Federal Court  Cour fédérale

Date: 20120208

Docket: IMM-3344-11

Citation: 2012 FC 179

Ottawa, Ontario, February 8, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOAO GUILHERME RIBEIRO GADELHA
SIMAS REIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of a Senior Immigration Officer (Officer) dated 27 April 2011 (Decision) in which the Officer denied the Applicant's request for an exemption on humanitarian and compassionate (H&C) grounds under subsection 25(1) from the requirement under subsection 11(1) to apply for permanent residence from outside Canada.

BACKGROUND

[2] The Applicant is a thirty-year-old citizen of Brazil. He is homosexual and has been living in Canada since 1998. He originally entered Canada on a visitor's visa to study at York University, but discontinued his studies there in 2002. The Applicant's visa expired in 2003, but he stayed in Canada without authorization.

[3] The Applicant has family in Brazil, including his mother, an aunt, and three cousins. He says he is estranged from his mother because she does not accept his homosexuality. His father is deceased. The Applicant also has a number of family members in Canada, including an aunt, uncle, and two cousins, one of whom is his godchild. He also has many friends in Canada. The Applicant wants to stay in Canada so he can remain connected with his family and community here.

[4] On 21 May 2010, Citizenship Immigration Canada (CIC) received the Applicant's request for an exemption under subsection 25(1) of the Act and the Officer considered his request. In reasons dated 27 April 2011, the Officer denied his request for an exemption. She said that the elements of the Applicant's request were not sufficient to establish that he faced unusual and undeserved or disproportionate hardship if he were required to apply for permanent residence from outside of Canada. The Officer notified the Applicant of her Decision by letter dated 27 April 2011.

DECISION UNDER REVIEW

[5] The Officer began her analysis by clarifying the question before her. She said that the purpose of the assessment was to determine if the Applicant would suffer unusual and undeserved or disproportionate hardship if he were required to apply for permanent residence from outside Canada and comply with the ordinary requirements for permanent residence. She also said that the Applicant bore the onus of demonstrating hardship.

[6] The Officer noted that the Applicant had arrived in Canada in 1998 and that he had overstayed his visitor's visa. He grounded his claim in the hardship that would result from the severance of his ties to his family and community in Canada if he returned to Brazil. He also asserted that he had no ties to Brazil and would face financial hardship there.

[7] Though the Applicant was admitted on a visitor's visa to study at York University, the Officer found that his studies, which were intermittent, had not led him to employment. He had become a Certified Reiki Master, though his certification was not from a recognized institution and he had not provided evidence to show that he had established himself as a practitioner. The Officer gave little weight to the Applicant's certification, which he acquired in 2009.

[8] With his request for an exemption, the Applicant had submitted income tax determination statements from 2000 to 2009. The Officer noted that these had all been filed with the Canada Revenue Agency between September 2009 and March 2010. She noted that he had a good credit history and savings of approximately $18,000. The Officer found that the Applicant had been self-supporting during his time in Canada, but that his earnings had always been below the low-income cut-off for a single person in Canada.

[9] The Officer also examined the Applicant's family ties in Brazil and Canada. He said he had no connection to his Brazilian family because his father and grandmother are dead. The Officer noted that his mother had visited him from Brazil in 2003 and 2006, after he said their relationship broke down because of his sexuality. She also noted that he had provided thirteen letters of support from family and community members. The Officer acknowledged that it would be difficult for the Applicant to sever ties with his family and community in Canada, but she also said that there was an indication he had some extended family in Brazil. The Officer was not satisfied that these factors would amount to unusual and undeserved or disproportionate hardship if he were returned to Brazil.

[10] During his time in Canada, the Applicant has been involved with a number of organizations, including the Metropolitan Community Church in Toronto and Al-Anon – an organization for family members of alcoholics. He also worked with a life-coach, who said in a letter to the Officer that an interruption in the Applicant's work with Al-Anon would cause him harm. The Officer said that the Applicant had not asserted separation from these organizations as a hardship he would face. Further, he had not adduced evidence showing that similar institutions did not exist in Brazil, so the Officer found that separation from these organizations would not amount to unusual and undeserved or disproportionate hardship.

[11] The Officer found that the Applicant had been living alone in Canada and lived alone when he attended high-school in Brazil. Though he said his mother in Brazil had relocated and, if returned, he would not live near her, the Officer found that his mother's relocation would not negatively affect the Applicant's ability to reintegrate into Brazil.

