Federal Court  Cour fédérale

Date: 20170811

Docket: IMM-4077-16

Citation: 2017 FC 766

Ottawa, Ontario, August 11, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

TJ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of an Inland Enforcement Officer [Officer] of the Canada Border Services Agency [CBSA], dated October 3, 2016 [Decision], wherein the CBSA refused the Applicant's request for a deferral of removal.

II. BACKGROUND

[2] The Applicant is a 41-year-old citizen of Trinidad and entered Canada as a permanent resident on January 22, 1993.

[3] On February 2, 2007, the Applicant was convicted of possession of a weapon for dangerous purpose. He was subsequently deemed inadmissible to Canada for serious criminality under s 36(1)(a) of the *IRPA* on June 19, 2007.

[4] On October 29, 2007, the Applicant was issued a deportation order, which he appealed to the Immigration Appeal Division [IAD]. The IAD granted a stay of removal for three years, which was extended twice for a total of three additional years.

[5] On July 24, 2014, the Applicant was convicted of two charges of assault with a weapon. Accordingly, the Applicant's stay was cancelled by operation of law on June 4, 2015.

[6] On June 23, 2015, the Applicant was initiated for a Pre-Removal Risk Assessment [PRRA] application. A negative PRRA decision was rendered on December 9, 2015 and a warrant was issued for his removal on December 18, 2015.

[7] On August 24, 2015, the Applicant submitted an application for permanent residence under humanitarian and compassionate [H&C] grounds. The H&C application was refused on March 11, 2016.

[8] On January 7, 2016, the Applicant was charged with assault, threatening death, and failure to comply with probation. The CBSA issued a warrant for his arrest and he was transferred to immigration hold, where he was detained until released on a cash bond on April 23, 2016. The Crown subsequently agreed to stay the outstanding criminal charges on August 16, 2016, pending the Applicant's removal from Canada.

[9] On September 15, 2016, the Applicant signed a Direction to Report for removal, which was scheduled for October 9, 2016. He then submitted a request for deferral of the removal on September 21, 2016.

III. DECISION UNDER REVIEW

[10] In a Decision dated October 3, 2016, the Officer denied the Applicant's request for a deferral of removal.

A. *H&C Application*

[11] The Officer noted that the Applicant had filed a request for reconsideration of his H&C application, which had not been decided at the time of the Decision. However, while the H&C application was initially submitted on August 24, 2015 and refused on March 9, 2016, the reconsideration was not requested until September 19, 2016.

[12] With references to Instruction Guide 5291 and Inland Processing Manual 5, the Officer stated that outstanding applications for permanent residence do not automatically give rise to

statutory stays of removal nor are they impediments to removal. The Officer then noted that Parliament had not enacted provisions to stay the enforcement of a removal order due to an outstanding H&C, or a reconsideration of an H&C application.

[13] The Officer found insufficient evidence to demonstrate that a decision on the reconsideration of the H&C application was imminent. The Officer was also satisfied that the Applicant had had the opportunity to have his H&C factors addressed prior to his removal from Canada. Additionally, the Officer found insufficient evidence to indicate that the reconsideration would not proceed after the Applicant's removal. Finally, the Officer questioned the timeliness of the request for reconsideration.

[14] The Officer considered the submission that the Applicant's previous counsel had provided ineffective assistance in the H&C application. However, the Officer noted that he or she was not mandated to assess the quality of an H&C application or the decision itself and that the onus to seek adequate counsel and ensure the quality of the H&C application was on the Applicant. Nonetheless, the Officer considered the H&C factors presented in the request.

B. *Hardships and Psychological Issues*

[15] The Applicant submitted that he suffered from developmental trauma disorder and alcohol dependency issues that were both related to physical and sexual abuse he suffered as a child in Trinidad. The Applicant further submitted that, if returned to Trinidad, he would suffer undue hardship due to absence of family support, which would destabilize his mental status,

threaten a relapse of his alcohol dependency, and result in further self-destructive-coping strategies.

