Federal Court  Cour fédérale

Date: 20141016

Docket: IMM-3593-13

Citation: 2014 FC 985

Ottawa, Ontario, October 16, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MARIAN CONKA, TATIANA CONKOVA, MATUS CONKA, BRANISLAV CONKA, ZUZANA CONKOVA, ROSALIA CONKOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION; THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] The applicants are challenging the legality of a decision, dated February 28, 2013, by which an immigration officer [Officer] refused their application for a visa exemption on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. This application is being heard in concert with file

IMM-1035-14, an application for judicial review of the pre-removal risk assessment [PRRA] refusal with regards to the same applicants (2014 FC 984).

[2] The applicants are all citizens of Slovakia of Roma ethnicity. Marian Conka and Tatiana Conkova are the parents of Rozalia, Matus, Zuzana and Branislav (between the ages of 17 and 21 at the date of this hearing). They entered Canada on November 16, 2009 and filed a refugee claim upon arrival. Their refugee claim was rejected on March 23, 2012 and the application for leave of that decision was dismissed on May 30, 2012. Afterwards, the applicants applied for H&C on May 11, 2012. The application for H&C was refused on February 28, 2013 and the applicant subsequently filed the present application for leave and judicial review of the H&C decision. The applicants also applied for a PRRA on April 6, 2013. A negative PRRA decision was made on January 6, 2014 and the applicants applied for leave and judicial review of the PRRA decision. The applicants were the subject of a removal order to be executed on March 17 and March 19, 2014, but they made a motion for an order to stay the execution of the removal order. While the motion pertaining to the H&C decision was denied, the motion for a stay pertaining to the PRRA decision was granted on March 13, 2014.

[3] As far as the present application for judicial review goes, with respect to the H&C factors, the Officer apparently considered the applicants' establishment in Canada, the adverse country conditions, and the best interest of the children, particularly of Matus who has significant health and developmental problems.

[4] The Officer found that while the adult applicants showed a basic level of establishment in Canada (through volunteering, classes and some friends), they had never worked in Canada and were not established financially, while Marian Conka had worked for numerous years in Slovakia as an electrician, line supervisor and general contractor.

[5] On the question of the best interest of Matus, the Officer recognized that Matus is at the severe end of the spectrum for autism and has a severe developmental disability, and that he also has kidney disease. Matus receives care and services both at a school serving students with developmental disabilities and through the General Nephrology Clinic at Toronto General Hospital. However, the Officer found that there was "insufficient evidence to demonstrate that the services available to Matus in Slovakia are so inadequate in comparison to those that he receives in Canada that it might be against his best interests to return to Slovakia" [emphasis added].

[6] On the question of the best interest of the three other children who had often experienced verbal abuse, bullying and discrimination in Slovakia (particularly at their schools), the Officer found that it would be in their best interest to stay in Canada. However, balancing the best interest of the children with the other factors led to the conclusion that the grounds raised by the applicants did not constitute unusual and undeserved or disproportionate hardships.

[7] In particular, the Officer found that Roma suffer discrimination, especially in the areas of employment, education, housing and healthcare, and that the applicants had suffered serious incidents of verbal and physical abuse. However, the Officer found that the applicants had not

provided evidence to demonstrate why it would be a hardship for them to make further efforts to obtain state protection and that the applicants were generally able to integrate into society much better than the general population of Roma, and that, consequently, the applicants would not experience unusual and undeserved or disproportionate hardship if they were required to return to Slovakia to apply for permanent residence from abroad.

[8] Three grounds of attack are presented today by the applicants:

- The Officer failed to conduct a proper analysis of the best interest of Matus;
- The Officer erroneously applied a state protection and generalised risk analysis when assessing hardship due to discrimination; and
- The Officer unreasonably minimized the best interest of the children and considered irrelevant factors in his final analysis of unusual or disproportionate hardship.

[9] The question of whether the Officer applied the wrong legal test is a question of law which attracts the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 44; *Pearson v Canada (Citizenship and Immigration)*, 2011 FC 981 at para 18 [*Pearson*]), while the question of the evaluation of the evidence by the Officer is a question of fact (or of mixed fact and law) which attracts the application of the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9). For the reasons that follow, the application for judicial review shall be allowed and the matter sent back for redetermination by a different officer, as I find the impugned decision on the whole unreasonable.

