error to determine that the Applicants' previous separation from their family in Guyana would minimize the hardships experienced by the Applicants in separating from their Canadian family. This finding was based on the erroneous presumption that the nature and importance of the Applicants' relationships in Guyana are equal to those in Canada.

[36] Similar reasoning has been rejected by the Federal Court in *Ebonka v. Canada Minister of Citizenship and Immigration*, 2009 FC 80. In *Ebonka*, the officer discounted the hardship created by the separation of the applicant from his wife in Canada because he had previously been separated

from his children and his mother in Nigeria. At paragraph 25 of this decision, the Court found as follows:

> The officer's reliance on the applicant's separation from these children that he barely knows, and from his mother, a relationship about which there is no evidence on the record, as the basis for his finding that the separation from his wife would not pose unusual hardship was not reasonable, and shows that the officer did not give regard to the particular circumstances of the applicant.

The Applicants submit that the improper reasoning used in the *Ebonka* case is similar to the Officer's reasoning in this case.

Credibility

[37] The Principal Applicant provided an unchallenged affidavit that explained the care that the Applicants provide for their mother. The Applicants submit that without this care she would be forced to move into a nursing home. Nevertheless, the Officer concluded that insufficient evidence had been presented that the Applicants' mother required the Applicants' assistance to care for her.

[38] The Applicants contend that the Officer's finding of "insufficient evidence" in this instance was a finding of credibility. The Officer's conclusion had no evidentiary basis and was contradicted by their evidence. The Applicants contend that an interview was required because credibility was determined to be a central issue in this case. As such, the Officer's failure to provide an interview constituted a breach of procedural fairness and natural justice. See, for example, *Shafi v. Canada*

Minister of Citizenship and Immigration, 2005 FC 714 and *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535.

No ability to return

[39] The Applicants submit that the Officer's Decision was made on the assumption that they would be permitted to return to Canada. However, they are subject to deportation orders and they say they will not be allowed to return to Canada. The Applicants cite and rely on paragraph 64 of *Malekzai* in which Justice O'Keefe held that: "where the officer's justification for refusing an application is grounded in the possibility of certain events, those events must not merely be illusory." The Applicants contend that the possibility of their returning to Canada is illusory, and is not realistic on the evidence before the Officer.

[40] Even if they are allowed to return, the Applicants submit that the Officer acted unreasonably in forcing them to leave Canada. The Applicants contend that it is futile to remove them from Canada only to return them if their application is approved. Such a procedure "fails to take into account the pain, dislocation and emotional toil entailed in any removal" (*Benjamin v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 582).

Improper assessment of the Applicants' establishment

[41] The Applicants submit that they meet the establishment criteria set out in the IP5 Guidelines. They say they demonstrated a high degree of establishment, including employment, the presence of close family, and financial establishment. Regardless, the Officer found their establishment to be insufficient.

[42] The Applicants rely on *Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804, in which an officer unreasonably minimized the establishment factor. The Applicants compare the facts of *Jamrich* to their own circumstances and contend that their establishment is at least equal to, if not greater than, that established in *Jamrich*.

Incorrect consideration

[43] The Officer erred in rejecting the Applicants' hardships by determining that they were not undeserved. The Officer focused on the Applicants' decision to enter and remain in Canada to dismiss their establishment in Canada as illegitimate.

[44] The Officer committed an error in dismissing the Applicants' hardship as being justifiable because it was not "undeserved." Even if the hardship was not "undeserved," it could still be "disproportionate."

[45] Moreover, an officer must still consider establishment even where it is acquired without status. See, for instance, *Laban v. Canada Minister of Citizenship and Immigration*, 2008 FC 661. The Officer erroneously focused on whether or not the hardship to the Applicants was "deserved," and consequently ignored evidence that supported a positive finding.

[46] The Applicants also say that the Officer's assessment of the Applicants deserving the hardship ignores the fact that they came to Canada due to factors beyond their control, namely, the threats they were experiencing in Guyana. The Applicants then remained in Canada because of these ongoing threats, as well as to care for their ailing mother.

The Respondent

[47] The Respondent says that the Officer's assessment of the H&C application included a proper examination of the Applicants' risk. The risk in this instance was considered in the context of the amount of hardship it would cause.

[48] The Applicants did not address hardship in their written H&C submissions, but included instead a portion of the Principal Applicant's affidavit. Consequently, the evidence before the Officer did not demonstrate why the Applicants' alleged risks met the threshold of being unusual and undeserved or disproportionate.