[16] The Officer acknowledged that the Applicant had been in Canada for over 23 years and had a degree of establishment, including a spouse and family nearby. However, the Officer found that, if removed, the separation of the Applicant from his spouse would not be complete or permanent, as his spouse could visit him in Trinidad, the Applicant could file for an application outside of Canada, and the couple could maintain contact via telephone and the Internet. The Officer also noted that there was insufficient evidence to suggest that his spouse would be unable to cope.

C. *Best Interests of the Children [BIOC]*

[17] The Officer considered the best short-term interests of the Applicant's five Canadian-born children, of which three were minors. The Officer found that the children would continue to have the love and support of their mother as well as access to Canadian social programs such as healthcare and education. The Officer then noted there was insufficient objective, corroborating evidence to indicate that the children would not be able to cope without the Applicant in Canada. Additionally, the Officer noted that the children would continue to have the support of their extended family in Canada, including their grandmother and aunts.

D. *Impact of Removal*

[18] The Officer considered the Applicant's troubled childhood and acknowledged the role of his family in the Applicant's recovery. The Officer reviewed a psychological report by Dr. Agarwal that stated the Applicant required familial support and professional help. However, the Officer found insufficient evidence to indicate that the Applicant was being professionally treated or would be unable to obtain professional help in Trinidad.

[19] The Officer then noted that the Applicant had arrived in Canada as a permanent resident but had lost that status upon his criminal conviction. Although the Applicant had received a stay of removal for a total of five years, the stay was ultimately cancelled by operation of law due to a further criminal conviction. Moreover, the Applicant was facing further criminal charges that had been stayed by the Crown pending his scheduled removal from Canada.

[20] In reviewing the circumstances, the Officer stated that he or she was not mandated to conduct an assessment of the merits of the reconsideration request for the H&C application, as the available discretion was limited to evidence of serious detrimental harm resulting from the enforcement of the removal order. The Officer then acknowledged that although the removal and relocation process would be challenging and difficult, it was not sufficient to warrant a deferral of removal.

[21] Furthermore, the Officer acknowledged the anxiety and stress caused by the removal and relocation, but found that it was an inherent part of the process. Moreover, the Applicant had

been aware of the removal for quite some time and the Officer was satisfied that the Applicant had had reasonable notice to prepare.

[22] As a result, the Officer determined that a deferral of the execution of the removal order was not appropriate in the circumstances of the case.

IV. ISSUES

[23] The Applicant submits that the following are at issue in this application:

1. Did the Officer completely misapprehend the medical evidence?
2. Did the Officer fail to adequately consider the best short-term interests of the three minor children by issuing a boiler-plate analysis, ignoring the evidence, and misapprehending the test as whether they would be "able to cope without [the Applicant]'s presence in Canada?"
3. Did the Officer apply the wrong test for ineffective assistance of counsel?

V. STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review

analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[25] The standard of review of the decision of a removals officer to defer removal is reasonableness, unless it involves a question of law: *Shpati v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 286 at para 27; *Peter v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1073 at para 82. Accordingly, the first two issues will be assessed under reasonableness. The third issue concerns the exercise of a removal officer's limited discretion in assessing factors that are relevant to removal, including whether allegations of ineffective counsel should be a factor in the exercise of that discretion. In my view, this engages the Officer's interpretation of the scope of his or her discretion and should also be reviewed on a standard of reasonableness.

[26] 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 para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 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."

VI. STATUTORY PROVISIONS

[27] The following provisions of the *IRPA* are relevant in this proceeding:

Enforceable removal order	**Mesure de renvoi**
48 (1) A removal order is enforceable if it has come into force and is not stayed.	48 (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	**Conséquence**
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

VII. ARGUMENTS

A. *Applicant*

(1) Discretion to Defer Removal

[28] The Applicant argues that officers have discretion to defer execution of a removal order where the circumstances warrant it, including the disclosure of new and sufficient evidence of previously unexamined risk. In such circumstances, the consequences of removal cannot be made good by readmitting the person to the country following the successful conclusion of their pending application: *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148 at para 48.