[12] Though the Applicant had gained proficiency in both of Canada's official languages and had become involved in his community, the Officer found that this level of establishment was normal,

given the length of his stay in Canada. The Officer also pointed out that his establishment was a direct result of his non-compliance with Canada's immigration laws when he overstayed his visa.

[13] The Officer concluded that the Applicant was similarly situated to others who must apply for permanent residence from abroad. She found that the elements of his request were not sufficient to establish unusual and undeserved or disproportionate hardship and denied his request for an exemption.

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable in this proceeding:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	**…**
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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	**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, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il

any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

ISSUES

[15] The Applicant raises the following issues in this application:

a. Whether the Officer breached his right to procedural fairness by:

i. providing inadequate reasons;

ii. denying him a fair hearing by not granting an interview;

iii. fettering her discretion;

iv. refusing to exercise her jurisdiction under subsection 25(1) of the Act.

b. Whether the Officer breached his equality rights under subsection 15(1) of the *Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982* (UK) 1982, c.11 and his right to life, liberty, and security of the person under section 7 of the Charter;

c. Whether the Officer applied the incorrect test for an H&C exemption;

d. Whether the Decision was unreasonable.

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a 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.

[17] Recently, the Supreme Court of Canada held in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible, acceptable outcomes." (paragraph 14). The adequacy of the Officer's reasons will be evaluated along with the reasonableness of the Decision as a whole.

[18] The Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review with respect to the first set of issues is correctness.

[19] In *Sahota v Canada (Minister of Citizenship and Immigration)* 2011 FC 739, Justice Michael Phelan held at paragraph 7 that the application of the proper legal test is reviewable on the standard of correctness. See also *Garcia v Canada (Minister of Citizenship and Immigration)* 2010

FC 677 at paragraph 7 and *Markis v Canada (Minister of Citizenship and Immigration)* 2008 FC 428 at paragraph 19. The standard of review with respect to the third issue is correctness.

[20] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39, the Supreme Court of Canada held that when reviewing an H&C decision, "considerable deference should be accorded to immigration Officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language" (paragraph 62). Justice Phelan followed this approach in *Thandal v Canada (Minister of Citizenship and Immigration)* 2008 FC 489, at paragraph 7. The standard of review on the fourth issue is reasonableness.

[21] 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." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only 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."

[22] With respect to the second issue, whether the Applicant's Charter rights were breached, it is well established that the onus of proving a breach of a Charter right rests with the party asserting the breach (see *R v Kapp*, 2008 SCC 41 at paragraph 66, *R v RJS*, [1995] SCJ No 10, at paragraph 280 and *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 (QL) at paragraph 40). This is a

question of mixed fact and law within the jurisdiction of the reviewing Court to be established on a balance of probabilities.

ARGUMENTS

The Applicant

The Officer's Reasons are Inadequate

[23] In his affidavit, the Applicant says that the Officer's reasons are inadequate in several ways. First, he says that they do not show that the Officer considered the fact that he was forced to drop out of university when he could not afford the tuition fees. Second, the reasons do not show the weight that the Officer put on his employment and ability to be self-supporting in Canada. Third, the Applicant says that the Officer did not give any reasons why sending him to Brazil does not constitute unusual and undeserved or disproportionate hardship, given that he has spent a significant amount of time in Canada and has a network of family and friends here.

[24] In his Memorandum, the Applicant says that the Officer's reasons do not show how she took into account the length of time he has been in Canada, his lack of family or friends in Brazil, how his family in Brazil has ostracized him because he is homosexual, and his support network of family and friends in Canada. The Decision does not show how these factors do not merit an exemption under subsection 25(1) of the Act. The Decision also does not show that the Officer considered the Applicant's submissions or his homosexuality.

The Applicant was not Given a Fair Hearing

[25] The Applicant says that, in addition to breaching his right to reasons, the Officer did not give him a fair hearing when she did not consider his homosexuality. He points to *Cardinal v Kent Institution*, [1985] SCJ No 78 (QL) where the Supreme Court of Canada said at paragraph 23 that

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[26] The Applicant also says that his right to a fair hearing was breached when the Officer did not call him for an interview or ask him to clarify issues. In his affidavit, the Applicant says that the Officer's reference to the 2003 and 2006 visits from his mother were actually visits to his aunt, not him. He also says that the Officer referred to an aunt and three cousins in Brazil as showing he has family ties in Brazil, though he actually has no contact with them. Further, the Officer's reference to his aunt and cousins was premised on a misunderstanding about his visit to Brazil in 1999. The Applicant says that all these misunderstandings could have been clarified if the Officer had called him or brought him in for an interview. Her failure to do so breached his right to a fair hearing.

