Federal Court  Cour fédérale

**Date: 20130206**

**Docket: IMM-8930-11**

**Citation: 2013 FC 129**

**Ottawa, Ontario, February 6, 2013**

**PRESENT: The Honourable Madam Justice Gleason**

**BETWEEN:**

**MAHAMOUDOU SAMA DIABATE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of the Ivory Coast, although he has not lived there in over 26 years. He left the Ivory Coast in 1986 and went to France, but did not obtain permanent residence status in that country. In 1993, he came to Canada and, in 1994 made a refugee claim under a false identity. This claim was refused by the IRB and leave to this Court was denied. In 1996, the applicant married a Canadian citizen, who attempted to sponsor him, but the spousal application was refused. The applicant and his wife subsequently separated. In 1997, the applicant was ordered to present himself for removal from Canada, but he failed to appear. Instead, he went to the United States, where he sought permanent residence. That application was also denied. Despite this, the

applicant remained in United States for over six years. He then returned to Canada in 2005. Shortly after arriving in Canada, he made an application under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or the IRPA] for humanitarian and compassionate [H&C] relief from the usual requirement that permanent residence must be sought from abroad.

[2] In a decision dated October 31, 2011, a Senior Immigration Officer rejected the applicant's H&C application. In the present application for judicial review, Mr. Diabate seeks to have this decision set aside. He argues that the Officer's decision is unreasonable because she erred in her assessment of the degree of Mr. Diabate's establishment in Canada and in her analysis of the hardship he would face in applying for permanent residence from the Ivory Coast. In terms of the content of the reasonableness standard, the applicant asserts that there is a continuum by which decisions are assessed for reasonableness, depending on the nature of the decision and error alleged and that in this case, where the officer erred in her interpretation of the IRPA, reasonableness requires that the decision stand up to a "somewhat probing analysis", which the Officer's decision does not.

[3] More specifically, with respect to the former argument, the applicant asserts that the officer gave insufficient consideration to the evidence of Mr. Diabate's ties to Canada and instead unfairly focused on the fact that he had remained here for over six years without status. The applicant argues that reliance on the fact of an applicant's unauthorised presence in the country as a reason to reject an H&C application is a reviewable error because it effectively renders the entire analysis nugatory. In this regard, the applicant claims that the whole point of an H&C application is to seek authorisation, on an exceptional basis, for the lack of status and that if the lack of such status is the

basis for rejecting the application, there has been no exercise of discretion by the H&C Officer, as is required by section 25 of the IRPA. The applicant attempts to distinguish the several cases where this Court has upheld H&C decisions that found there to be insufficient establishment in Canada, despite the passage of several years while the decisions were being considered, by arguing that in those cases the delay was occasioned by failure to dispose of refugee or pre-risk removal [PRRA] claims in a timely fashion as opposed to the situation that pertains here, where the delay was occasioned by the length of time it took the respondent to process the applicant's H&C claim, itself. In the latter circumstance, the applicant asserts that the Minister is under no obligation to consider the application and, therefore, that the passage of time may be determined to be sufficient reason to grant H&C consideration.

[4] With respect to the applicant's second argument concerning the officer's assessment of hardship, Mr. Diabate asserts that the officer engaged in an unfair and selective review of the evidence regarding country conditions in the Ivory Coast, failed to assess the applicant's personal circumstances and the hardship he would face in being returned to a country as unstable as the Ivory Coast, where he has no family or acquaintances and has not lived for 26 years, and, most importantly, erred in rejecting the H&C application by reasoning that the risks Mr. Diabate would face if returned to the Ivory Coast were shared by all Ivorians. Even if this were true (which the applicant denies), he argues that the officer committed a reviewable error in considering the notion of his exposure to a generalized risk, as this concept is irrelevant to determination of hardship under section 25 of the Act. Rather, according to the applicant, concepts of generalised risk are only relevant under section 97 of the IRPA and thus are only appropriately considered in a refugee determination or a PRRA. They are not appropriate considerations in an analysis under section 25 of

the IRPA, the applicant argues, precisely because the purpose of section 25 of the Act is to provide exceptional relief that would otherwise not be available under other sections of the Act. If the same considerations are invoked under section 25 as exist in refugee determinations and PRRA assessments, section 25 is stripped of all meaning, which the applicant asserts is an unreasonable interpretation of the statute.

