Federal Court  Cour fédérale

Date: 20131024

Docket: IMM-828-13

Citation: 2013 FC 1077

Ottawa, Ontario, October 24, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

RICHARD LEE EBERHARDT

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of an officer [Officer] of Canada Border Services Agency [CBSA] dated January 16, 2013 [Decision or Exclusion Order], which issued an exclusion order against the Applicant.

BACKGROUND

[2] The Applicant is a 60-year-old citizen of the United States, but lives in Canada with his 13-year-old daughter, who is a Canadian citizen. The Applicant is divorced from his daughter's mother, who is also a Canadian citizen. The Applicant is the sole custodial parent and means of support for his daughter. He maintains a home in Canada so that his daughter can remain close to her mother, who has been dealing with substance abuse issues. The Applicant and his daughter have formed deep ties to their community in Surrey, British Columbia, and the Applicant has submitted many letters of support along with this application for judicial review.

[3] CBSA records show that the Applicant crossed the Canada/US border 22 times between February 2009 and July 2012. On November 22, 2012, CBSA officials attended at the Applicant's home and advised him to either apply for permanent residence or return to the United States (Exhibit A, Gill Affidavit). After this, the Applicant discussed this possibility with an immigration consultant.

[4] On December 12, 2012, two CBSA officials – Enforcement Officers Ober and Emmot – interviewed the Applicant at his home. The Applicant admitted that he owned the home, wanted to reside in Canada permanently and had attempted to file an application for permanent residence previously but was told by Citizenship and Immigration Canada that his application would be rejected. Officer Ober's notes state that the Applicant also admitted that he spends "almost all of his time in Canada," while the Applicant denies making this admission.

[5] At the December 12, 2012 interview, Officer Ober told the Applicant that he believed he was inadmissible to Canada, and would be preparing a report to this effect (Exhibit C, Gill

Affidavit). The Applicant told the officers that he was making efforts to obtain permanent residence, and he agreed to remain in Canada until the officers' report was prepared.

[6] The Applicant says that on December 18, 2012 he was again questioned at his home by two CBSA officers, and that one officer said he knew that the Applicant had not made any trips to the United States over the past two years, which was not true. The Applicant says that the officers made various statements in an attempt to confuse him, and warned him that any discrepancies in his memory of events could lead to his immediate arrest and removal from Canada. The officers seized the Applicant's U.S. passport and warned him that he would be contacted for a more detailed interview at a later date.

[7] On January 2, 2013, Officer Ober prepared a report under subsection 44(1) of the Act to inform the Minister of Public Safety and Emergency Preparedness [the Minister] that he believed the Applicant was inadmissible to Canada pursuant to subsection 41(a) and paragraph 20(1)(a) of the Act. CBSA also called the Applicant to a hearing under subsection 44(2) of the Act to determine whether he would be authorized to remain in Canada, or whether a removal order would be issued against him.

[8] The proceeding was held on January 16, 2013. The Applicant attended with his daughter and an immigration consultant. A Minister's delegate made an exclusion order against the Applicant (Exhibit F, Gill Affidavit), which the Applicant refused to sign.

[9] The notes to the file of Officer Gill, the Enforcement Case Officer responsible for effecting the Applicant's removal from Canada (Exhibit G, Gill Affidavit), state that on January 16, 2013 the Applicant refused to sign the exclusion order, saying he first wished to speak to an attorney. On the

same day the Applicant left Officer Gill a voicemail saying that "on the advice of his attorney he would like to schedule an admissibility hearing."

[10] On January 18, 2013, Officer Gill informed the Applicant that, to the best of his knowledge, the Applicant was not entitled to an admissibility hearing with respect to the exclusion order. The Applicant indicated he was confused, and asked Officer Gill to contact his lawyer, whom the Applicant identified as Mr. Gurpreet Badh of Smeets Law Corporation. Mr. Badh informed the Officer that the Applicant had come in to see him but had not formally retained his services. The Officer asked Mr. Badh if he had told the Applicant to ask for an admissibility hearing. Mr. Badh replied that in light of the humanitarian and compassionate factors involved he was of the view that the case should have been referred for an admissibility hearing, and that in light of the principles of natural justice he felt that the case should have been heard before the Immigration and Refugee Board. The Officer then requested that Mr. Badh clarify with the Applicant as to what legal options were available to him.