The Officer Breached the Applicant's Charter Rights

[27] The Applicant asserts that the Officer breached his rights under sections 7 and 15 of the *Charter*. He says that, when she denied him a fair hearing, the Officer breached his equality rights under section 15, based on the fact that he is homosexual. The Applicant relies on *Kapp*, above,

where the Supreme Court of Canada said at paragraph 15 that an "insistence on substantive equality has remained central to the Court's approach to equality claims." He also points to *Withler v Canada (Attorney General)* 2011 SCC 12, where the Supreme Court of Canada affirmed a two part test for examining breaches under section 15 of the Charter at paragraph 61:

> The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (i) Does the law create a distinction based on an enumerated or analogous ground? and (ii) Does the distinction create a disadvantage by perpetuating prejudice and stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.

The Officer Applied the Incorrect Test for Hardship

[28] In the Decision, the Officer said that "The [Applicant] bears the burden of proof to demonstrate that if he were to return to Brazil to present his application, he would suffer unusual and undeserved or disproportionate hardship as per section 25 of the [Act]." The Applicant says that the test of unusual and undeserved or disproportionate hardship that the Officer applied was too high. He points to *Yhap v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 205, where Justice James Jerome said that

> [T]he discretion afforded an immigration officer by s. 114(2) of the Act is wide. The officer is asked to consider, with respect to the possible admission to Canada of a given applicant, "reasons of public policy" as well as the "existence of compassionate or humanitarian considerations". Neither the section of the Immigration Act which sets out definitions of terms contained in the Act nor the Immigration Regulations describe in any greater detail how the section is to be applied, nor what interpretation the officer is to give to the rather broad terms contained therein.

[29] The Applicant says that *Yhap* teaches that unusual and undeserved or disproportionate hardship is not the test under subsection 25(1) and that the actual test for an H&C exemption is broader and less restrictive than that articulated by the Officer. He refers the Court to *Chirwa v*

Canada (Minister of Manpower and Immigration) (1970) 4 IAC 338 (IAB) where the Immigration Appeal Board held that compassionate considerations are

> those facts established by the evidence which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another, so long as these misfortunes warrant the granting of special relief from the effects of the provision of the Immigration Act.

[30] The Applicant also points to Justice Sean Harrington's judgment in *Espino v Canada (Minister of Citizenship and Immigration)* 2006 FC 1255 at paragraph 1:

> Compassion has been defined as including suffering together with another, participation in suffering; fellow-feeling, sympathy, the feeling or emotion when a person is moved by the suffering or distress of another and by the desire to relieve it.

[31] Based on these two cases, the Applicant says that the Officer applied the incorrect test for an H&C exemption under subsection 25(1) of the Act.

The Officer Refused to Exercise Jurisdiction and Fettered her Discretion

[32] When the Officer applied the incorrect test for an H&C exemption, the Applicant says that this amounted to fettering her discretion. He also says that, in doing so, the Officer refused to exercise the jurisdiction she had to grant an exemption in situations where there is less than unusual and undeserved or disproportionate hardship. By restricting the scope of an H&C exemption, the Officer refused to exercise jurisdiction and fettered her discretion.

The Decision was Unreasonable

[33] Finally, the Applicant argues that the Officer's rejection of his request for an H&C exemption was unreasonable because she ignored and misstated evidence, did not assess the

evidence before her cumulatively, made an absurd conclusion, punished him for overstaying his visa, and made findings which were perverse and capricious.

[34] The Officer ignored the fact that the Applicant had to drop out of University because his mother had disowned him and no longer supported him financially. She also misstated the events surrounding his mother's visits in 2003 and 2006 and the facts about his remaining family in Brazil. The Officer also ignored the thirteen letters of support he had provided in support of his application.

[35] Though the Officer referred in the Decision to the Applicant's volunteer work with Al-Anon and the Metropolitan Community Church, she dismissed these as separate factors and did not assess their cumulative impact on the Decision as a whole. She also did not assess the Applicant's establishment in Canada, proficiency in English and French, and social network in Canada in the context of the evidence as a whole. Rather than assessing the evidence in its totality, the Officer weighed and assessed each of the factors individually. The Applicant notes that in *Vaca v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 926, Justice Bud Cullen wrote that

> [The] lawyer on the spot representing the applicant had the good sense to do an immediate "memo to file" which reads in part: "Ms. Nakagawa said she had no question as to the establishment of our clients but could not consider H&C on establishment alone." Ms. Nakagawa says she "read the affidavit of Raul Gala Vaca dated February 12, 1991" yet did not dispute this comment written in the Memo to File on July 5, 1990. The Department's own guidelines are not as equivocal as Ms. Nakagawa stated them. They read: "Economic and establishment situations alone would not normally constitute grounds for a positive humanitarian and compassionate recommendation". Here she did not consider that this case might be the exception. The myriad letters and affidavits of support from family, friends and neighbours, the English language certificate, the doctor and the priest's support, the purchase of a home, the participation in a business, all go to compassionate and humanitarian grounds - but they were not considered other than as economic establishment.