[5] The respondent concurs that the applicable standard of review in respect of each of the errors asserted by the applicant is reasonableness but argues that such standard is set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*], which requires that a decision be upheld if it is transparent and intelligible or if it falls within the range of permissible outcomes in light of the applicable facts and law. The respondent argues that the officer's decision is reasonable because she considered all the relevant factors and came to conclusions that were reasonably open to her on the evidence. The respondent asserts that the applicant seeks to have the Court re-weigh the evidence and substitute its views for those of the officer, which is not the appropriate inquiry in any judicial review application and is especially inappropriate where what is at issue is the review of an exercise of discretion by the Minister's delegate.

[6] More specifically, insofar as concerns the applicant's first argument regarding the length of time the applicant had been in Canada without legal status, the respondent argues that the officer did not premise her decision on this fact and instead weighed and reviewed all the evidence cited by the applicant regarding the degree of his establishment in Canada and found it to be insufficient to warrant H&C consideration. Thus, according to the respondent, the officer did not commit the error

alleged by the applicant of grounding her decision on the degree of Mr. Diabate's establishment in Canada solely on the fact that the applicant has been in the country without status for a lengthy period. In addition, the respondent argues that the jurisprudence establishes that H&C applications are not an alternate immigration stream and thus that mere passage of time during which an applicant has lived in Canada, in and of itself, is insufficient to warrant H&C consideration (citing in this regard *Gill v Canada (Minister of Citizenship and Immigration)*, 2011 FC 863; *Mirza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 50; and *Mann v Canada (Minister of Citizenship and Immigration)*, 2009 FC 126).

[7] Insofar as concerns Mr. Diabate's arguments regarding the evaluation of hardship, the respondent argues that the officer's interpretation of the country documentation was reasonable, that it is certainly not for the Court to re-weigh and re-evaluate how that documentation is to be interpreted, and that the officer did acknowledge Mr. Diabate's personal circumstances, including his lengthy absence from the Ivory Coast and lack of support in that country. With respect to the officer's adoption of the language of generalized risk in her assessment of the hardship the applicant might face if returned to the Ivory Coast, the respondent argues that the officer did not apply the test under section 97 of the IRPA but, instead, considered the hardship that the applicant might face and determined that the applicant failed to link the country conditions to his personal situation to establish he would suffer unusual, undeserved or disproportionate hardship if returned to the Ivory Coast.

[8] In light of the foregoing, the following issues arise in this case:

1. What standard of review is applicable in respect of the each of the errors claimed in the officer's decision, which involve both an alleged misinterpretation of the IRPA and alleged unreasonable factual findings;
2. To the extent the reasonableness standard is applicable, what is the content of that standard;
3. Did the officer commit a reviewable error in her assessment of the degree of Mr. Diabate's establishment; and
4. Did the officer commit a reviewable error in her assessment of the hardship Mr. Diabate might face if returned to the Ivory Coast?

Each of these issues is examined below.

**What standard of review is applicable to the decision?**

[9] The first error alleged by the applicant involves the officer's assessment of the evidence and determination of whether the degree of the applicant's establishment in Canada warranted H&C consideration. This is a question of fact or mixed fact and law and is, as the parties submitted, reviewable on the reasonableness standard (*Dunsmuir* at para 51).

[10] The second alleged error, however, involves an alleged misstatement of the test applicable to the assessment of hardship under section 25 of the IRPA. Although the parties concurred that the reasonableness standard is applicable to review of the officer's reasoning on this point, this Court has generally found correctness to be the applicable standard to review the test applied by an officer under section 25 of the IRPA (see *L(B) v Canada (Minister of Citizenship and Immigration)*, 2012 FC 538, 216 ACWS (3d) 181 at para 11; *Prashad v Canada (Minister of Citizenship and*

*Immigration)*, 2011 FC 1286 at para 28, 6 Imm LR (4th) 105; *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 at para 26; *Paul v Canada (Minister of Citizenship and Immigration)*, 2011 FC 135 at para 15; *Osegueda Garcia v Canada (Minister of Citizenship and Immigration)*, 2010 FC 677 at para 7; *Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 12; and *Ebonka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 80 at para 16).