[49] It is the Applicants' onus to establish the facts on which their claim rests, and an Officer need not make determinations on anything beyond the material provided by an applicant. See, for example, *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paragraphs 8-9, *Oyinloye v. Canada (Minister of Citizenship and Immigration*, 2007 FC 582 at paragraphs 12-13, and *Raji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 653.

Generalized risk

[50] The Officer noted the Applicants' submission of a common fear shared by people of East Indian descent in Guyana. However, she was not satisfied that the risks alleged by the Applicants were personalized. The Federal Court has held that the allegations of risk made within an H&C application must relate to a risk that is personal to an applicant: *Lalane v. Canada (Minister of Citizenship and Immigration*, 2009 FC 6 at paragraphs 1, 38 and *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 138 at paragraph 39. It was the Applicants' burden to establish the link between the evidence of risk and their personal situation.

[51] The Federal Court determined in *Ramotar v. Canada (Minister of Citizenship and Immigration*), 2009 FC 362, that a personalized risk is necessary in the instance of Indo-Guyanese returning to Guyana:

> All Indo-Guyanese face the same threat of crime upon their return from Canada to Guyana. Accordingly, it was reasonably open to the immigration officer to decide that the applicants would not face "unusual or disproportionate hardship" compared to all Indo-Guyanese sent home from Canada after a failed refugee claim. An H&C finding otherwise, would "open the floodgates" as submitted

> by the respondent, in that all Indo-Guyanese would overstay their legal status in Canada and file an H&C application on the basis that they face a likelihood of "hardship" if returned to…Guyana.

[52] The Applicants failed to establish the link necessary to demonstrate a personalized risk based on the high crime rate, corruption and ethnic tensions that exist in Guyana.

Individualized risk

[53] In her assessment, the Officer considered the Applicants' circumstances, including the Principal Applicant's assault, the police's inability to investigate, and the threatening phone calls.

[54] The Applicants presented the Officer with risk allegations from the Principal Applicant's PIF, but made no submission as to why their risk constituted unusual and undeserved or disproportionate hardship. It is the Applicants' onus to establish the correlation between their risk and hardship.

State Protection

[55] The Respondent also submits that the Officer was correct in her consideration of state protection. In fact, it was the Applicants who raised the concern of state protection. The Applicants did so by submitting that their fear was based on a lack of police and government protection. The Officer's consideration of state protection was reasonable because it mitigated the Applicants' alleged hardship.

[56] The Officer noted the existing efforts to mitigate crime and corruption in Guyana. In her assessment, the Officer found sufficient evidence to support a finding of adequate state protection. The Officer was correct in her approach to this assessment - adequacy is the appropriate threshold to consider for state protection. See *Mendez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 584 at paragraph 23, *Flores v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 723 at paragraphs 10-11, and *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94.

Hardship to mother-in-law

[57] The Respondent submits that the Officer considered the hardship to the Principal Applicant's mother-in-law. The Officer noted that the Applicants supply transportation for their mother to appointments and errands. However, the Applicants did not show that their mother would be unable to arrange alternate transportation.

No credibility determination

[58] The Officer's finding of insufficient evidence regarding the mother-in-law's hardship did not constitute a negative assessment of the Applicants' credibility. As was determined in *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at paragraphs 16, 21-27, the assessment of sufficiency of evidence and credibility are distinct and separate. Accordingly, assigning weight to evidence should not be mistaken for an assessment of credibility.

[59] The Applicants did not provide sufficient indication or evidence as to why their mother would experience hardship. According to *Ferguson* at paragraph 27, "[i]f there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities." In such situations, a decision maker is not making a credibility assessment of the person giving the evidence, but is simply finding that the evidence itself does not have sufficient probative value (*Ferguson* at paragraph 27).

Reasonable assessment of establishment

[60] The Officer conducted a thorough assessment of the Applicants' evidence of their establishment in Canada and determined that their degree of establishment did not reach the threshold to justify a statutory exemption.

[61] The Applicants feel that they have met all the issues in the establishment component of an H&C application. However, this does not entitle them to a positive outcome. Establishment is just one of the factors to be considered in an H&C assessment. As long as the Officer sufficiently considered all factors relevant to an H&C application, it is not the Court's role to interfere with the weight the Officer chose to assign to these factors: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paragraph 11.

[62] In this case, the Officer properly weighed the establishment factor along with the other factors necessary to make a reasonable decision.

Reasons are not beyond their control

[63] The Officer did not err in her consideration of the Applicants' control of their circumstances. The Respondent cites and relies on paragraph 5.21 of IP5 Guidelines which states that "positive consideration may be warranted when the applicant has been in Canada for a significant period of time due to circumstances beyond the applicant's control." According to the Guidelines, circumstances beyond an applicant's control can combine with a significant degree of establishment in Canada to result in a favourable H&C decision. However, this is a high threshold to meet.