[11] The Officer scheduled an interview with the Applicant for February 1, 2013, and informed the Applicant that the purpose of this interview was to discuss removal arrangements. The Applicant requested that the Officer contact Mr. Badh and the Officer replied that he was not prepared to do so until a use of representative form was submitted. The Applicant asked why he was not eligible for an admissibility hearing and the Officer replied that he was not entitled to one. The Applicant asked what the Officer meant by that, and the Officer replied that he would provide further information at the meeting, and that the Applicant could bring a representative with him if he wished.

[12] The Applicant called the Officer on January 30, 2013 asking about the duration of the interview scheduled for February 1, 2013. The Applicant told the Officer that he intended to file for judicial review of the exclusion order, and the Officer said that the Applicant was free to explore that option. The Officer informed the Applicant that the purpose of the interview was to make removal arrangements, but the Applicant would be given some time to wrap up his affairs. The Applicant said that he intended to deal with the case lawfully, but needed to stay in Canada until the end of his daughter's school year. The Officer informed the Applicant that he was willing to give him two weeks to stay in Canada and any request for a deferral needed to be put into writing.

[13] On January 31, 2013 the Applicant started this application for judicial review, and on March 21, 2013 the Court granted the Applicant a stay of his removal.

DECISION UNDER REVIEW

[14] The Decision under review in this application consists of the exclusion order against the Applicant dated January 16, 2013, which references the inadmissibility report made on January 2, 2013. These documents state that the Applicant is deemed inadmissible because he entered Canada without a permanent residence visa intending to remain in Canada on a permanent basis, and did so.

ISSUES

[15] The Applicant raises the following issues in this application:

1. Did the issuance of the exclusion order against the Applicant involve a breach of natural justice?

2. Would execution of the exclusion order within any time frame of less than six months cause undue emotional, physical or financial hardship to the Applicant or his daughter?

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 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 well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[17] The first issue raised here is a matter of procedural fairness. In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that it "is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review applicable to the first issue in this application is correctness.

[18] As the Respondent points out, the second issue goes, in essence, to an evaluation of the Minister's decision to issue an exclusion order against the Applicant. This is a highly factual

determination and is reviewable on a reasonableness standard (*Rhoades v Canada (Minister of Public Safety and Emergency Preparedness)*, 2005 FC 986 at paragraphs 20-21 [*Rhoades*]).

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

STATUTORY PROVISIONS

[20] The following provisions of the Act are applicable in this proceeding:

Obligation on entry	**Obligation à l'entrée au Canada**
20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence;	a) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
[…]	[…]

Non-compliance with Act

41. A person is inadmissible for failing to comply with this Act

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act;

[…]

Preparation of report

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Manquement à la loi

41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

[…]

Rapport d'interdiction de territoire

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[…]	[…]

[21] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) are applicable in this proceeding:

Permanent resident	**Résident permanent**
6. A foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa.	**6.** L'étranger ne peut entrer au Canada pour s'y établir en permanence que s'il a préalablement obtenu un visa de résident permanent.
[…]	[…]
Subsection 44(2) of the Act — foreign nationals	**Application du paragraphe 44(2) de la Loi : étrangers**
228. (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be	**228.** (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :
[…]	[…]
(*c*) if the foreign national is inadmissible under section 41 of the Act on grounds of	*c*) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :
[…]	[…]
(iii) failing to establish that they hold the visa or other document	(iii) l'obligation prévue à l'article 20 de la Loi de prouver

as required under section 20 of the Act, an exclusion order,	qu'il détient les visa et autres documents réglementaires, l'exclusion,
[…]	[…]

ARGUMENTS

The Applicant

[22] The Applicant states that the exclusion order was issued without making him fully aware of his options, and with little or no consideration for the extenuating circumstances of his situation. The Applicant says he was never made fully aware of the options available to him for achieving landed immigrant status in Canada.