[11] However, recent jurisprudence of the Supreme Court of Canada indicates that where, as here, a decision-maker is interpreting his or her home statute, the reasonableness standard of review should apply (see *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 34, [2011] 1 SCR 3 [*Celgene*]; *Alliance Pipeline Ltd v Smith*, 2011 SCC 7 at para 28, [2011] 1 SCR 160 [*Smith*]; *Dunsmuir* at para 54; *Canada (Attorney General) v Mowat*, 2011 SCC 53 at para 16, [2011] 3 SCR 471 [*Mowat*]; *ATA v Alberta (Information and Privacy Commissioner)*, 2011 SCC 61 at para 30, 339 DLR (4th) 428) [*Alberta Teachers*]. See also the reasoning of my colleague Justice Mactavish in *Canadian Human Rights Commission v Canada (Attorney General)*, 2012 FC 445 at paras 231-241, 215 ACWS (3d) 439 [*Caring Society*]).

[12] More specifically, beginning in *Dunsmuir*, the Supreme Court recognized that, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (at para 54). This was reiterated in *Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 at para 44, [2009] 1 SCR 339 [*Khosa*], a case under the IRPA: "*Dunsmuir* … says that if the interpretation of the home statute or a closely related statute by an expert decision-maker is reasonable, there is no error of law justifying

intervention." *Khosa* involved a discretionary decision of the Immigration Appeal Division [IAD] deciding whether H&C consideration was warranted in a situation of exclusion for criminality. The nature of the decision made was quite similar to that in this case – and the Supreme Court held that the reasonableness standard was applicable.

[13] In *Celgene*, the Supreme Court of Canada again challenged the previous notion that correctness should apply to statutory interpretation, noting:

> 34 This specialized tribunal is interpreting its enabling legislation. Deference will usually be accorded in these circumstances…Only if the Board's decision is unreasonable will it be set aside. And to be unreasonable, as this Court said in *Dunsmuir*, the decision must be said to fall outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (para. 47). Far from falling outside this range, I see the Board's decision as unassailable under either standard of review.

[14] The majority in *Smith* made the same statement, with Justice Fish recalling *Dunsmuir* by stating that interpretation of a home statute "will usually attract a reasonableness standard of review" as per *Dunsmuir* and subsequent case law (at para 28). Similarly, in *Mowat*, the Court observed, "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference" (at para 24). Finally, in *Alberta Teachers* (at para 30), the majority stated the following with respect to statutory interpretation:

> […] There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity"[…] This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole

> and that are outside the adjudicator's expertise, ...questions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or *vires'* […]." [citations omitted]

[15] The majority also endorsed the statement of Justice Evans that *Dunsmuir* created a "very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive, statute, or any other frequently encountered statute, or even common or civil law principle" (at para 41).

[16] The Federal Court of Appeal has not ruled directly on this issue. However, in *Shpati v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 286 at para 27, in reviewing a request to defer removal, the Court noted that "any question of law on which the [removals] officer based his decision (such as the scope of the statutory authority to defer) is reviewable on a standard of correctness: *Patel v. Canada (Minister of Citizenship & Immigration)*, 2011 FCA 187 (F.C.A.) at paras. 26-27." Removals officers, like visa officers, make discretionary decisions under the IRPA – but then so did the IAD in *Khosa*. The Federal Court of Appeal has likewise held that review of visa officers' interpretations of the regulations under the IRPA is to be conducted on the correctness standard (*Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 339 [*Khan*] at para 26 and *Patel v Canada (Minister of Citizenship and Immigration*, 2011 FCA 187 at para 27). These holdings, however, appear to conflict with the guidance from the Supreme Court regarding the deference owed to a tribunal in interpreting its home statute.