[36] The Officer in the present case wrote that

> […] I note that the [Applicant] was living alone as a high school student in Brazil. I also note that the [Applicant] has been residing alone throughout his entire stay in Canada. Therefore, I conclude that his mother's relocation should not negatively affect the [Applicant's] ability to successfully reintegrate himself into Brazil.

[37] When she wrote this, the Applicant says that the Officer drew the absurd conclusion that he does not need people in his life as family and friends. He also says that she punished him for overstaying his visa when she said that

> Furthermore, the [Applicant's] prolonged stay in Canada was not beyond his own control. Indeed, his establishment resulted through his own non-compliance with Canada's immigration laws.

[38] Rather than punishing him for overstaying his visa, the Officer should have regarded his long stay in Canada as a positive factor in his application, given that he had supported himself and had become proficient in both official languages during that time.

[39] Because the Officer made perverse and capricious findings, the Applicant says that the Decision should not stand. For support he points to *Owusu-Ansah v Canada (Minister of Employment and Immigration),* [1989] FCJ No 442, *Jazxhiu v Canada (Minister of Citizenship and Immigration),* [2000] FCJ No 1533, *Hatami v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 402, *Horvath v Canada (Minister of Citizenship and Immigration)* 2001 FCT 398, *Gondi v Canada (Minister of Citizenship and Immigration)* 2006 FC 433, and *Jones v Canada (Minister of Citizenship and Immigration)* 2006 FC 405.

[40] The Applicant argues that the Decision was unreasonable because the only course of action that was reasonably open to the Officer was to grant the exemption. He refers to *Rudder v Canada*

(Minister of Citizenship and Immigration) 2009 FC 689, where Justice François Lemieux had this to say at paragraphs 36 through 38:

> The Officer found Faye Rudder had no compelling reasons to travel and even less reasons to return to Guyana because she was not sufficiently established there. The Officer questioned the source of funds available to Faye Rudder in Canada. In my view, the Officer could only have reached these conclusions by ignoring the evidence or by drawing inferences from the evidence which are unreasonable. In the circumstances, this Court's intervention is warranted. I cite Justice Lagacé's recent judgment in *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 471.
>
> I conclude by finding that this is an appropriate case for the issuance of a direction that a different visa officer issue to Faye Rudder forthwith a TRV for a period of one month when it is suitable for the Applicant to travel to Canada. I find that on the evidence in the record this is the only reasonable result a Visa Officer could reach on a re-consideration.
>
> In *Pacific Pants Company Inc. et al v. the Minister of Public Safety and Emergency Preparedness*, 2008 FC 1050, this Court at paragraphs 48 and 49 had an opportunity to discuss the scope of paragraph 18.1(3)(b) of the *Federal Courts Act* which authorizes the Court on setting aside a decision to do so "with such directions as it considers to be appropriate". I referred to the Federal Court of Appeal's decision in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, as authority that directions issued under paragraph 18.1(3)(b) may include directions in the nature of a directed verdict. In my view, a directed verdict is compelling on the facts of this case.

The Respondent

[41] The Respondent argues that there is no reason for the Court to interfere with the Officer's Decision because she considered all the evidence and came to a reasonable conclusion. Deference is owed to the Officer's weighing of the evidence and, though the Applicant disagrees with her conclusion, the Court should not intervene.

Statutory Framework

[42] Under subsection 25(1) of the Act, the Minister is authorized to give special and additional consideration to an exemption from the general application of the Act. Where the Minister does not exercise this discretion, this does not take a right away from an applicant.

The Officer Has Discretion to Weigh Factors

[43] The Respondent says that the Applicant's arguments amount to no more than an invitation to the Court to re-weigh the factors the Officer considered. The Applicant has not demonstrated that the Officer exercised her discretion unreasonably. The Officer considered all the relevant factors and came to a conclusion which was reasonable and open to her on the evidence. The jurisprudence of this Court establishes that it is not for the Court to re-weigh the factors considered by a decision-maker, provided that she has considered all the necessary factors. See *Stelco Inc. v British Steel Canada Inc.*, [2000] FCJ 286 (FCA), *Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 at paragraph 15, and *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 at paragraphs 34, 37, and 39.