Best interest of Matus

[10] On the question of the best interest of Matus, the applicants submit that the Officer failed to adequately deal with the concerns put to him; notably that he did not consider the impact that uprooting and moving Matus would have on him, that he did not consider the discrimination that Matus faced as a Roma child with a severe disability; and that he did not consider the vast difference in care that Matus received in Slovakia and in Canada. The applicants further submit that the Officer applied the wrong test: he considered whether the health and educational services in Slovakia were adequate and whether Matus would suffer any hardship instead of considering what would be in his best interest.

[11] In response, the respondent submits that the Officer did assess what would be in Matus's best interest. The respondent essentially reiterates the Officer's findings that there was not sufficient objective evidence that the resources for people dealing with autism in Slovakia and in particular, in Bratislava, are inadequate or ineffective, or that the treatment received by Matus for his kidney disease was substandard. The respondent adds that the Officer did not apply the wrong legal test, as his statements regarding the fact that there was insufficient objective evidence to establish that the services Matus would receive would be inadequate simply show that the Officer was evaluating the evidence.

[12] Before examining the reasoning of the Officer, it is necessary to refer to the uncontradicted medical evidence provided by the applicants with respect to the medical condition and special needs of Matus.

[13] First, in her extensive report dated March 11, 2011, Mrs. Tanya Fudyk who assessed Matus, concludes:

> In summary, Matus is a 16 year old adolescent who continues to present with autism (at the severe end of the spectrum) and a developmental disability, likely ranging from severe to profound. The current results suggest development at an 18 month level. His adaptive skills range from below a year level (language expression and comprehension) to a 4 year level (gross motor skills). Observation of Matus indicates that he is a student who demonstrates characteristics associated with autism including difficulties engaging in non-preferred activities and difficulty controlling repetitive behaviours, which interfere with his ability to attend and learn. However, it is important to recognize that Matus has made progress since beginning school in Canada. He is beginning to communicate through sign language more and as he becomes increasingly familiar with novel activities, he is a more willing participant. Overall, Matus is an adolescent who requires a high level of support to function adaptively at school and home and he will continue to need this type of, support as he proceeds into adulthood and beyond. (Tribunal record at page 126).

[14] Second, Matus has only one kidney. With respect to his kidney condition, Dr. Rachel Pearl, Pediatric Nephrologist, who followed him, notes in a letter dated May 22, 2012:

> This boy has chronic renal failure related to a solitary scarred kidney. I first met him two years ago when he came from Slovakia. He has global developmental delay of unknown etiology. He requires careful medical follow up to manage his renal failure. He has hypernatremia and is at risk for dehydration if he can not drink fluids. It is possible he will require renal replacement therapy in the future or renal transplant. (Tribunal record at page 337)

[15] The applicants' grievances against the impugned reasoning of the best interest of Matus are well founded. In *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, Justice Zinn explains the proper analysis:

> [15] In stating that "there is insufficient evidence before me to indicate that basic amenities would not be met in Brazil" the

> Officer is importing into the analysis an improper criterion. He appears to be saying that a child's best interest will lie with staying in Canada only when the alternative country fails to met the child's "basic amenities." That is neither the test nor the approach to take when determining a child's best interests. As Justice Russell recently held in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166, at paragraph 64:
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> > There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only then will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is not: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?"
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> [16] Undoubtedly placing a child in an environment where his or her basic needs are not met can never be said to be in that child's best interest. However, to suggest that the child's interest in remaining in Canada is balanced if the alternative provides a minimum standard of living is perverse. This approach completely fails to ask the question the Officer is mandated to ask: What is in this child's best interest? The Officer was required to first determine whether it was in Leticia's best interests to go with her parents to Brazil, where she had never been before, or for her to remain in Canada where she had "better social and economic opportunities." Only once he had clearly articulated what was in Leticia's best interest could the Officer then weigh this against the other positive and negative elements in the H&C application. (See also *Felix v Canada (Citizenship and Immigration)*, 2014 FC 582)

[16] I completely agree with the statements above made by my colleague and I endorse his reasoning which is equally applicable to the case at bar. That said, even if the Officer had applied the proper legal test, his analysis with regards to the best interest of Matus would still be unreasonable.