[23] The Applicant crossed the American-Canadian border numerous times during the span of more than five years, and he says he was given different information by CBSA officers as to what constituted a legal duration of his stay in Canada. The Applicant says he was frequently told by CBSA officers during routine border crossings that American citizens are free to enter Canada for up to 6 months at a time. The Applicant was also given visitor records by CBSA officials on a few occasions to allow him extended stays in Canada.

[24] The Applicant says he was told by CBSA officials that, as long as he could prove at any time that he had a permanently available place of residence in the United States, his freedom to travel to Canada would not be jeopardized. He says he was also told by CBSA officials that as long as he had visible means of financial support his freedom to travel would not be jeopardized.

[25] The Applicant argues that these discrepancies breached the Applicant's rights to procedural fairness, as he could not truly understand his legal situation. The Applicant says he was misled on

several occasions as to his right to be in Canada, and is now being unduly persecuted to the extent of being threatened with exclusion.

The Respondent

[26] The Respondent points out that the Applicant admitted that he resided in Canada and wanted to continue to do so permanently. He also admitted that he was told to apply for permanent residence in 2010, but never did so. This contravened paragraph 20(1)(a) of the Act, and rendered the Applicant inadmissible to Canada. As a result, it was open to the Officer to prepare a report under subsection 44(1) of the Act and for the Officer to make a removal order.

[27] The Applicant admitted that he did not have permanent resident status and that he sought to reside in Canada permanently. Neither he nor his immigration consultant could point to any error in the Officer's report when given the opportunity to do so. Given the basis of the Applicant's inadmissibility, the Officer was correct to issue an exclusion order and not to refer the matter to the Immigration Division for an admissibility hearing (see section 228 of the Regulations).

[28] The Applicant says that he believed that he could enter and remain in Canada lawfully for up to six months at a time, and that he could continue doing so indefinitely. However, the Applicant was not seeking to enter and remain in Canada to visit. He was permanently residing in Canada and misusing the temporary resident visas in the visitor category. Such visas are not meant for people seeking to remain in Canada permanently (*Rhoades*, above, at paragraph 33).

[29] Not only that, but the Applicant has provided no evidence that CBSA officers misinformed him and the Report to File of the Officer makes clear that CBSA officers told the Applicant that he

should apply for permanent residence. Even if the Applicant was misinformed by CBSA officers, the Court cannot be bound by erroneous interpretations of the law. The Applicant had a responsibility to comply with the requirements of the Act, irrespective of any communications he may have had with CBSA officers (*Granger v Canada (Employment & Immigration Commission)*, [1986] 3 FC 70 (FCA) [*Granger*]).

[30] The Applicant argues that the Minister had a duty to consider "extenuating circumstances" and hardship to him and his daughter in making the exclusion order, and he attaches to his affidavit several letters of support. However, none of these factors are relevant to an exclusion order. The Respondent submits that the Federal Court of Appeal's findings in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, are applicable to this case:

> 35 I conclude that the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.
>
> […]
>
> 37 It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(a) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in

> sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act (see *Correia* at paragraphs 20 and 21; *Leong* at paragraph 21; *Kim* at paragraph 65; *Lasin v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1655, 2005 FC 1356 at paragraph 18).

[31] In *Lasin v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1356 [*Lasin*], the applicant significantly overstayed a visitor's visa, married in Canada and had a pending humanitarian and compassionate [H&C] application. A Minister's delegate made an exclusion order against him on the same basis as occurred with the Applicant. The applicant in *Lasin* similarly argued that it was an error for the officer not to consider H&C factors. The Court rejected this argument, stating at paragraphs 18-19:

> As such the immigration officer was not called upon to take into consideration H&C factors for her decision concerning the issuing of an exclusion order. The only question before the immigration officer in determining whether to issue the order, was whether the information regarding the applicant's inadmissibility was accurate.
>
> The immigration officer only had to conclude, based on the facts that the applicant did not have the proper status in order to remain in Canada. The standard of review for this type of administrative fact finding decision is that of patently unreasonable. I am convinced that the immigration officer followed the process set out in the Act and made a reasonable determination.