There was no Charter Violation

[44] Although the Applicant has asserted that the Officer violated his rights under sections 7 and 15 of the Charter, he has not provided any evidence of a *Charter* violation. It is not enough to establish a Charter violation simply to point out that he is homosexual.

No Interview Required

[45] The Officer was under no obligation to call the Applicant for an interview. Following *Baker,* above, at paragraphs 33 and 24, the Respondent says that what is required in an H&C application is meaningful participation in the process. By making submissions, the Applicant meaningfully participated in the decision-making process, so there was no breach of procedural fairness.

The Officer Applied the Correct Test

[46] Where the Applicant has said that the test for an H&C exemption should be based on the broad wording of subsection 25(1) of the Act, the Respondent says that this argument has been rejected by this Court. CIC's manual *IP5 – Immigration Applications in Canada made on Humanitarian and Compassionate Grounds* informs immigration officers that this Court has adopted the unusual and undeserved or disproportionate hardship test in *Singh v Canada (Minister of Citizenship and Immigration)* 2009 FC 11. The Respondent notes that arguments similar to the Applicant's were rejected in *Jung v Canada (Minister of Citizenship and Immigration)* 2009 FC 678 and *Aoanan v Canada (Minister of Citizenship and Immigration)* 2009 FC 734.

[47] The Officer applied the correct test, weighed the factors appropriately, and did not violate the Applicant's Charter rights or rights to procedural fairness, so the Decision should stand.

ANALYSIS

[48] The Applicant disagrees with the Decision and does not wish to return to Brazil to apply for permanent residence in Canada, as is the norm. His application for judicial review attempts to

characterize his disagreement as various reviewable errors. In my view, none of the grounds he puts forward are convincing.

[49] His H&C application emphasized what the Applicant sees as his desirable qualities and abilities, as well as his contributions to Canadian society and ardent desire to remain in Canada. He regards himself as a well established “de facto” resident. What his application fails to deal with is why, if the Applicant is required to return to Brazil and apply for permanent residence from outside of Canada he will suffer any kind of hardship. The issue is not whether the Applicant is a worthy Applicant to Canada, or whether life here for him would be better than life in Brazil. The issue is whether he would face unusual, undeserved or disproportionate hardship. The Applicant believes he ought to be an exception to the rule.

[50] As regards the specific grounds of error raised by the application, I am pretty well in agreement with the Respondent’s conclusions that the Applicant’s arguments, variously stated, all essentially amount to a request for this Court to re-weigh the factors considered by the Officer and come to a different conclusion. H&C decisions are discretionary and guarantee no particular outcome. As long as an officer exercises her discretion reasonably and within the parameters of procedural fairness, this Court should not intervene.

[51] I also agree with the Respondent that the Applicant’s argument that the Officer ignored evidence, or failed to give proper attention to certain factors, is merely an argument as to the weight given to various factors. This Court has repeatedly held that it is not the responsibility of the Court to re-weigh the relevant factors which were duly considered by an Officer making highly discretionary decisions or to substitute its own inferences or conclusions based on a re-weighing of

the evidence. In the case at bar, it is my view that all relevant factors were duly considered and weighed and the Officer came to a conclusion which is supported by the evidence as a whole. See *Stelco*, *Legault*, and *Suresh*, all above.

[52] The Applicant also baldly asserts that the Officer violated his Charter rights under sections 7 and 15, rights but he does not explain why or how. In my view, there is no evidence before me to show that the Officer violated his Charter rights. He simply argues that, because he is a homosexual, his Charter rights have been violated. I agree with the Respondent that there is no merit in this argument.

[53] The fact that the Officer did not conduct an interview with the Applicant does not give rise to a reviewable error in the context of this case. An interview is not generally required to ensure procedural fairness when evaluating an H&C application. In *Baker*, above, the Supreme Court of Canada observed that immigration officer decisions are "very different from judicial decisions" and that what is required is "meaningful participation" in the decision making process. In this case. I agree with the Respondent that the Applicant's submissions to the Officer in support of his H&C application demonstrate that he had a meaningful opportunity to participate. *Baker*, above, and *Bavili v Canada (Minister of Citizenship and Immigration)* 2009 FC 945, at paragraphs 26 to 29.