[64] The Applicants have been in Canada since 2004, despite a finding that they would not be at risk upon return to Guyana. Accordingly, the Officer identified properly that the Applicants chose to remain in Canada.

[65] Moreover, the Federal Court has determined that applicants who establish themselves while remaining illegally in Canada for numerous years have a heavier onus to prove that they should be given exceptional relief: *Chau v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 107 at paragraphs 16-17. The Applicants face this heightened onus due to their illegal presence in Canada.

ANALYSIS

[66] The Applicants have raised many issues in an attempt to demonstrate that the Decision is unreasonable and that the H&C process was procedurally unfair. In the end, the grounds they raise depend upon a particular reading of the Decision that, in my view, is not supported by close inspection and a consideration of the reasons as a whole.

Incorrectly Conflating Tests for PRRA and H&C

[67] The Applicants assert that exposure to generalized risk can be a hardship even if it might exclude the Applicants under section 96 and 97. I agree. However, the Officer does not neglect to consider whether generalized risk is an unusual and undeserved or disproportionate hardship for the Applicants. She merely says that the evidence submitted by counsel for the Applicants "does not satisfy me that the risks are personal." This occurs in a context where the Officer is examining "their personal circumstances and the evidence before [her] to determine if the risk justifies an exemption under humanitarian and compassionate considerations."

[68] The personal circumstances of the Applicants (and the risks they have faced in the past) are addressed in detail. The Officer is merely saying that the additional evidence adduced by counsel deals with "general country conditions." The hardships that the Applicants will face as a result of these general conditions are not ignored or discounted. Rather, the Officer is simply characterizing

the evidence for the purpose of deciding whether those general hardships can “amount to unusual and undeserved or disproportionate hardship” for the Applicants.

[69] The Officer also goes into considerable detail about what the Applicants have faced in the past and acknowledges their evidence that “people of East Indian decent live in constant fear for their lives from the Indo Guyanese.” The Officer does not ignore or discount these factors in considering hardship, or because state protection exists. What is more, the Officer goes into detail that indicates she considered the effectiveness of state protection, an issue that was also examined in the Applicants’ refugee and PRRA claims.

[70] I see nothing in the Decision to suggest that the Officer has conflated the tests and has not fully considered the personal circumstances of the Applicants in the context of the general risks and hardships faced by people of East Indian decent in Guyana.

Unreasonable Determination vs. Breach of Natural Justice

[71] The Applicants argue that their previous separation from family in Guyana does not mean that they will not suffer hardship if they leave Canada. This concern grows out of the Officer’s comment that “[w]hile I acknowledge the applicants have family in Canada, I note that they left family and friends when they decided to flee Guyana and come to Canada. As such, I find the applicants have already experienced the emotions surrounding familial separation.”

[72] I do not read this as saying that previous separation from family in Guyana means that there will not be hardship on leaving Canada. The Officer fully acknowledges the hardship the Applicants will face on leaving Canada, but points out that they have faced family separation before and have shown that they can cope with it.

[73] It is also clear from a reading of the Decision as a whole that the Officer does not make a credibility finding. In particular, the Applicants point to the uncontradicted affidavit from Premnauth stating that the Applicants provide regular care and companionship to Nalene's mother and that the mother depends on them for this care, failing which she will likely have to move into a nursing home.

[74] The affidavit in question provides the following evidence:

> My wife's mother, Parbattie Ramootar, sixty (66) years old, is also a Canadian citizen. She lives close to us in Scarborough and is dependent on us in many ways. As a diabetic we drive her to her many doctor's appointments and to purchase her medications. We also take her to run her errands such as taking her grocery shopping. If we were made to leave Canada, I verily believe that my mother-in-law would have to move to a nursing home, which our family can not afford. In addition, because she is so close to my wife, there will be a great degree of emotional hardship between the families if our separation is effected by CBSA. My mother in law is getting older and if we are removed from this country, I don't think that we will ever be able to come back to see her if her health worsens and she passes away.

[75] The Officer addresses this evidence as follows:

> The principal applicant states that the mother-in-law is dependent upon him and his wife in that they drive her to doctor's appointments and to purchase medications. However, I note the applicants have

> provided insufficient evidence to establish that the principal applicant's mother-in-law could not attend her appointments and purchase her medication in a different manner.

[76] The Officer also addressed the emotional aspects of separation.

[77] As the Respondent points out, this Court has outlined a principled approach to the issue of credibility versus sufficiency of evidence. See *Ferguson* at paragraphs 16, 21-27.