[17] In the case at bar, the Officer misread the applicants' submissions to conclude that Matus had access to medical care and to a special school for children with autism, but without making any credibility findings, disregarded the concrete experience Matus and his parents had in these establishments. It is worthwhile to reproduce the uncontradicted evidence of Matus's parents concerning Matus, which comes from their statutory declaration in support of the H&C application:

> 18. Our second eldest son Matus was born on 13 May, 1994 after a normal pregnancy and childbirth. When he was about 3 months old, he contracted a very high fever and we took him to the hospital. The doctors took him from us, to stay in hospital to check everything. He stayed in that hospital for about 2 weeks, and we visited him every day. We were first told he had an infection of the heart, then another diagnosis, then another. After about two weeks they sent him to another hospital, where we were told that one of his kidneys was not functioning properly.
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> 19. Our son had high fever during these two weeks in hospital, and we believe he was not given proper medical care. They did no bloodwork during this time. They did not make his fever go down. We believe this is because we are Roma. We have friends who work as cleaners in the hospital, who have told us that Roma children are kept separate from the other child patients.
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> 20. During those first two weeks we were not allowed to go into the nursery where Matus was, although other white parents were allowed in to hold their children. I brought clean pyjamas and blankets for Matus, but these were not allowed in the nursery. A nurse told us that we could not enter because we are gypsies, and dirty.
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> 21. Matus remained in hospital for the first year of his life. We were not allowed to touch or hold him during that first year of his life. This was true in both the first, and second hospital. We observed Matus through the glass, however, and saw that he spent that first year of his life lying on his back. Both his arms and legs were tied to the bed. He could not play, or scratch himself. Apart from his medical care, no one interacted with him. We truly believe his mental suffering during this first formative year of his life may have triggered his autism. Even until now, he is unable to cuddle. It is very hard to get close to him to hug him. He fights off physical contact. We believe this formative year also affected

Matus' attitude towards doctors; he fights them. And to this day, he lies on his bed with his arms above his head, as they were when they were tied.

22. During his first year of life we observed Matus in hospital through the glass of the nursery. We could tell from early days that he had some developmental problems. He did not respond to normal stimulus. But perhaps this was not surprising given the terrible way he was treated. When the nurses fed him, they would just prop the bottle into his mouth and it would pour into him. No one held him for his feedings and his arms continued to be tied during his feedings also. To this day, whenever he drinks he guzzles as fast as he can. We know this is partly because of his kidney problem, but we also wonder whether it might partly be because of his early feeding experience.

23. At one point, we believe it was around 9 months of age, Matus nearly died and had to be revived in hospital. We were never informed what had happened. When we tried to make further inquiries, no one would tell us. There was not a single note in his chart. It was never reported.

24. Also at around 9 months old Matus had a kidney removed and he had a nephostropic bag put in. His second kidney only works about 40-50%. After this Matus was in and out of the hospital with many infections until he was 8 or 9 years old and was ongoing antibiotics until just recently. He has had three surgeries throughout the years: two that involved his kidneys and one that involved removing the nephroscopy bag. We could have had the nephroscopy bag removed sooner, but the doctor demanded an under-the-table payment which we could not afford.

25. When we arrived in Canada we took Matus to the Hospital for Sick Children as soon as possible. The specialists in Toronto have given us practically the opposite medical advice from what we heard in Slovakia. Matus' medicine was stopped instantly, and replaced. We were also told in Slovakia that Matus should not drink much water, but here the doctors encourage Matus to drink lots of water. When we brought Matus to Canada the doctors told us he was dehydrated.

26. When we brought Matus home, he couldn't sit by himself at one year of age. Matus continued to be followed by the kidney specialists. We recall asking about Matus' developmental delay, but the doctor yelled at us not to tell him how to do his job. Finally when he was 4 or 5 years old, Matus was seen by a specialist referred by our family doctor, who diagnosed him with autism.