[54] The Applicant's principal argument, in my view, amounts to saying that the jurisprudence which has consistently been used to guide H&C decisions is wrong. He says that the Officer's decision not to allow this application on H&C grounds was unreasonable, and was made based upon the "wrong test," because the Officer found that the Applicant would not suffer "unusual,

undeserved or disproportionate hardship" if his application was not granted. The Applicant argues that the test should be broader, given the wording of section 25 of the Act.

[55] As the Respondent points out, this argument has been made before this Court previously, and has been denied on each occasion.

[56] Immigration Manual IP 5, guides immigration officers in the exercise of their discretion under subsection 25(1) of the Act. Section 5.10 sets out how hardship should be assessed. With regard to the test impugned by the Applicant, the manual states,

> The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on Subsection 25(1), which means that these terms are more than mere guidelines. See *Singh v. Canada (Minister of Citizenship and Immigration)*; 2009 Carswell Nat 452; 2009 FC 11.

[57] This very same argument was also recently dismissed in *Jung* and *Aoanan*, both above. Further, the long list of jurisprudence where the test of "unusual, undeserved or disproportionate hardship" has been approved by the Federal Court in its decisions on subsection 25(1) is extremely lengthy.

[58] Some of the Applicant's arguments and the evidence he relies upon in this application were not before the Officer but are found in an affidavit sworn by the Applicant for this application. It is trite law that the Court must assess a decision based upon the record before the Officer except for a few exceptional grounds that are not present in this case. See *State Farm Mutual Automobile Insurance Co. v Canada (Privacy Commissioner)* 2010 FC 736 at paragraph 54, *Abbott*

Laboratories Ltd. v Canada (Attorney General) 2008 FCA 354 at paragraph 37 and *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FC 135 (FCA) at paragraph 13.

[59] At the oral hearing on 20 December 2011, in Toronto, the Applicant highlighted what he regarded as key points.

[60] First of all, the Applicant says the Officer ignored the fact that he has no further contact with his mother and has nothing to do with his family in Brazil. However, when I read the submissions and evidence that was placed before the Officer, I cannot say there is anything unreasonable about the Officer's assessment of what the Applicant faces in Brazil.

[61] The Applicant also says that the Officer ignores and brushes aside the positive factors that support his establishment in Canada, including the many letters of support he submitted and his volunteer work. He says these factors were mentioned in the Decision, but were not weighed. Once again, my reading of the Decision leads me to conclude that the Applicant is wrong in this regard. Unless I disbelieve what the Officer says he has done, I have to conclude that all of the factors raised in submissions were identified, assessed and weighed by the Officer.

[62] The Decision specifically says the Officer considered all the factors the Applicant put forward. In submissions, counsel gave the Court the kind of wording he thought the Officer should have used and the kind of detail he felt appropriate. However, just because a decision is not written the way an applicant feels it should be written does not render that decision unreasonable or inadequate. Based upon the evidence and the submissions that were made to the Officer (and the onus that was upon the Applicant to establish his case for an exemption), I cannot say she ignored

evidence, made material mistakes of fact, or provided reasons which are not reasonably responsive to the issues at play in this application.

[63] For example, the Applicant makes much in this application of his sexual orientation and feels that the Officer ignored it or did not give it sufficient weight. A reading of his H&C submissions, however, does not reveal that the Applicant put forward his sexual orientation as a significant factor in his H&C application. He also did not suggest that his sexual orientation would lead to hardship if he returned to Brazil. All that the Applicant's then counsel said on the matter was that

> As a gay man Mr. Reis relies to a great extent upon the strong network of friends and resources that are available to him in Canada and played a significant role in guiding him with his sexual orientation; resources and support, that might not have been available to him in Brazil. The supportive ties that he has established with organizations and friends have helped him to become the person he is today.

[64] There is no evidence at all that networks of friends, resources and organizations cannot be acquired or accessed in Brazil. Like anyone else leaving Canada, the Applicant will lose the frequent contact he has here with friends and organizations. There is nothing to suggest that this will be a particular hardship to the Applicant because he is gay or that, had he stayed in Brazil, he would not have found his true identity and become the person he is today. This is simply unsupported speculation. Even the Applicant's personal statement that is attached to his counsel's submissions does not suggest otherwise.

[65] In my view, then, the Officer identified and addressed all the Applicant's concerns in the Decision in a way that is commensurate with what he chose to place before her. The reasons adequately explain why the Officer could not grant the exemption.