[78] In his affidavit, the Principal Applicant presented evidence of what he believes and thinks will happen to his mother-in-law. Those beliefs are never questioned by the Officer. They are subjective states of mind that the Officer does not doubt. But subjective opinions are not enough. The Officer also requires the evidence to demonstrate whether the Principal Applicant's beliefs can be objectively verified. The credibility of the Principal Applicant is not questioned. The Officer simply points out that there is insufficient objective evidence on the situation of the mother to demonstrate the full extent of the dependency.

[79] In my view, no credibility finding was made in this case. The concern was sufficiency of evidence. No interview was required and there was no breach of procedural fairness.

Ability to Return to Canada

[80] The Applicants complain that the Officer based her Decision upon a conclusion that the Applicants could apply to return to Canada from Guyana, and the evidence demonstrated that this is not a realistic possibility for the Applicants.

[81] In their submissions to the Officer, the Applicants pointed out that it was their view that they would not qualify for permanent residence under the Act.

[82] They also pointed out that the mother is dependent upon them. Their point is that it would be highly unlikely that they would be allowed to return to visit the mother because they will be barred for life as persons subject to deportation orders unless they are able to obtain an Authorization to Return from the Minister pursuant to section 52 of the Act.

[83] The Applicants now say that the possibility of their returning to Canada is illusory, and they point the Court to a line of cases where the Court has found a reviewable error because of certain assumptions that Officers have made about the right to return. See *Maleksai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1099; *Arulraj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 529; *Shchegolevich v. Canada (Minister of Citizenship and Immigration)* 2008 FC 527; and *Raposo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 118.

[84] I have reviewed the cases carefully and it seems to me that the Officer in this case did not make the same kind of finding that underlies such decisions. For example, in *Malekzai*, Justice O'Keefe dealt with a situation where "the H&C Officer did not take into consideration the potential inadmissibility of the applicant when assessing the best interest of the applicant's Canadian-born child."

[85] In the present case, the equivalent dependent would be the Applicant's mother. But in relation to the mother, the Applicants' ability to return was not an issue because the Officer found that there was insufficient evidence to support the dependency and, in particular, "to establish that the principal applicant's mother-in-law could not attend her appointments and purchase her medication in a different manner."

[86] This is not a case where the Officer based her Decision upon an assumption that the Applicants would be able to get back into Canada to look after their mother.

[87] The Applicants also urged the Officer to consider their view that, if sent back to Guyana, they would not be able to return to Canada because they cannot qualify under any program that will lead to permanent residence.

[88] However, the Applicants do not seem to be aware that an H&C exemption does not grant them permanent residence. The Officer was simply deciding whether the Applicants should apply in

the usual way outside of Canada, or whether they should be allowed to apply from within Canada. The Officer was not called upon to decide whether they will qualify or not for permanent residence.

[89] I see nothing in the Decision to suggest that the Officer assumed that the Applicants could return to Canada, either permanently or temporarily. She merely found that they should apply in the usual way.

Establishment Issues

[90] It is clear that the Officer considered all aspects of the Applicants' establishment in Canada and found that she was "not satisfied that their establishment is to such a degree that if compelled to apply in the normal manner it would result in their experiencing unusual and undeserved or disproportionate hardship."

[91] Essentially, on this point, I have to agree with the Respondent that the Applicants are really asking the Court to reweigh the evidence and reach a different conclusion from the Officer that is favourable to them. That is not the role of the Court on review.

[92] I do not think it was inappropriate for the Officer to take into account the fact that the Applicants chose to stay in Canada: "[t]he Applicants could have left after their refugee claim was denied in June 2004, almost five years ago." The Applicants may well have had good reasons for

staying in Canada, but this does not mean that they remained in Canada due to circumstances beyond their control.

Conclusions

[93] I can see that the situation the Applicants find themselves in is very difficult because of what they face in Guyana and because of their establishment and family situation in Canada. I can also see that it is possible to take issue and disagree with the Officer's conclusions. It seems to me that a decision in favour of the Applicants would have been reasonable. However, I cannot say that the Officer's Decision was incorrect or unreasonable. I have carefully reviewed the concerns and issues raised, and although I have great sympathy for the Applicants, I cannot say that the Decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-1044-09
STYLE OF CAUSE:	PREMNAUTH PREMNAUTH, NALENE PREMNAUTH, and ANDENA PREMNAUTH v. THE MINISTER OF CITIZENSHIP AND MMIGRATION
PLACE OF HEARING:	TORONTO, ON
DATE OF HEARING:	September 30, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	November 3, 2009

WRITTEN REPRESENTATIONS BY:

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Leanne Briscoe	FOR THE RESPONDENT

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