[29] Officers also have discretion to defer removal where the short-term best interests of the child would be compromised. In fact, sufficient consideration must be given to the short-term best interests of the child: *Joarder v Canada (Citizenship and Immigration)*, 2006 FC 230 at para 3.

[30] The jurisprudence demonstrates that officers have the discretion to defer removal under s 48 of *IRPA* where the decision involves consideration of relevant factors and circumstances unique to the particular case. Moreover, where there are compelling circumstances that make it necessary for a deferral, justice requires that the officer exercise their discretion for a deferral: *Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 at paras 3, 17, 23.

(2) Medical Evidence

[31] The Applicant submits that the Officer erred by not addressing the impact that family separation would have on the Applicant's mental illness.

[32] The Applicant submitted affidavits from his sister and mother that described their roles in helping the Applicant maintain his sobriety. The Applicant also submitted a psychiatric report that highlighted multiple medical diagnoses, including developmental trauma disorder, post-traumatic stress disorder, major depressive disorder, and alcohol use disorder. The report also clearly stated that the Applicant required familial support to avoid relapsing back into alcohol use disorder.

[33] However, the Decision merely states that the psychological report was reviewed and that there was insufficient evidence to indicate the Applicant was in professional treatment or would be unable to obtain professional treatment in Trinidad. This response does not consider the impact of familial separation on the Applicant, which is crucial given the medical evidence that he was likely to relapse without familial support. Additionally, the consideration of professional help and its availability does not negate the impact of familial separation. Thus, it was unreasonable for the Officer to ignore the impact of removal on familial support for the Applicant's mental health.

[34] The Applicant also argues that the Officer erred in discounting the medical diagnoses based upon a lack of evidence regarding ongoing professional treatment. First, the Officer's finding is incorrect with regards to insufficient evidence that the Applicant was undergoing professional treatment; the Applicant had submitted evidence that he was attending individual counselling and was supported by a sponsor through Alcoholics Anonymous. Second, the jurisprudence provides that the likelihood of an applicant's mental health worsening if removed from Canada is a relevant consideration that must be identified and weighed regardless of the availability of treatment in the country of removal: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 47-48 [*Kanthasamy*].

[35] Finally, the Applicant contends that the Officer erred by failing to distinguish between psychological distress that exists solely due to an impending removal and mental illness that exists regardless of the removal. In the Decision, the Officer stated that the stress and anxiety that would be experienced by the Applicant was an inherent part of the removals process.

However, the Applicant's mental illnesses are not an inherent part of the removals process; they are the result of childhood sexual, physical, and emotional abuse. Even if the mental illnesses are aggravated due to removal, it is not due to the removal *per se*, but to the fact that the Applicant is being removed to the country where the abuses occurred, which is clearly stated in the psychiatric report. In this context, the availability of professional treatment in Trinidad should be irrelevant to the determination of whether the Applicant would face psychological harm if removed. The issue, as stated by the psychiatrist, is that the Applicant would suffer harm if removed to the country that is the cause of his mental illnesses and the failure to address this issue is a misapprehension of the medical evidence and a reviewable error: *Jayasundararajah v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1312 at para 55; *Bhagat v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 45 at paras 22-23; *Gyuker v Canada (Citizenship and Immigration)*, 2001 FCT 323 at paras 9-10.

(3) Best Interests of the Children

[36] The Applicant takes issue with the BIOC analysis in the Decision. A removals officer must conduct a proper analysis in determining the best short-term interests of the children, which the Officer failed to do in the present case.

[37] The first half of the BIOC analysis is boilerplate and unresponsive to the circumstances. The Officer states basic, uncontested facts such as the children's access to social programs and the fact that they would remain in the care of their mother. This is an error because it does not provide a rationale for the Decision: *Velazquez Sanchez v Canada (Citizenship and Immigration)*, 2012 FC 1009 at paras 18-19.