27. Matus was 17 years old when we submitted this humanitarian and compassionate application. He stood for the first time at around 4 or 5 years of age. At about 8 or 9 years of age, Matus started attending a school for kids with special needs. It was terrible. The teachers advised us only to bring Matus once or twice a week. When he did go, he mostly sat on the floor in the corner of the room, ignored. The teachers did not try to teach him anything. They did not teach him any basic life or communication skills. We remember going to pick up Matus, and knocking at the door. The teacher opened the door and closed it again. We heard the teacher say, "Bring the gypsy, his parents are here".

28. That school was the only option available for extra support for Matus. As a result we mostly kept Matus at home. I, Tatiana, cared for him full-time and I, Marian, supported the family by working. Matus was very difficult to control. He could not speak. He would get frustrated and bite himself or others, or cry, or kick or throw furniture. It was very stressful because we could not understand what he needed.

29. We tried to follow the advice of the doctor not to allow him to take in more than 2L of liquid per day. I would take away a drink after Matus had a few sips. But he would get angry and hurt himself. If we weren't careful he would also grab a dirty vase of water and drink it, or anything in sight, even cleaning supplies. We had to watch him constantly for his own safety. Now we understand that he was thirsty, and his kidney condition meant he should have been drinking so much more.

30. On two occasions I, Tatiana, was doing errands with Matus when we were attacked by skinheads. Once was around June 2005, and we were riding on a bus. Skinheads started to verbally abuse us, calling us gypsies, and I decided to get off the bus for our safety. At the time Matus had a tube inserted into his body so he could urinate. The skinheads pushed us and pulled the tube of Matus' body. Matus was screaming in pain, and the site where the tube came out was bleeding. I, Tatiana, took Matus immediately to the hospital. From there, while Matus was treated. I called the police but they took over 30 minutes to arrive. By then the police said they couldn't do anything for us since the attackers had fled.

31. The second incident happened in August 2009, when Matus and I, Tatiana, were on our way home from grocery shopping. Some skinheads stopped us and as per usual, started with the verbal abuse. It soon escalated and I was pushed to the ground and my hair was pulled. I covered Matus with my body to protect him from the kicks. It finally stopped when my screams for help

> attracted other people. The skinheads again fled the scene. I went with Matus to the police station right away, but the police yelled at me. They asked me, "where could we look for these people?" They were unable to help.
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> 32. Now, in Canada, it is extraordinary the difference we see in Matus since he has been able to access an appropriate specialized program. He attends a program at Lucy McCormick Senior School in Toronto for youth with special needs like his. In the two years he has been at that school, Matus has learned sign language. He can now communicate with his family through sign language. He is very visibly calmer and happier.

[18] In light of the assessment of Matus's mental condition, the question was not how a normal seventeen-year-old adolescent would adapt if he were to return to Slovakia, but how an autistic adolescent whose "adaptive skills range from below a year level (language expression and comprehension) to a 4 year level (gross motor skills)" would adapt to a fundamental change of environment. An environment (Slovakia) that has proved to be both insecure and hostile for a Roma child, who besides being autistic, is suffering from an important kidney failure requiring prolonged medical attention.

[19] The Officer does recognize that documentary evidence supports the applicants' submission that Roma experience discrimination in access to healthcare and segregation in healthcare facilities, but dismisses the discrimination that Matus and his parents experienced by indicating that they were able to access various medical services on numerous occasions and speculates that the discriminatory attitude they experienced in the hospital could simply be a staff directive of preventing infection by generally restricting access. The Officer also fails to compare the level of care Matus had access to in Slovakia to the care he receives in Canada, simply indicating that Matus had access to medical services and was not denied medical care. The

Officer does not really address the applicants' submissions on the level of care that Matus received or on the various incidents of discrimination they faced while receiving care, except to say that there is insufficient objective evidence, and the Officer does not consider the improvement of Matus's condition since he started receiving services and care in Canada.