[32] The Applicant argues that the Officer had a duty to inform him of all the avenues he could pursue to remain in Canada before making the exclusion order, and that the failure to do so amounted to a breach of procedural fairness. The Respondent submits that there is no such duty (*Araujo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 515 at paragraph 14; *Loranca v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1186 at paragraph 9).

Furthermore, CBSA officials advised the Applicant that he should make an application for permanent residence in 2010 and 2012.

[33] The Respondent submits that it was the Applicant's obligation to pursue any avenues available to him to legally remain in Canada, and he ought not to be permitted to remain in Canada until such time as he chooses to do so, particularly given his lack of diligence in applying for a permanent residence visa.

[34] The Respondent also submits that some of the relief sought by the Applicant is improper. The Applicant requests that the inadmissibility report made under subsection 44(1) of the Act be referred to the Immigration Division. However, section 228 of the Regulations makes clear that the Officer was correct in not referring the report there.

[35] The Applicant also requests that a one-year temporary resident visa be issued to him to give him time to make an application for permanent residence on humanitarian and compassionate grounds. If the Court finds that the Officer made a reviewable error, then the appropriate relief would be to set aside the order and send the matter back for redetermination. The Court cannot grant the Applicant a temporary resident visa, especially when the Applicant has not even made an application to CIC for such a visa (*El Alleti v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 201 at paragraph 13).

The Applicant's Reply

[36] The Applicant says that throughout his travels between the U.S. and Canada he was told different things by different CBSA officials. Some told him that each time he entered Canada he

was allowed to stay for up to six months without any particular documentation, and others told him that his stay depended on accumulated time over the course of one year. The Applicant submits that these discrepancies are well known to many and that there is no concrete definition as to which rules cover which case.

[37] The Applicant further submits that he has not attempted to "reside permanently on an indefinite series of visitor's visas," nor has he attempted to illegally or underhandedly obtain or abuse any documentation allowing him to stay in Canada. The Applicant reiterates that CBSA does have a duty to inform applicants of whatever avenues exist to stay legally in Canada and to avoid leaving people unknowingly in violation of the law. Furthermore, the inconsistencies in the administration of policy are very confusing and create problems of inadvertent violations of the Act.

[38] The Applicant also submits that although CBSA officials may be under no duty to consider the hardships to his Canadian child, the Court should consider these interests. Furthermore, the Applicant told the CBSA officers he spoke with in November and December 2012 that he was in the process of applying for permanent residence, but the officers did not ask for any evidence verifying the Applicant's efforts, and seemed determined to execute removal before such efforts could be completed.

ANALYSIS

[39] Mr. Eberhardt was able to represent himself very well before me. He was articulate and well-prepared. He lacks any formal legal training, but he had a good grasp of the issues. I feel that his application received a full airing.

[40] Like many self-represented litigants, Mr. Eberhardt over-estimated the powers of the Court and asked for some forms of relief (i.e. that he be granted a temporary visa) that are not properly part of an application for judicial review. In these proceedings, I am confined to assessing the Exclusion Order of January 16, 2013 for reviewable error and, in the event that such an error exists, returning the matter for reconsideration.

[41] As is the case with many people facing removal from Canada, Mr. Eberhardt's situation deserves considerable sympathy from the Court. However, I am cognizant that sympathy alone is not a ground for judicial review and that the Court cannot interfere with a Decision that the law says should have considerable deference unless a reviewable error exists. Parliament has empowered the Officer to make this Decision and the Court cannot intervene unless Mr. Eberhardt can establish the legal grounds for doing so.

[42] In making my decision, I am also confined to the evidentiary record that has been filed in this case. During the course of his presentation, Mr. Eberhardt said many things for which there is no record before me. Essentially, Mr. Eberhardt raises three (3) basic issues for review and I will deal with each in turn.