[17] The application of the correctness standard to an officer's interpretation of section 25 of the IRPA lives uncomfortably with the Supreme Court's recent jurisprudence. The IRPA is

undoubtedly the home statute of an immigration visa officer undertaking an H&C analysis. Thus, following the jurisprudence of the Supreme Court of Canada in this regard, one would think that the standard of review applicable to the test employed under section 25 should be reasonableness. Fortunately, nothing turns in this case on the choice of standard of review as, for the reasons discussed below, the officer's approach to section 25 in assessing the degree of hardship the applicant alleges he would suffer is both incorrect and unreasonable.

**What is the content of the reasonableness standard of review?**

[18] Determining that the standard of review is reasonableness does not end the inquiry as it is then necessary to delineate what that standard means. As Justices Bastarache and Lebel, writing for the majority, noted in *Dunsmuir* at para 46, "[r]easonableness is one of the most widely used and yet most complex legal concepts". Notwithstanding the several cases from the Supreme Court of Canada addressing the application of reasonableness that have followed *Dunsmuir*, defining the content of the standard remains an elusive task.

[19] *Dunsmuir* teaches that reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process [as well as…] with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law [at para 47]. It is clear that the key to this standard is deference. The Supreme Court of Canada has urged that courts should not substitute their own views for those of the administrative decision-maker (see e.g. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at paras 15-16). In *Newfoundland Nurses* (at para 13), Justice Abella returned to the Supreme Court of

Canada's decision in *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227, in which Justice Dickson urged judicial restraint in reviewing the decisions of administrative tribunals, subject-matter experts in their areas of expertise, and defined the content of the reasonableness standard (to be applied when a tribunal is interpreting its home statute) as whether the interpretation can "be rationally supported by the relevant legislation" (p 237).

[20] What appears to be emerging from the developing jurisprudence in this area is recognition that the degree of deference required under the reasonableness standard may vary depending on the particular nature of the question that led to the decision taken and the context of that decision, which will both help define the range of acceptable or reasonable outcomes. As Justice Binnie articulated in *Khosa* at para 59:

> Reasonableness is a single standard that take its colour from the context. ... [A]s long as the process and the outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[21] Appellate courts have attempted to provide some guidance in the application of this standard and have emphasized the importance of the contextual approach identified by Justice Binnie. In the recent decision of *Attorney General v Abraham*, 2012 FCA 266 [*Abraham*], Justice Stratas, writing for the Federal Court of Appeal, explained that while reasonableness is a single standard, "asserting that there is a range of possible, acceptable outcomes begs the question as to how narrow or broad the range should be in a particular case" (at para 42). Justice Stratas highlighted the importance of the context of the particular issue facing the court in determining how wide that range should be.

[22] The Ontario Court of Appeal has taken a similar approach to unpacking the reasonableness standard, endorsing a "contextual approach" that results in a differing range of acceptable outcomes, depending upon the nature of the decision being reviewed (see *Mills v Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para 22, 237 OAC 71).

[23] Following this guidance, the application of reasonableness depends first on the characterization of the question being reviewed. This characterization will then shape the breadth of the range of answers and interpretations that are rationally possible. For a highly discretionary decision rooted in factual determinations, the range of acceptable outcomes will typically be quite expansive. In contrast, where a court is reviewing a legislative interpretation, or the application of a legislative provision in the exercise of discretion, the range of reasonable decisions may be narrower (see discussion of Justice Stratas on this point in *Abraham* at paras 43-48) and will involve consideration of whether the interpretation advanced is one that the words of the statute can reasonably bear. What is clear from the foregoing is that the language of "somewhat probing analysis", suggested by the applicant, is no longer applicable.

[24] With this framework in mind, I turn to the case before me. As discussed, the case law recognises that the reasonableness standard is applicable to an officer's assessment of whether H&C consideration is warranted on the facts of an applicant's particular situation. H&C consideration is a discretionary remedy, based on an assessment of the factual circumstances of a particular applicant, which would imply a broader range of reasonable outcomes (*Abraham* at para 44).

[25] However, as noted, the case law indicates that the correctness standard is applicable to review the officer's enunciation of the test to be employed when determining whether H&C consideration is warranted. But, even if this issue were reviewable on the reasonableness standard, it might be subject to fewer possible options, given the relatively higher legal content of this question (*Abraham* at para 45).