[38] The second half of the analysis simply states that there was insufficient evidence to indicate the children would not be able to cope without the Applicant in Canada. A BIOC analysis requires more than a consideration of whether the children will be able to cope in the absence of a parent. Additionally, the test is not whether the children will be able to cope in the absence of a parent, even in the context of a deferral request. The Decision should have stated and defined the BIOC and examined the impact of the Applicant's removal on the children, but the Officer did neither and, instead, applied an arbitrary hardship analysis that is akin to the analysis rejected in *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 [*Hawthorne*]. As stated in *Kanthasamy*, above, at paras 77-78, the BIOC analysis should not be conducted through a hardship lens because it would be overly restrictive.

[39] *Hawthorne*, above, at para 5, also provides that specific reasons must be given as to why the non-removal of a parent is in a child's best interests. The Officer did not even address the primary factor that was raised with regards to the BIOC, which was that it is in the children's best interests that the Applicant maintains his sobriety. The Officer did not conduct any evaluation of how the children's best interests would be impacted by a deterioration in their father's mental health, particularly a relapse into alcohol dependency. Moreover, the Officer did not assess the Applicant's post-traumatic stress disorder through the lens of a BIOC analysis, which is an error: *Aguirre et al v Canada (Citizenship and Immigration)*, 2014 FC 274 [*Aguirre*].

[40] Finally, the Officer's finding that there was insufficient evidence to establish that the Applicant's wife and children would not be able to cope without his presence in Canada is

summarily dismissive of the children's own concerns, which is contrary to *Hawthorne*, above, at para 10.

(4) Ineffective Counsel

[41] The Applicant sought a deferral until after his H&C application was reconsidered because the circumstances surrounding the preparation of that application amounted to a denial of natural justice that resulted in a decision rendered without all the relevant evidence being before the decision-maker. In preparing the application, the Applicant had retained a now-suspended immigration consultant. The consultant engaged in unprofessional conduct by consuming alcohol with the Applicant during or after their meetings. In the H&C application, the consultant did not submit a statement from the Applicant and did not provide any information about the BIOC. Instead, the consultant submitted a statement pertaining exclusively to H&C factors with the Applicant's PRRA application, which the PRRA officer did not have the authority to consider.

[42] In addressing the issue concerning the ineffective assistance of counsel, the Officer misstated the applicable test in saying that the onus rested on the Applicant to ensure he obtained adequate counsel and the quality of the H&C application. The applicant is not responsible for the incompetence or negligence of his representative.

[43] Moreover, the Applicant met the requirements to establish a denial of natural justice on the basis of incompetent counsel. First, he submitted evidence of the deficient H&C application and outlined the unprofessional conduct, thereby demonstrating actual incompetence with a precise factual foundation that established the exact dimensions of the problem. Second, the

H&C decision stated that the refusal was due to insufficient evidence, which demonstrates that the incompetence of counsel had resulted in prejudice. Third, the Applicant provided the consultant with an opportunity to explain the conduct, but did not receive a response.

[44] In the Decision, the Officer erroneously stated that he or she could not assess the quality of the H&C application, thereby failing to consider crucial evidence. This is a fettering of discretion and a failure to conduct the first two prongs of the test for a breach of natural justice on the basis of incompetent counsel.

[45] In light of the above, it was also wrong for the Officer to state that he or she was satisfied that the Applicant had had the opportunity to have his H&C factors addressed prior to the removal.

B. *Respondent*

(1) Discretion of Removals Officers

[46] The Respondent submits that removals officers have authority to defer the execution of a removal order in very limited circumstances. The factors that can be considered are related to the physical ability to comply with the removal order: *Simoes v Canada (Citizenship and Immigration)*, [2000] FCJ No 936 at para 12. Removals officers are also not authorized to conduct H&C evaluations.

