Federal Court  Cour fédérale

**Date: 20100601**

**Docket: IMM-2738-09**

**Citation: 2010 FC 571**

**Ottawa, Ontario, this 1st day of June 2010**

**Before:** **The Honourable Mr. Justice Pinard**

**BETWEEN:**

**Sabir Mohammad SHEIKH**
**Seema Sabir SHEIKH**
**Ashra Kamwal SHEIKH**
**Sami Mohammad SHEIKH**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Pre-Removal Risk Assessment ("PRRA") Officer F. Osmane (the Officer) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), dated March 27, 2009, wherein he rejected the applicants' application for a regulatory exception on humanitarian and compassionate grounds (the "H&C application") so as to apply for permanent residence from within Canada.

[2] Mr. Sabir Mohammad Sheikh (“Sabir”) is the principal applicant. He is married to Seema Sabir Sheikh (“Seema”) and they have three daughters and one son. His eldest daughter, Tayyaba Kanwal, is married and living with her husband in North York, Ontario, and she has two children. She is not part of this application because her husband is sponsoring her. Sabir’s youngest daughter was born in Canada and is not an applicant. His son, Sami Mohammad (“Sami”) was born in the United Arab Emirates and his other daughter, Ashra Kamwal (“Ashra”), in Pakistan. All of the applicants are citizens of Pakistan.

[3] In their H&C application, the applicants allege that they are at risk of harm due to Sabir’s connections with the Pakistan People’s Party (“PPP”). The wife and children of the principal applicant allege they will suffer the same risk because of membership in a particular social group, namely, the family.

[4] They received a positive decision by the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) on December 21, 2001 which was annulled on August 20, 2007 on the basis of the discovery of a misrepresentation and in the absence of other evidence justifying granting them protection in Canada. The Federal Court did not grant leave for judicial review of that decision.

[5] The Officer recognized that the evaluation of the risk of return in an H&C application is different from the PRRA. The PRRA can apply sections 96 and 97 of the Act. Critical to an H&C determination is whether there is excessive or unjustifiable hardship. The Officer highlighted that the applicants had not presented any evidence from a source independent of themselves or

corroborative that would show that they face hardship by reason of political opinion, nationality or membership in a particular social group. This was their burden to carry and they did not discharge it.

[6] Also to be assessed in an H&C application is the degree of establishment of the applicants. They arrived in Canada on December 21, 2000 and since being granted refugee status they have lived in Canada for almost a decade.

[7] The principal applicant has been self-employed in an office of immigration consultants from January 2003 to June 2007 and as a manager of *Marché B. K.* since July 2007. The Officer noted that the applicant had not provided income tax returns or notices of assessment to corroborate his income or the assertion that he has paid income tax since coming to Canada. The absence of this kind of proof is a negative factor influencing the Officer's conclusions on the establishment factor because the applicant is well-educated, has worked in a bank in the United Arab Emirates, which earned him a certificate in recognition of his services, and he is represented by experienced counsel. In short, there is no excuse to have omitted this information.

[8] The applicant did provide a bank statement for the months of March and June 2008 but the Officer found that this is not a sufficient substitute for income tax statements or notices of assessment for many years. The Officer then considered the evidence of Mr. Bilal Bakar, president of *Marché B. K.*, which indicates that the principal applicant held the position of manager for a year. Nevertheless, Mr. Bakar confirmed to the Officer that the principal applicant had not occupied his position since February 2008.

[9] Generally, with respect to establishment, the decision-maker determined that the principal applicant had not met his burden. It was noted that the applicant had produced six letters confirming his history as a kind and generous man. While the decision-maker accepted that this is a positive factor it is not sufficient to justify an exception to the permanent residency application out-of-country requirements.

[10] The Officer then continued to evaluate the establishment factor with respect to each of the other applicants.

[11] In regard to the spouse of the principal applicant, Seema, he found that she did not provide any evidence that she has taken steps to integrate herself into the community. The decision-maker considered the fact that in 2004 she had a baby and this added to her workload in the house and noted that it would be understandably difficult for her to integrate into the Canadian social fabric to a significant extent. However, she had not given any indication as to whether she was participating in activities to integrate into society. To return to Pakistan would not constitute hardship that is unusual and unwarranted or disproportionate.

[12] With respect to Ashra, the applicant's 25-year-old daughter, the Officer noted that she was divorced and had recently obtained her secondary school diploma and started at Concordia University in May 2008. She is well-thought of at *Walmart* where she works part-time. The Officer concluded that she had gone to some lengths to establish herself after the breakup of her marriage.

[13] The applicant's other child, Sami, was born in the United Arab Emirates in 1988, has Pakistani citizenship, and completed secondary school in Montreal 2006. He has worked for a polling company since March 2006.

[14] From the evidence, the Officer concluded that the children have made more effort than their parents to establish themselves in Canada. However, it was ultimately insufficient because it was their burden to show how making a visa application outside of Canada would be an unusual, excessive or unjustifiable hardship.