[66] Along the same lines, the Applicant also complains that the Officer may have addressed the issues he raised in support of his application separately, but did not also consider their cumulative impact. The Decision specifically says otherwise and the Officer emphasizes that she has considered the relevant factors, both individually and cumulatively.

[67] I realize that it is not sufficient for an officer to simply say that he or she has considered all of the evidence or all of the factors cumulatively. In the present case, however, I think it is clear that the Officer is not using empty words. The Decision is structured in such a way that we see how the Officer identifies and treats individual factors and she clearly considers their overall and cumulative impact. Having done so, she decided, reasonably in my view, that the Applicant "is similarly situated to other prospective immigrants to Canada who must apply [from] abroad in the normal fashion." I can see no error of law or unreasonable cumulative weighing.

Certification

[68] The Applicant has submitted the following question for certification:

> Is the Ministerial policy, and articulation, of the test, applied by immigration officers to determine whether "humanitarian and compassionate grounds, have been established under s. 25 of the IRPA, as decided in the within, and all other cases, namely:
>
> > The applicant bears the burden of proof to demonstrate that if he were to return to Brazil to present his application, ***he would suffer unusual and undeserved or disproportionate hardship*** as per section 25 of IRPA.
>
> (a) *ultra vires* s. 25 in that the "unusual, undeserved, and disproportionate hardship" test overly-restricts, and *de facto* amends s. 5?; and/or
>
> (b) fetters the broad discretion under s. 25(1) as long-held by this Court in *Yhap*?

[69] Justice Shore has already canvassed this issue in *Rizvi v Canada (Minister of Citizenship and Immigration)* 2009 FC 463 at paragraphs 13-15:

> Inherent in the notion of H&C applications is that hardship is a normal consequence of deportation proceedings, and that relief is to be granted only when hardship goes beyond the inherent consequences of deportation. The Officer did not fetter her discretion by assessing whether the Applicants would suffer unusual and undeserved or disproportionate hardship if required to leave Canada. This is the proper burden to be met in an H&C application before the requirement to hold a visa can be exempted (*Uddin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 937, 116 A.C.W.S. (3d) 930, 116 A.C.W.S. (3d) 930 at para. 22; *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206, 101 A.C.W.S. (3d) 995 (F.C.T.D.) at paras. 12 and 26).
>
> The argument that the focus on hardship is incompatible with the language of ss. 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, s. 27 (IRPA) and that immigration officers should be approaching the H&C analysis by using factors similar to those used by the Immigration Appeal Board (IAB) in *Chirwa v. Canada (Minister of Citizenship and Immigration)*, [1970] I.A.B.D. No. 1, has been rejected by this Court. In *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956, 116 A.C.W.S. (3d) 929, Justice Eleanor Dawson noted that the jurisprudence of the IAB has not been followed in connection with H&C applications:
>
> > [16] To the extent it was argued that jurisprudence from the Immigration Appeal Division, including *Chirwa v. Canada (The Minister of Manpower and Immigration)* (1970), 4 IAC 338 (I.A.B.) and *Jugpall v. Canada (Minister of Citizenship and Immigration Canada)* [1999] IADD No. 600 (I.A.D.), provides proper guidance as to what H&C considerations are, that jurisprudence was developed in consideration of provisions other than subsection 114(2) of the Act. That jurisprudence has not been followed by this Court in connection with H&C applications under subsection 114(2). See, for example, *Lee v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 139 (T.D.).
>
> In *Lim*, above, the Court made the following further comments regarding the approach in *Chirwa*, above:

> [17] Moreover, I am not sure that there is significant difference between the guidance offered in IP-5 and that offered by the jurisprudence of the Immigration Appeal Division. In cases such as *Chirwa*, the Appeal Division has relied on a definition of compassionate considerations as being "...those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another - so long as these misfortunes warrant the granting of special relief from the provisions of the Immigration Act". Circumstances of unusual and undeserved or disproportionate hardship would seem to me to be generally co-extensive with those which would excite a desire to relieve misfortune within the *Chirwa* definition.

[70] Also, as the Respondent points out, this Court in *Ha v Canada (Minister of Employment and Immigration)*, [1992] FCJ No. 625, considered whether these H&C guidelines circumscribe the proper exercise of the decision-maker's decision. Justice Rouleau, referring to an unreported decision of Justice Strayer, noted that "[t]hese guidelines have come under the scrutiny of the Court and have been found to be not only permissible but also desirable", and held "[t]here [was] therefore no merit to the applicant's challenge to the guidelines." The court in *Ha* embraced the rationale that the guidelines are desirable because they promote consistency amongst H&C decisions.