[47] The Officer had a responsibility to consider the circumstances related to the H&C application and its potential impact on the removal order, including the conduct of the Applicant: *Williams v Canada (Public Safety and Emergency Preparation)*, 2010 FC 274 at para 38. The Officer complied by assessing the immigration history, Applicant's conduct, BIOC, and hardship alleged upon return and its potential impact on removal.

(2) Assessment of Medical Evidence

[48] The Respondent argues that the Officer's assessment of the medical evidence was reasonable.

[49] First, the Officer noted that his or her limited discretion was centered on evidence of serious detrimental harm resulting from the removal, as stated in the jurisprudence of this Court: *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 49 [*Baron*].

[50] Second, the Officer did not misapprehend the medical evidence; in the reasons, the Officer noted the submissions regarding the threat of the Applicant's relapse into alcohol dependency due to the separation, but found that the separation was not necessarily complete or permanent.

[51] Third, the Officer acknowledged that the Applicant's mental illnesses were not solely due to the pending removal by stating that the illnesses stemmed from past childhood abuse. Accordingly, the Applicant's argument that the Officer misapprehended the mental illnesses as existing due to the removal is unfounded.

[52] Fourth, the Officer considered the impact of removal on the Applicant by addressing the concern of a potential relapse, as well as whether the Applicant was currently in professional treatment. Contrary to the Applicant's submissions, the evidence was not clear that the Applicant was in treatment. There was an indication that the Applicant had made an appointment for counselling and that his cousin was his Alcoholics Anonymous sponsor, but such evidence does not indicate the Applicant was undergoing treatment.

(3) BIOC

[53] In the context of a deferral decision, the Officer was required to consider the short-term interests of the children, such as their immediate care. As such, the issue of whether the Applicant would be able to maintain his sobriety was not a consideration because it is a long-term interest and is not within an enforcement officer's jurisdiction. This Court has stated numerous times that enforcement officers are not H&C officers: *Munar v Canada (Citizenship and Immigration)*, 2005 FC 1180 at para 36. Consequently, enforcement officers have no obligation to substantially review the children's best interests before executing a removal order; they only need to review whether the children will be adequately looked after subsequent to the parent's departure: *Baron*, above, at paras 57, 81; *Uthayakumar v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 998 at para 12.

[54] Accordingly, the Officer did not need to consider how the children would be affected by deterioration in the Applicant's mental health and potential relapse into alcohol dependency. Moreover, the risk of relapse and deterioration is speculative, as the Applicant has achieved and maintained sobriety under difficult circumstances, including incarceration and separation from

his family. Additionally, the Respondent notes that the record demonstrates the Applicant is subject to a "no contact" order with his spouse as a condition of his pending criminal charges; he lives with his sister, has no contact with his wife, and has visits from his children on weekends. The Applicant is able to maintain sobriety in these conditions and began the process while incarcerated and separated from his family members.

[55] Finally, the Officer's language does not indicate a hardship analysis was engaged. The Officer stated that there was insufficient evidence to demonstrate the Applicant's wife and children would not be able to cope without his presence in Canada; this is not a hardship analysis, but a comment made in the context of the BIOC analysis.

(4) Ineffective Counsel

[56] The Respondent contends that the Officer did not err in his comments on the allegation of incompetent counsel. As stated previously, an enforcement officer's discretion is very limited and there are no cases submitted by the Applicant that support an officer's authority to defer a removal based on an allegation of incompetent counsel. Instead, the jurisprudence demonstrates that applicants generally bear the consequence of their choice in counsel, including representation by consultants: *Cove v Canada (Citizenship and Immigration)*, 2001 FCT 266 at paras 5-6.

[57] Furthermore, the Applicant stated that he did not disclose his past childhood abuses or alcohol dependency to the consultant. The Applicant also did not undergo a psychological assessment until after his H&C application was refused; as such, he was not diagnosed with any

mental health issues at the time of the H&C application. Consequently, it is not reasonable to expect that the consultant would have known about these issues and included them in the H&C application.