[15] The Officer was not persuaded by the fact that requiring these children to quit their jobs and interrupt their studies would constitute the requisite hardship even in light of the economic conditions and professional opportunities for the two of them.

[16] Lastly, the Officer considered the best interests of the child who was born in Canada, Sabrina. For someone so young, the Officer recognized that it is not reasonable to expect that she would have developed ties to Montreal and at this age she continues to depend on her parents. Outside of the general concern that she will not be able to have access to the kind of opportunities for quality of life outside of Canada, no evidence was mentioned about her specific health or personal needs to demonstrate that the child would experience unusual and unwarranted or disproportionate hardship. The Officer also noted that members of the applicants' extended family lived mostly in Pakistan. This mitigated against a finding of hardship for the child.

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[17] Decisions on H&C applications are discretionary requiring a "factual intensity" such that the deferential standard of reasonableness is appropriate (*Zambrano v. Minister of Citizenship and Immigration*, 2008 FC 481, 326 F.T.R. 174, at paragraph 31; *Mooker v. Minister of Citizenship and Immigration*, 2008 FC 518). The essential questions in this inquiry are whether there exists "justification, transparency and intelligibility within the decision-making process" and whether the decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the law and the facts" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47).

[18] The hardship factor is a major consideration for in-Canada applications on H&C grounds for an in-Canada waiver of regulatory requirements which was the basis of the Federal Court's decision in *Irimie v. Canada (Minister of Citizenship and Immigration)*, 10 Imm. L.R. (3d) 206, [2000] F.C.J. No. 1906 (T.D.) (QL) where Justice Denis Pelletier concluded:

> [26] I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test is to make the H & C process an *ex post facto* screening device which supplants the screening process contained in the *Immigration Act* and *Regulations*. This 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. The H & C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship. There is no doubt that the refusal of the applicants' H & C application will cause hardship but, given the circumstances of the applicants' presence in Canada and the state of the record, it is not unusual, undeserved or disproportionate hardship. Whatever standard of review one applies to the H & C officer's decision, it meets the standard. The application for judicial review must therefore be dismissed.
>
> (My emphasis.)

[19] The applicants' submissions in support of their H&C application suggested the following risk factors that the Officer consider in regard to the family's situation:

- The family has a long-standing history with as members and activities with the PPP and has been harassed and killed (his father and a nephew) by MQM terrorists. Given the documented rise in sectarian violence in Pakistan, Mr. Sheikh and his family would face a disproportionate risk of suffering violence.
- The principal applicant's daughter faces a particularized risk of return because of the lack of state protection for women who are targeted for violence. Furthermore, professional women and westernized women are at a higher risk of being targeted for violence.
- A final risk-factor raised by counsel for the applicants in the H&C application is the general crisis of human rights in Pakistan. The documents relied on to support this assertion include a 1994 UN communication regarding the potential of torture of political dissidents in Kashmir, Pakistan.

[20] The respondent emphasizes that the applicant was not found to be credible by the Board on account of the misrepresentations discovered. According to the respondent, the applicant simply disagrees with the Board's findings with regard to the assessment of risk upon return. The respondent further argues that the evidence submitted in support of the principal applicant's risk of return should be considered in light of the negative credibility finding of the allegations made by the Board at the vacation hearing. I agree. While I may have come to a different conclusion regarding the evidence, the decision-maker's finding that the principal applicant does not face a risk of return due to his political opinion is not unreasonable in light of all of the evidence and should not be disturbed. Indeed, it is trite law that it is not for this Court to reweigh the evidence.

[21] However, there was no assessment of the risk of return faced by Ashra at either the application to vacate, or the PRRA decision. Her alleged risk seems to have been considered only in the context of the "best interests of the child" or "establishment" rubrics in the H&C decision.

[22] Counsel for the applicants specifically raised a risk of return for the principal applicant's daughter, Ashra, which is not assessed in the decision.

[23] She survived domestic violence from her former husband. She is now divorced and is completing studies in political science and dreams of becoming a criminal lawyer. Her ex-husband is of Pakistani origin. Her ambition and her fight to protect herself from her ex-husband will be drastically undermined if she must apply for a permanent resident visa from Pakistan. Her ex-husband has threatened to kill her if she returns to Pakistan. His intention to avenge his perceived wrong (i.e. divorce) is demonstrated by his act to reveal the family's misrepresentation to immigration officials which caused them to lose their status.

[24] In his submissions in support of the H&C application, counsel for the applicants referenced the Amnesty International Report of April 2002 as an authority that there is no protection for women who are targets of abuse in Pakistan. There would be no state protection available for Ashra in the event that her ex-husband acted on his threat.