**Did the officer commit a reviewable error in her assessment of the degree of Mr. Diabate's establishment?**

[26] Turning, then, to the application of the reasonableness standard to the officer's assessment of the degree of the applicant's establishment, guidelines for the exercise of the officer's discretion are found in Citizenship and Immigration Canada's Inland Processing Manual 5: "Immigration Applications in Canada made on Humanitarian or Compassionate Grounds" [IP 5]. While not legally binding, these guidelines have been recognized as being of "great assistance to the Court" by the Supreme Court of Canada (*Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817, [1999] SCJ No 29 at para 72 [Baker]).

[27] IP 5 states the following regarding degree of establishment in Canada at section 5.14:

> Positive H&C consideration may be warranted when the period of inability to leave Canada due to circumstances beyond the applicant's control is of considerable duration and where there is evidence of a significant degree of establishment in Canada such that it would cause the applicant unusual or disproportionate hardship to apply from outside Canada.

[28] As the applicant correctly notes, relevant factors to be considered by the officer include a history of stable employment, community involvement, and the claimant's civil record (IP 5 at s

11.5). The applicant points to his personal and economic ties to Canada, including the fact that he has lived in the same residence (with his sister's family) for the past six years, his good civil record, his regular employment and his close relationship with his niece and nephew, and argues that the officer erred in minimizing these facts and in instead focusing on the fact that he has been in Canada for a lengthy period without status.

[29] Where, as here, the applicant demonstrates a certain degree of establishment, so long as the officer considers the relevant factors, it will be rare that this Court will intervene in the analysis, as the range of possible, acceptable conclusions is quite large. Indeed, it is well established that it is not for this Court to re-weigh the factors presented in an H&C application (*Khosa* at para 61; *Allard v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1268 at para 45). And, as stated by Justice Blais (then of this Court) in *Lee v Canada (Minister of Citizenship and Immigration)*, 2005 FC 413 at para 9, while the degree of establishment in Canada may be a relevant factor for an officer to consider, this factor is not determinative:

> In my view, the officer did not err in determining that the time spent in Canada and the establishment in the community of the applicants were important factors, but not determinative ones. If the length of stay in Canada was to become the main criterion in evaluating a claim based on H&C grounds, it would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. (*Irimie v. Canada (Minister of Citizenship and Immigration*), [2000] F.C.J. No. 1906)

[30] In addition, contrary to the applicant's suggestion, the Minister *is* under an obligation to process H&C applications made from within Canada, in light of the clear wording of the Act, which, at subsection 25(1), reads:

> Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act […] examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from 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." [Emphasis added.]

Therefore, there is no distinction between the present case and the numerous others in which this Court has upheld findings that delay alone is an insufficient basis to justify H&C relief (e.g. *Qiu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 859 at paras 11-13; *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 612 at paras 10-15; *Luzati v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1179 at para 21). While the delay in these cases resulted from the time taken to process PRRA claims, there is no meaningful difference between that situation and the present where the delay flows in part from the time taken to process the applicant's H&C application. In both cases, the Minister is under a statutory obligation to process the applications. Thus, the length of time the applicant has been in Canada does not, in and of itself, warrant positive H&C consideration, particularly in light of the applicant's lack of cooperation with the immigration authorities in having previously declined to present himself for removal when ordered to do so.

[31] Nor did the officer incorrectly hold the applicant's lack of status against him, as his counsel alleges. While the officer did comment that the applicant's ties "were formed in a context where the applicant was aware of the precariousness of his status", the decision does not turn on this point. More specifically, while I agree with the applicant that the purpose of section 25 is to provide relief for those without proper immigration status (see e.g. *Benyk v Canada (Minister of Citizenship and*

*Immigration)*, 2009 FC 950 at para 14), this comment was not central to the officer's analysis: she considered the applicant's ties to Canada and concluded that they were not exceptional. This determination was reasonably open to her on the facts of this case, given there is nothing exceptional about the applicant's situation. Thus, the first of the alleged errors advanced by the applicant does not warrant intervention.