C. *Applicant's Further Argument*

(1) Medical Evidence

[58] The Applicant further argues that he has raised a serious issue with respect to the Officer's treatment of the medical evidence. The evidence before the Officer indicated that: there would be a destabilization in the his mental health if removed from Canada due to pre-existing mental illnesses; he was likely to suffer a relapse in his mental illnesses; and he was likely to resort to self-destructive coping strategies, including resuming alcohol consumption, if removed. The reasons for the destabilization of the Applicant's mental health were attributed to the trauma of returning to the place where the abuse had occurred and separation from his family, particularly the primary supportive figures, his mother and sister, in his recovery. However, the Officer only noted that the Applicant's family played a significant role in his recovery and failed to analyze the impact of the separation.

(2) Best Interests of the Children

[59] The Applicant also claims that the Decision cannot stand due to the BIOC analysis. There would be a devastating impact on the children in the short-term if their father were to relapse into alcoholism, given the negative impact of the Applicant's alcoholism on the children and the positive impact of his sobriety on them. The fact that the BIOC were not examined prior to

removal is a “special consideration” noted in *Baron*, above, that justifies the deferral of the Applicant’s removal pending the H&C application reconsideration.

(3) Ineffective Counsel

[60] The Applicant takes the position that the allegations against his previous counsel constitute “special considerations” indicated in *Baron*, above, that warrant a deferral of the execution of the removal order pending the reconsideration of the H&C application.

D. *Respondent’s Further Argument*

(1) Assessment of Medical Evidence

[61] The Respondent further submits that it was reasonable for the Officer to consider that the Applicant required professional treatment to avoid a relapse into alcohol dependency, as stated in the psychiatric report, and then to find insufficient evidence that the Applicant was seeking professional treatment or would be unable to find such treatment in Trinidad. The sole evidence regarding the Applicant’s participation in professional treatment was an affidavit from his cousin and sponsor that the Applicant participated in Alcoholics Anonymous, a non-professional support network. However, there was no evidence that indicated that, upon return to Trinidad, the Applicant could not participate in a similar program or would be unable to seek professional counselling.

(2) Best Interests of the Children

[62] The Respondent also reiterates the argument that a substantial review of the BIOC was not required. In the deferral context, an officer's obligation to consider the BIOC is at the low end of the spectrum: *Ally v Canada (Citizenship and Immigration)*, 2015 FC 560 at paras 21-23 [*Ally*]. The Officer was alive and sensitive to the children's short-term and immediate interests, and found that the children would remain in Canada, supported by their mother and other family, and would have access to Canada's social programs, healthcare, and education.

[63] Furthermore, as in *Ally*, above, it was reasonable for the Officer to find the children had access to Canadian social services. The finding helped inform the subsequent finding that there was insufficient evidence to indicate the Applicant's wife and children would not be able to cope if the Applicant were not in Canada, a comment that remarks on the factual circumstances of the remaining family members. The comment does not create a new BIOC test, as the Officer used the exact same language in reference to the Applicant's spouse in the prior paragraph of the Decision.

[64] The Officer was not required to consider the hypothetical impact of the Applicant's future health on the children. Unlike *Aguirre*, above, the children are not being removed from Canada.

(3) Ineffective Counsel

[65] The Respondent also argues that the Officer's discretion was not fettered in the analysis regarding the allegations of incompetent counsel. The test for ineffective assistance of counsel and corresponding allegation had little bearing on the Officer's discretion to defer the removal. The Applicant sought a deferral on the grounds that his H&C application was being reconsidered, which is different from the facts of the jurisprudence cited by the Applicant, where the Court was asked to decide whether a re-determination was warranted.

[66] It was reasonable for the Officer to state that he or she did not have authority to assess the quality of the H&C application, including whether it was likely to succeed. This Court has held that an enforcement officer is not obligated to conduct an inquiry akin to a "pre-H&C" and consider factors that are properly addressed at other stages of the process: *Manoharararj v Canada (Citizenship and Immigration)*, 2006 FC 376 at paras 20, 26, 28.