[71] The hardship test was also favourably cited by Justice Denis Pelletier in *Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906, at paragraphs 11 and 12. More recently, in *Singh*, above, at paragraphs 31-38 and *Eng v Canada (Citizenship and Immigration)* 2011 FC 596 at paragraph 8, this Court reaffirmed the fact that the "unusual and undeserved, or disproportionate hardship" test has become the prevalent guideline in H&C decision-making and

does not result in fettering of discretion. The Court also refused to certify questions of a similar nature in *Jung*, above.

[72] It is also telling to note that *Yhap*, above, which the Applicant relies on to establish that the discretion under section 25 is broad and that the test articulated in the Guidelines is too narrow, actually upholds that test. Justice Jerome wrote at paragraph 38 of *Yhap*, that

> I am not required here to adjudicate upon the propriety of the guidelines for humanitarian and compassionate review set out in Chapter 9 of the Immigration Manual. I will say, however, that those guidelines appear to constitute the sort of "general policy" or "rough rules of thumb" which are an appropriate and lawful structuring of the discretion conferred by s. 114(2).

[73] Not only has this Court consistently upheld application of the guidelines, the Federal Court of Appeal in *Legault*, above, at paragraph 23 clearly established that the "unusual and undeserved or disproportionate hardship" test is acceptable for an application on H&C grounds. As the Respondent points out in *Legault*, the Federal Court of Appeal cited the ministerial guidelines established for inland processing, and while noting that the Minister is not bound by the guidelines, emphasized that they provide guidance to decision-makers when they exercise their discretion in determining whether sufficient H&C considerations exist to warrant the requested exemption. The Court of Appeal in *Hawthorne v Canada (Minister of Citizenship and Immigration)* 2002 FCA 475 at paragraph 9, likewise, held that the use of the "unusual and undeserved, or disproportionate hardship" test in the guidelines merely assists decision-makers and does not fetter their discretion:

> Fourth, "hardship" is not a term of art. As noted in section 6.1 of Chapter IP 5 of the Immigration Manual (reproduced at para. 30 of my colleague's reasons), the administrative definition of "unusual and undeserved hardship" and "disproportionate hardship" in the Manual are "not meant as 'hard and fast' rules" and are, rather, "an attempt to provide guidance to decision makers when they exercise their discretion". It is obvious, for example, that the concept of

> "undeserved hardship" is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship.

[74] Moreover, the Supreme Court of Canada in *Baker*, above, at paragraphs 16, 17 and 72, recognized that "unusual and undeserved, or disproportionate hardship", as referenced in IP5 Manual, is a legitimate guide or lens for an officer to use in assessing what constitutes a reasonable interpretation of the agency power. (emphasis added):

> (c) The Ministerial Guidelines
>
> 72 **Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention.** As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values, such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. **The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable.** They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. **The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by this section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H&C power.**

[75] In light of the well-settled nature of the jurisprudence, I believe that the Applicant's arguments on point have been clearly and consistently addressed and that there is no purpose to be served by certifying his proposed question.

[76] It is true that the jurisprudence from this Court and the Federal Court of Appeal establishes that, in some circumstances, application of the Guidelines can be an unlawful fetter on an Officer's discretion (see *Legault* at paragraph 25, *Singh*, at paragraph 35, and *Ha v Canada (Minister of Citizenship and Immigration*) 2004 FCA 49. at paragraph 49). In *Rizvi*, Justice Shore said at paragraph 16 that

> The Officer in this case had regard to the particular circumstances of the Applicants, and did not fetter her discretion by rigidly adhering to the Guidelines at the expense of a full consideration of the evidence before her.

[77] This passage suggests that the unusual and undeserved or disproportionate hardship test, which is otherwise an acceptable measure of hardship, may operate as a fetter where an officer rigidly adheres to the Guidelines. The Court on judicial review, then, is called to evaluate whether, on the facts before it, the Officer applied the unusual and undeserved or disproportionate hardship test in such a way as to fetter her discretion. In this way, the second branch of the Applicant's proposed question would, in my view, ask the Federal Court of Appeal to answer in the abstract a question which can only be answered according to the facts of each case.

[78] In *Kunkel v Canada (Minister of Citizenship and Immigration)* 2009 FCA 347, at paragraph 9, the Federal Court of Appeal held that "a certified question must lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose." The second branch of the Applicant's proposed question fails this test: there can be no answer of general application to a question which depends on the unique facts of each case. In my view, the second branch of the Applicant's proposed question is inappropriate for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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