[20] The Officer's statements with regards to the adequacy of services in Slovakia are not a simple evaluation of the evidence and show that he applied the wrong legal test. At no point in the decision does the Officer mention positively what would be in the best interest of Matus. He does however repeatedly state that the applicants did not provide sufficient objective evidence to demonstrate that the services in Slovakia are "inadequate" or even "significantly inadequate." He concludes that:

> [H]aving reviewed the evidence, I find insufficient evidence to demonstrate that the services available to Matus in Slovakia are so inadequate in comparison to those that he receives in Canada that it might be against his best interests to return to Slovakia. [emphasis added]

[21] The Officer was not tasked with evaluating whether Matus's basic needs would be met in Slovakia, but rather with evaluating what would be in his best interest. The Officer did not apply the correct legal test and that is a reviewable error. As submitted by the applicants, similar analyses have been struck down by this Court in previous decisions.

[22] I entirely agree with the applicants' submission that instead of being sensitive to this issue and assessing it to determine the best interest of the child, the Officer simply conceded that this is a level of hardship that Matus will have to face. He states "I recognize that Matus would experience some level of hardship if forced to return to Slovakia due to having to adapt to

changes in staff providing medical and social support to him." In fact, the Officer demonstrated his lack of sensitivity by suggesting even further changes, such as the applicants moving to a completely new city of Bratislava. This suggestion is made without any regard to the consequences of uprooting this child, and demonstrates that the Officer was not alert to the issue and was clearly minimising the impact of hardship on this child.

[23] It is important not to overlook the fact that even if the best interest of children is not necessarily determinative, the very purpose of the humanitarian and compassionate application is to ensure that the best interest of children are met, and that they do not suffer hardship. Justice Décary of the Federal Court of Appeal makes this very point in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 (CanLII), when he states "It is obvious […] that the concept of 'underserved hardship' is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship" (at para 9). For an Officer to simply accept that hardship will occur frustrates his role as a protector of the children's interests.

[24] At this point, it is important to underline that the mental condition of Matus does not only impose a duty of care on his parents, but it can also involve the *parens patriae* jurisdiction of the State itself, which, from time to time, has been divested to courts in case of persons mentally incompetent (see *E (Mrs) v Eve*, [1986] 2 SCR 388, 1986 CanLII 36 (SCC) at paras 72 to 74). While this is not a case where Canadian courts have been called to exercise a *parens patriae* jurisdiction, the Officer had to ask himself if it was in the "best interest" of an intellectually disabled child, who turns out to be an ethnic Roma, to be forced by Canada to return to his home country, Slovakia, where discrimination against Roma is rampant and persistent, simply because

his parents and family have not been sufficiently established and there are Roma who have been more discriminated. In such a case, in the context of an H&C application, the effectiveness of the state protection had to be considered in measuring the degree of hardship imposed on the applicants if they are to make an application from their home country and wait possibly years before receiving a response.

Analysis of discrimination and adverse country conditions

[25] The Officer's analysis of discrimination and adverse country conditions is also problematic. As decided by the Court in the past, state protection need not be perfect to be adequate, but in assessing risk and hardship in the H&C application, the Officer has to take into account the realities of the situation and whether, notwithstanding the home country state apparatus, the applicant's personal circumstances and the real risk he faces deserve an H&C exemption (*Pearson*, above at paras 38-41). As indicated by this Court in *Durrant v Canada (Citizenship and Immigration)*, 2010 FC 773 at para 4:

> The question on an H&C application is not whether adequate state protection is available to the applicants in their country of origin, but rather whether, having regard to all of the applicants' individual personal circumstances, they would face unusual, undeserved or disproportionate hardship if returned home.

[26] Even if I assume that it was open to the Officer to consider the availability of state protection in the evaluation of the existence of unusual and undeserved or disproportionate hardship, the Officer also had to consider the applicants' actual circumstances, the personal discrimination or risk they faced in the past or were likely to face as Roma (*Pearson*, above at para 38; *Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 at para 16 [*Sosi*]; *Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177 at para 30).

[27] It's also important to note in this case the RPD did not make any negative credibility findings with regards to the applicants' submissions on the discrimination they faced in Slovakia. Absent any credibility findings, the Officer had to take into account the facts on the discrimination experienced by the applicants as they were accepted by the RPD and as they were contained in the applicants' statutory declaration (*Ahmed v Canada (Minister of Citizenship and Immigration)*, [2001] 1 FC 483, [2000] FCJ No 1365 at paras 26-29; *Sosi*, above at para 16).