[25] It is significant that the Amnesty Report explained that murdering women on the grounds of "illicit" relationships or "perceived insubordination" (e.g. divorce) by men is commonplace in Pakistan. The risk to Ashra is underscored by the conclusions of the Amnesty Report: "Under international human rights law, state officials are obliged to prevent abuse by private actors and state agents but the Pakistani state has systematically failed to fulfill this obligation." The Amnesty Report specifically explains that women who seek divorce and who successfully are granted a divorce abroad, or in Pakistan, are murdered at alarming rates. The men who murder them are not

persecuted and are supported in society. Often it is the male relatives of the ex-husband who kill or torture the woman.

[26] Surely, the Officer's failure to consider this specific risk of return is significant in light of Ashra's assertion that her ex-husband has abused her and threatened to kill her upon return to Pakistan and the documentary evidence corroborating this risk. In my opinion, this renders the decision regarding Ashra unreasonable because the evidence and the submissions were mischaracterized by the Officer.

[27] In addition, the applicants' submissions in support of their establishment in Canada highlight the following key considerations:

- Sabir: He is established in his business and has been involved in many community organizations.
- Ashra: Has completed her high school education, works part-time at *Walmart*, and is currently pursuing her studies at Concordia University in the hopes of applying to McGill to study Law.
- Sami: Is an excellent student with ambition to become an engineer.
- Neither of the adult children has ever lived in Pakistan. The extent they know of that country is from short family trips taken for the purposes of vacation.

[28] The respondent submits that the Officer clearly took into consideration their personal situations praising the children's courage and their determination to complete their studies. However, I note that the Officer does not mention that the children have spent ten years in Canada and prior to arriving in Canada they lived in the United Arab Emirates. There is no mention that they have never lived in Pakistan. The seismic cultural shock which the applicant's adult children would be forced to experience upon removal to Pakistan is not considered. An indeterminate

interruption in studies and work, combined with a separation from their sister, Tayyaba, and her children, as well as their friends and lack of connection or knowledge to Pakistan are clear indications that hardship will be forced on them. There is no assessment with respect to this evidence by the Officer.

[29] While I am not prepared to intervene with respect to the Officer's analysis concerning the situation of the parents and their youngest child, which appears to be reasonable in light of the entire evidence, I am of the view that the decision with respect to the adult children cannot be reasonable given the failure to acknowledge or engage in a discussion of their cultural connection to Canada and the non-existence of a connection to Pakistan. These children who came as dependents to their father's refugee claim have lived in Canada for over a decade and should be uniquely considered.

[30] The Officer does not distinguish between "unusual and undeserved" hardship - that which is not anticipated by the Act or is a result of circumstances beyond the person's control - and "disproportionate hardship" - that which creates a disproportionate impact on the applicant due to their personal circumstances (IP-5 Guidelines). Regardless of the terminology, I consider that the Officer's decision that neither of the applicant's adult children will face hardship is unreasonable in light of the evidence of risk of return for Ashra (and the Officer's failure to acknowledge it) and the establishment of both of the adult children in Canada and accordingly, it should be quashed.

[31] Finally, with respect to the best interest of the youngest child, I agree with the respondent that the fact that the child is young and entirely dependent of her immediate family is a sufficient analysis of the best interest of the child.

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[32] For all the above reasons, the decision of Officer F. Osmane with respect to the applicants Ashra Kamwal Sheikh and Sami Mohammad Sheikh is quashed and sent back for redetermination by another officer. The decision made with respect to Sabir Mohammad Sheikh, the principal refugee claimant, and Seema Sabir Sheikh, his wife, was one which falls into the range of reasonable possible outcomes and should not be disturbed.

[33] The applicants propose the following question for certification:

> Do the guarantees of Articles 23 and 24 of the *International Covenant on Civil and Political Rights* regarding the protection of family life and the protection of children mandate the acceptance of requests for residence based on humanitarian consideration when there are Canadian children or a Canadian spouse who is affected by the decision in the absence of significant negative countervailing considerations?

[34] I agree with learned counsel for the respondent that the question proposed for certification ought not be certified because it does not meet the criteria enunciated by the Federal Court of Appeal in *Liyanagamage v.Canada (M.C.I.)* (1994), 176 N.R. 4.

[35] The applicants' question is related to an issue which has already been settled by the Federal Court of Appeal on more than one occasion (see, for example, *Okoloubu v. Canada (M.C.I.),* [2009] 3 F.C.R. 294). Therefore, the proposed question is not certified.

**JUDGMENT**

The application for judicial review of a decision of the Pre-Removal Risk Assessment Officer F. Osmane, dated March 27, 2009, with respect to the applicants Ashra Kamwal Sheikh and Sami Mohammad Sheikh is allowed, the impugned decision is set aside and the matter is sent back for redetermination by another Officer. The decision made with respect to the principal applicant, Sabir Mohammad Sheikh, and his wife Seema Sabir Sheikh is dismissed.

"Yvon Pinard"

Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2738-09 |
| **STYLE OF CAUSE:** | Sabir Mohammad SHEIKH, Seema Sabir SHEIKH, Ashra Kamwal SHEIKH, Sami Mohammad SHEIKH v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | April 22, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Pinard J. |
| **DATED:** | June 1, 2010 |

**APPEARANCES:**

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