[67] Additionally, it was reasonable for the Officer to find the Applicant's H&C reconsideration request was not imminent. As noted by the Officer, the request was submitted on September 19, 2016, just a few weeks prior to the removal date and more than six months after the refusal. Pending H&C applications that are brought on a timely basis and are yet to be resolved due to backlog may constitute a ground for deferral, but the Applicant's request did not meet either of these requirements: *Baron*, above, at para 49. Moreover, filing an H&C application at a late stage in the removal process is not a bar to removal; similarly, filing a

reconsideration at a similar stage is not a bar as the reconsideration will be processed after the Applicant has left Canada: *Baron*, above, at paras 50-53.

VIII. ANALYSIS

A. *Medical Issues*

[68] The Applicant says that the Officer misunderstood the nature of the medical evidence and "does not address the impact that family separation will have on the Applicant's mental illness, despite the role of his family being the most crucial in his recovery process."

[69] The Applicant also says that the Officer failed to understand and address the fact that his mental illness is not an inherent part of the removals process and that it will be aggravated if he is removed to the country where the trauma that led to the mental illness occurred.

[70] The Officer addresses the medical issues at two (2) points in the Decision:

> I note that according to the deferral request, [the Applicant] will suffer excessive hardship upon return to Trinidad. It is submitted that [the Applicant] suffers from Developmental Trauma Disorder, related to physical and sexual abuse he suffered during his childhood in Trinidad that he also struggles with an (*sic*) alcohol dependency issues. It is submitted that [the Applicant] will suffer undue hardship upon return to Trinidad where he has no family support to turn to and where separation from his family will be another stress which will serve to destabilize his mental status and where he is a threat to relapse to alcohol dependency and further self-destructive coping strategies. I acknowledge that [the Applicant] has been in Canada for over 23 years and has a degree of establishment in Canada, including finding stable work, having a spouse and 5 children and his close family nearby.
>
> Finally, I have considered the impact of removal upon [the Applicant] himself, upon his return to Trinidad. I acknowledge

> that according to the deferral request, [the Applicant] had a troubling childhood and I commend him for facing his issues and dealing with his past sexual abuse and also his alcohol dependency. I also acknowledge that his family plays a significant supporting role during his recovery. I have reviewed Dr. Agarwal's psychological report and note that Dr. Agarwal states that while [the Applicant] requires the support of his family he also requires professional help. I note that insufficient evidence was submitted to indicate that [the Applicant] is currently seeking professional help or that he would be unable to find professional help upon his return to Trinidad.

[71] So there is a full acknowledgement that the Officer understands that the Applicant's submissions make it clear that he "will suffer undue hardship upon return to Trinidad where he has no family support to turn to and where separation from his family will be another stress to destabilize his mental status and where he is a threat (*sic*) to relapse to alcohol dependency and further self-destructive coping strategies."

[72] The Officer acknowledges that "his family plays a significant supporting role in his recovery" but does not address how this "significant supporting role" can be carried out if the Applicant is returned to Trinidad. The Officer simply says that "insufficient evidence was submitted to indicate that [the Applicant] is currently seeking professional help or that he would be unable to find professional help upon his return to Trinidad."

[73] It seems to me, then, that although the Officer acknowledges the important role that the Applicant's family must play in his treatment and recovery, the Officer fails to consider how that role can be played if the Applicant is deported to Trinidad. It may be that the Officer believed that this was not a factor he could consider in exercising his discretion to defer removal, but there is no explanation to this effect and, given the jurisprudence, it is not clear why such a factor

should not be considered and addressed. This is a telling and serious omission that renders the Decision unreasonable.

[74] The Officer clearly says that "My limited discretion is centred on evidence of serious detrimental harm resulting from enforcement of the removal order as scheduled," but he fails to consider the medical evidence of what will happen to the Applicant without the support of his family and whether this amounts to "serious detrimental harm."