[28] Again, it is worthwhile reproducing what the principal applicant and his wife state in this regard in their statutory declaration:

> 11. In Sala we experienced repeated abuse and discrimination by our neighbours, who did not want us as Romas living on their streets. At times they physically blocked the road, making a human chain, trying to keep us from getting home. The tires on our car were repeatedly slashed. Stones were often thrown through the front window facing the street. We never used that front room, but rather stayed with our children in the back room of the house.
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> 12. We witnessed our children being bullied in school as they grew up. They regularly came home from school crying or very upset for having been called "dirty gypsies". Our children routinely came running home in fear because other kids threw rocks at them. We witnessed this treatment of our children both in Spisska Nova Ves, and later in Sala.
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> 13. Our children learn very well and are very bright. But their teachers gave them low grades, and often told us they didn't believe our children were capable of learning. We just knew this was wrong. The teachers also always accused the Roma children when something bad had happened, such as a broken window.
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> 14. Our son Branislav loves sports. He was excluded from joining sports teams at school, however, because he is gypsy. The other children, and their parents, did not want a gypsy kid on their team. There was no official policy to exclude Roma kids from sports, but this was how it played out in reality.
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> 15. We often went to the school to speak with the teachers about these problems. The teachers would claim to help fix the situation,

> but nothing ever changed. At one point the cruelty of other kids turned into taunts against our son Branislav, with kids accusing him of having sex with his mother. When we approached the teacher about this, she did nothing to discipline the other kids. Rather, she later brought my son to the front of the classroom, smacked him in front of the class, and accused him of being a tattle-tale. The bullying against our son escalated after this, such that he became the victim of more frightening stone-throwing.
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> 16. We would have gone to the principal of the school, but the principal was the mother of Branislav's teacher. We felt defeated and powerless to do anything about it. We thought about switching our children's school, but I, Marian, knew from my, Marian's, sister who had kids in another school in Sala that the situation was no better there.
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> 17. In Canada, Rozalia, Branislav and Zuzana attend Jarvis Collegiate in Toronto. They are thriving in school. Their grades are great. Branislav is successful in sports. They have all earned English in the short time we have been in Canada. We are amazed at our children's accomplishments now that they are not in a discriminatory society.

[29] In the present case, the Officer's evaluation of the applicants' actual circumstances is unreasonable. The Officer recognizes that the applicants have experienced severe incidents of discrimination including verbal and physical abuse while living in Slovakia, but finds that since the male applicant was consistently employed, since the children were attending the mainstream school system and since Matus had accessed medical services on numerous occasions, the applicants were better integrated in society than the general population of Roma in Slovakia and the hardship they experienced because of discrimination did not reach the level of unusual and undeserved or disproportionate. The Officer recognizes that there is discrimination against Roma but minimizes the discrimination experienced by the applicants because of the fact that they were able to access services, without considering the discrimination they suffered while accessing these services, including in education and health care. This is unreasonable.

[30] Instead of considering the concrete experiences of the applicants, the Officer concludes that the discrimination faced by the applicants is not as bad as the discrimination faced by other Roma, which leads him to the conclusion that the hardship that would be suffered by the applicants is not unusual and undeserved or disproportionate. In past cases, the Court has found that it was a reviewable error to dismiss an H&C application on the basis that the potential hardship of a family – including a child whose best interest is to remain in Canada – is similar to the hardship experienced by others in their home country: *Dina v Canada (Citizenship and Immigration)*, 2013 FC 216 at paras 9 and 10 [*Dina*]. The applicants are correct when they indicate that if a comparison is to be made, it should be made with the white Slovakian population: the fact that some Roma experience worse discrimination than the applicants should not be used to minimize the level of hardship lived by the applicants.