**Did the officer commit a reviewable error in her assessment of the hardship Mr. Diabate might face if returned to the Ivory Coast?**

[32] The same, however, cannot be said of the second error asserted by the applicant. In this regard, I do find that the officer committed a reviewable error in her assessment of the hardship that the applicant would face if returned to the Ivory Coast. In assessing this factor, the officer reviewed the current country conditions in the Ivory Coast, which paint a picture of improving democratic conditions but ongoing violence. She then concluded, "Although there are still some problems in Ivory Coast, I note that they apply to the entire population. The applicant has not shown in what respect his situation is different from that of the population as a whole". With respect, this formulation of the applicable test under section 25 of the IRPA is neither correct nor reasonable.

[33] I agree with the applicant that such an interpretation of section 25 frustrates its purpose. As indicated, section 25 exists to provide relief from the provisions of other sections of the IRPA. To impose those requirements on an applicant seeking relief from them entirely frustrates the section and is thus an interpretation that the Act cannot reasonably bear. The officer imported a requirement of section 97 – that, to be eligible for protection, an individual must face a risk "not faced generally by other individuals in or from that country" – into her section 25 analysis. Such an interpretation strips section 25 of its function.

[34] Justice Mandamin addressed a similar issue in *Shah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1269, [2011] FCJ No 1553 [*Shah*], where he was reviewing a decision of an H&C officer regarding an applicant from Trinidad. In that case the officer had reasoned that the applicant had "provided insufficient objective evidence that she would be personally targeted by the criminal elements upon her return to Trinidad" and concluded that H&C consideration was not warranted because "the situation and hardship the applicant fears is faced generally by other individuals in the country" (*Shah* at para 70). In determining that this decision must be set aside, Justice Mandamin concluded (at para 73):

> I find the Officer applied a higher standard than appropriate for H&C decisions by incorrectly requiring the Applicant to establish a personal risk beyond that faced by other individuals in Trinidad. The test of risk causing unusual, underserved or disproportionate hardship is not limited to personal risks to an Applicant's life or safety, and the Officer failed to properly consider whether the overall problem of criminality constituted unusual and undeserved, or disproportionate hardship in the circumstances. This constitutes a reviewable error. […]

[35] In coming to this conclusion, Justice Mandamin relied upon the reasoning of Justice Pinard in *Rebaï v Canada (Minister of Citizenship & Immigration)*, 2008 FC 24 [Rebaï], where Justice Pinard distinguished between the proper scope of a PRRA analysis and an H&C analysis (at para 7):

> When performing a PRRA analysis, the question to be answered is whether the applicant would personally be subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment […] On an H&C application, the underlying question is whether the requirement that the applicant apply for permanent residence from outside of Canada would cause the applicant unusual and undeserved or disproportionate hardship […] While the officer can adopt the factual findings from the PRRA analysis, the officer must consider these factors in light of the lower threshold of risk applicable to H&C decisions, of "whether the risk factors amount to unusual, undeserved or disproportionate hardship" […]
> [citations omitted]

[36] I find the present case to be on all fours with *Shah*. The officer's role in an H&C analysis is to assess whether an individual would face "unusual and undeserved or disproportionate hardship" if required to apply for permanent residence outside of Canada. It is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin. Rather, the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate.

[37] In the particular circumstances of this case, it might well be an undue hardship for the applicant to be forced to return to the Ivory Coast, a country struggling with violence, in which the applicant has no family and has not lived for 26 years. This consideration, though, would need to be balanced with the choices made by the applicant, which involved disregard of the law and thereby lengthened the period of the applicant's absence from the Ivory Coast. The officer failed to squarely address these issues as she focussed instead on the general conditions faced by all Ivorians, a consideration that is wholly foreign to the required analysis, for the reasons stated above.

[38] Thus, this application for judicial review will be granted and the matter remitted for re-determination by a different officer. This case does not raise a serious question of general importance warranting certification as it is closely tied to the reasoning of the officer and the standard of review issue is not determinative.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. This application is granted;
2. The decision is set aside;
3. The applicant's H&C application shall be remitted to a different immigration officer for reconsideration;
4. No question of general importance is certified; and
5. There is no order as to costs.

"Mary J.L. Gleason"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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