[75] The Respondent suggests that, if I read the Decision as a whole, the medical evidence is acknowledged and dealt with by the Officer who says, for example, that the Applicant's separation from his family "need not be complete or permanent." I find these arguments unpersuasive. The record shows that the Applicant's support is coming from his mother and sister, and not his spouse. It was separation from his mother and sister that was highlighted in the deferral request and the Officer does not deal with this. The Applicant's position is supported by the relevant jurisprudence. For example, in *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 [*Danyi*], the Court had the following to say:

> [38] The Officer's approach to the medical evidence concerning Veronika runs afoul of the teachings from *Kanthasamy*, where the Supreme Court stated as follows with respect to a psychologist's report submitted to an H&C officer:
>
> > [46] In discussing the effect removal would have on Jeyakannan Kanthasamy's mental health… the Officer said she "[did] not dispute the psychological report" and "accept[ed] the diagnosis". The report concluded that he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood resulting from his experiences in Sri Lanka, and that his condition would deteriorate if he was removed from Canada.

The Officer nonetheless inexplicably discounted the report:

… the applicant has provided insufficient evidence that he has been or is currently in treatment regarding the aforementioned issues or that he could not obtain treatment if required in his native Sri Lanka or that in doing so it would amount to hardship that is unusual and undeserved or disproportionate.

[47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce additional evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.

[48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations in addition to medical inadequacies in the country of origin, may be relevant: Inland Processing, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)* (2011), 96 Imm. L.R. (3d) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)* (2012), 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthasamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the

> psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthasamy's health problems in her analysis.
>
> [39] Although *Kanthasamy* involved an H&C application, unlike the present case which concerns a request to defer removal, in my view the Supreme Court's foregoing comments are equally applicable in the context of this case. The Officer in this case, like the officer in *Kanthasamy*, unreasonably discounted the psychologist's finding concerning Veronika's mental health. The Officer faulted the psychologist's report for being dated and not stating whether Veronika currently suffers from suicide ideation or is currently at risk for suicide. The Officer in this case, much like the officer in *Kanthasamy*, also found "insufficient medical evidence … to indicate that Veronika has sought or received mental health treatment, as recommended" and that "insufficient evidence was presented to indicate that Veronika could not pursue mental health treatment upon her return to Hungary." The Officer did not reasonably consider or adequately assess the fact that removal itself would trigger or cause further psychological harm to Veronika, and his treatment of the medical evidence concerning Veronika, in view of *Kanthasamy*, is unreasonable.
>
> [40] To summarize with respect to this issue, the Officer's decision is unreasonable and must be set aside because his assessment and treatment of the medical evidence concerning Alex and his mother unreasonably discounted such evidence, especially in view of the fact that removal itself would trigger or cause psychological harm to each of them.

[76] Much the same can be said for the present case.

B. *Mootness*

[77] Since I heard this application on May 31, 2017, counsel have informed the Court that a negative decision was rendered in the Applicant's H&C reconsideration request on May 29, 2017.

[78] This means that the present application before me was moot at the time of the hearing, although neither counsel nor the Court were aware that this was the case.

[79] In my view, then, no live controversy remains between the parties because the Applicant has now been granted the reconsideration for which he requested a deferral of removal.

[80] Applicant's counsel asks that I nevertheless exercise my discretion as per *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 and decide the application.

[81] The Applicant argues that the medical evidence issue in this case transcends the facts and warrants further clarification by this Court. In my view, the treatment of medical evidence of the kind adduced in this case has already been given ample consideration by the Court. See, for example, *Danyi*, above, which I have followed in my analysis. Consequently, I see no point in proceeding any further with this application. It must be dismissed for mootness.

[82] Counsel concur that this application raises no question for certification and the Court agrees.

JUDGMENT IN IMM-4077-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed for mootness;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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