The consideration of mitigating factors

[31] In other cases where the Officer has found the best interest of children favoured a positive decision but was outweighed by other factors, the Court has turned its attention to the mitigating factors to determine if they were reasonably assessed (*Dina*, above; *Beharry v Canada (Citizenship and Immigration)*, 2011 FC 110; *Pearson*, above; and *Elenes Gaona v Canada (Citizenship and Immigration)*, 2011 FC 1083). This court has found that review is warranted in situations where the factors considered by the tribunal in coming to its decision are not relevant or appropriate. Recently, in *De Coito v Canada (Citizenship and Immigration)*, 2013 FC 482, Justice Gleason summarised the jurisprudence on review of discretionary decisions. She states:

> [6] The instances where review is warranted due to the unreasonable nature of the result reached by a tribunal in making a discretionary decision will be few and far between because it is not for the reviewing court to reweigh the factors considered by the

> tribunal, provided the factors it considered are the relevant ones (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 37, [2002] 1 SCR 3). Where, however, the tribunal fails to consider the relevant factors or considers irrelevant ones in coming to its decision, the case law has long recognised that such failure will provide the basis for intervention (see e.g. *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2, 137 DLR (3d) 558).

[32] In this case, the Officer clearly sets out four "mitigating factors" in the last paragraph of his decision. They are:

- He finds insufficient evidence to demonstrate that Matus's medical, educational and social needs could not be met upon his return to Slovakia;
- Although discrimination does exist, the government does not condone it;
- The applicants have integrated themselves better in Slovak society than the majority of the Roma;
- Their establishment in Canada is at best basic.

[33] Despite the able presentation made at the hearing by the respondent's counsel, I must agree with the applicants' counsel that the first three are considerations that are inappropriately brought into the H&C analysis by the Officer.

[34] First, the Officer's finding that Matus's medical and social needs could be met in Slovakia fails to consider the discrimination that he would face in accessing those services, and accepts that he will face hardship by tearing him away from support services here. I agree with the applicants' counsel that this factor does not actually mitigate any of the concerns that the Officer is supposed to be alert, alive and sensitive to. The fact that Matus would be allowed to go to a school and enter a hospital was not the issue, the issue was that the care he was getting was

inferior based on discriminatory attitudes, and that tearing him away from stability would cause serious hardship. In such circumstances, the fact that he can get some care and schooling does not address the concern presented.

[35] As submitted by the applicants' counsel, the second mitigating factor is also irrelevant. The fact that the government of Slovakia does not condone the discrimination faced by Roma does not mitigate the fact that it happens. Firstly, according to the documentary evidence and numerous Court cases, there is much evidence to hold the contrary view – a point that I do not need to decide today – that government actors do in fact condone the discrimination. Secondly, and more importantly, whether discrimination is condoned or not, it is still rampant, and the Officer accepts that it has serious adverse effects on the family. The reality is that the applicants will face this serious discrimination regardless of government policies. The humanitarian and compassionate application must be assessed from this practical reality. As to the third mitigating factor, the Officer stresses the applicants' success in integrating into Slovak society better than most Roma. Again, it is an irrelevant consideration, especially given that the Officer himself finds that in trying to integrate, they have faced serious discrimination in the past.

[36] To summarize my thought, it is unreasonable for the mitigating factors to simply be trite considerations that fail to account at all for the reasons why the applicants are seeking relief in the first place. This frustrates the very purpose of an H&C application. Indeed, as in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Officer has diminished the interest of the children to such a level that he, in effect, ignored them. An Officer cannot simply accept that a child should face hardship, and present no coherent reason or public

policy that would support removal. The mitigating factors in this case are unreasonably applied to the circumstances of this case.

Conclusion

[37] For all these reasons, the judicial review is allowed and the impugned decision is set aside and the matter is sent back for redetermination by a different Officer. No question of general importance has been proposed by counsel.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application is allowed. The impugned decision is set aside and the matter is referred back for redetermination by a different Officer. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3593-13
STYLE OF CAUSE:	MARIAN CONKA, TATIANA CONKOVA, MATUS CONKA, BRANISLAV CONKA, ZUZANA CONKOVA, ROSALIA CONKOVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION; THE MINISTER OF CITIZENSHIP AND IMMIGRATION; THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 8, 2014
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	OCTOBER 16, 2014

APPEARANCES:

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Nicholas Dodokin	FOR THE RESPONDENTS

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