

Federal Court



Cour fédérale

Date: 20150825

Docket: IMM-7205-14

Citation: 2015 FC 1004

Ottawa, Ontario, August 25, 2015

**PRESENT:** The Honourable Madam Justice Mactavish

**BETWEEN:**

**HEINZ KLEIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Heinz Klein is a German citizen who came to Canada on a visitor's visa in 1986 and never left. He has suffered from depression for more than 30 years, which has, at times, been severe enough to require his hospitalization. Mr. Klein has nevertheless been able to carve out a meaningful life for himself in Canada, where he has made many friends and has become deeply involved in his community, where he holds a leadership role.

[2] Mr. Klein does not lead a conventional existence. He works odd jobs and earns money through busking. Despite his significant mental health issues, Mr. Klein has never once sought social assistance, and has been able to support himself with the assistance of his community.

[3] Mr. Klein is estranged from his family in Germany, and has no friends, family or support systems available to him in that country.

[4] In refusing Mr. Klein's H&C application, the immigration officer repeatedly made reference to the fact that Mr. Klein chose to remain in Canada without status after his visitor's visa expired in 1986. It is apparent from a review of the officer's reasons as a whole that this was an extremely important consideration for the officer, which was given considerable weight.

[5] It is true that in deciding whether requiring an H&C applicant to apply for permanent residence from outside Canada would constitute *undeserved* hardship, officers are entitled to consider the extent to which the person's stay in Canada was due to factors within or outside their control. That said, even if an applicant's lengthy stay in Canada was entirely a matter of personal choice (as is the case here), an immigration officer must still consider whether requiring the person to apply for permanent residence from outside Canada would result in *unusual* or *disproportionate* hardship. I am not satisfied that the officer properly considered this aspect of the H&C test.

[6] While recognizing that Mr. Klein would suffer some hardship if he were required to return to Germany in order to apply for permanent residence, the officer held that Mr. Klein had not demonstrated that "he is suffering from depression more so than what is experienced by those who are required to leave a country such that it [...] amounts to unusual, undeserved or

disproportionate hardship". Given the evidence in the record regarding Mr. Klein's decades-long battle with depression, this finding is unreasonable.

[7] I am also satisfied that the officer demonstrated a lack of sensitivity in evaluating the extent of Mr. Klein's establishment in Canada. It is true that Mr. Klein was homeless during his early years in Canada, and that he has not held conventional employment during his time in this country. Mr. Klein also does not own a home, a car, a business or any of the other assets that are typically viewed as indicators of establishment in Canada. But Mr. Klein is not your typical H&C applicant. He is a person with a disability who has clearly worked very hard to make a life for himself in Canada. He volunteers extensively in a variety of organizations, and has succeeded in earning the respect and love of many people in his community. To require that someone in Mr. Klein's position be able to demonstrate that he has achieved the conventional markers of establishment is to ignore the reality of his life.

[8] An example of this is the officer's comment regarding the lack of receipts to support Mr. Klein's earnings. In addition to his volunteer activities, Mr. Klein is a musician who supports himself in part by busking. Busking is not a job that typically generates paperwork.

[9] The officer further appears to have dismissed all of the evidence regarding the important role that Mr. Klein plays in his community solely on the grounds that he remained in Canada without proper immigration authorization.

[10] The officer concludes by accepting that Mr. Klein will indeed face some hardship on his return to Germany, but discounts this by once again returning to his lack of status in Canada,

noting that Mr. Klein did not “have a reasonable expectation that he would be able to remain in Canada permanently given the course of his immigration history”.

[11] As a result of the above, I am not satisfied that the officer assessed Mr. Klein’s application in a reasonable or compassionate manner. The officer’s preoccupation with Mr. Klein’s lack of immigration status fails to recognize the fact that the whole purpose of an H&C application is to overcome matters such as inadmissibility or a lack of immigration status.

[12] As a consequence, Mr. Klein’s application for judicial review is granted. I agree with the parties that this case is highly fact-specific and does not raise a question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted.

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"Anne L. Mactavish"

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7205-14

**STYLE OF CAUSE:** HEINZ KLEIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** AUGUST 20, 2015

**JUDGMENT AND REASONS:** MACTAVISH J.

**DATED:** AUGUST 25, 2015

**APPEARANCES:**

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