[43] First of all, he says that the Exclusion Order was made in breach of procedural fairness because:

(a) He was never interviewed or allowed to make submissions before the Order was made;

(b) The immigration officials concerned never advised him of the options available to him for acquiring permanent residence before the Exclusion Order was made;

(c) He has been misled in the past by immigration officials who advised him that he did not need to apply for permanent residence to enter and remain in Canada for extended periods; and

(d) The Decision was made in advance of the hearing with the Officer who made the Decision.

[44] Unfortunately, there is little in the way of evidence on the file, or support in the legal authorities, to substantiate these allegations.

[45] In his own affidavit, Mr. Eberhardt refers to meetings with CBSA officials prior to the Exclusion Order being made. The Respondent's evidence is much more complete and leaves no doubt that Mr. Eberhardt was made fully aware of what was taking place and was given an opportunity to speak to relevant issues. When he appeared at the interview with the Officer, Mr. Eberhardt was accompanied by his immigration consultant and they were able to ask questions and make suggestions.

[46] The evidence shows that, at this meeting on January 16, 2013, the Officer presided over Mr. Eberhardt's proceeding under subsection 44(2) of the Act. Mr. Eberhardt confirmed that he had not made an application for permanent residence. He explained that he wanted his daughter to remain in Canada to maintain contact with her mother and also because her whole life was in Canada. He did not think it would be a good idea for her to relocate to the United States. When

asked whether he considered himself to be residing in the United States while his daughter resided in Canada, Mr. Eberhardt responded that it was too hard for him to cross the border every day. The Officer told Mr. Eberhardt that it appeared he was now more established in Canada than in the United States and Mr. Eberhardt responded that he had done this for his daughter. Mr. Eberhardt's immigration consultant asked the Officer to consider humanitarian and compassionate factors. The Officer explained that his review was limited and that he would make the removal order if Officer Ober's report was well-founded. The consultant also asked about referring the matter for an admissibility hearing. The Officer explained that, due to the nature of the inadmissibility in this case, the responsibility to review Officer Ober's report fell to a Minister's delegate, not the Immigration Division. Finally, the Officer asked Mr. Eberhardt and the consultant to point out any error in Officer Ober's report and they pointed to no such error. As a result, the Officer made an exclusion order against Mr. Eberhardt.

[47] In his presentation before me, Mr. Eberhardt said that parts of the Officer's account are not true. But the Officer made notes at the meeting and they have been produced to the Court in sworn evidence. Under these circumstances, there is no reason to doubt what the Officer says and the Court must accept his evidence.

[48] Mr. Eberhardt has pointed to no authority to suggest that immigration officials were obliged to assist him to identify and avail himself of any options he might have to avoid deportation. There is no such legal obligation. It is up to Mr. Eberhardt to seek whatever advice he needs and it appears he has had access to consultants and lawyers. What the evidence does establish clearly is that Mr. Eberhardt has been told numerous times over the years by immigration authorities that he

needs to apply for permanent residence. As yet, he has not done that, although he has told the Court that he is about to make such an application. I also notice that the Officer's notes state that he asked Mr. Eberhardt whether he had considered an H&C application or seeking a work permit to allow him to stay (Certified Tribunal Record at 3). Mr. Eberhardt says that is not true, but there is no evidence before me that refutes this. In any event, immigration officials have no obligation to counsel Mr. Eberhardt whose obligation it is to look after his own interests. All indications are that he has sought advice from qualified people.

[49] There is no evidence before me that Mr. Eberhardt has been misled by immigration officials in any way that is relevant to this application. At the hearing of this judicial review application, Mr. Eberhardt told the Court that, as he has moved back and forth between Canada and the United States, various border guards have told him that he can stay for extended periods without the need for permanent residence status, but there is no evidence to this effect. The evidence before me is that Mr. Eberhardt has been told numerous times that he must acquire permanent resident status if he intends to spend the length of time in Canada that he has spent, and intends to spend. He has initiated a permanent residence application in the past, so he clearly knows what he should be doing.

[50] There is no evidence that the Exclusion Order was made in advance before the hearing with the Officer. This is a bald assertion by Mr. Eberhardt. The sworn testimony of the Officer is that he prepared and printed an order to take with him to the meeting in case it was needed and "I had not made up my mind to make the exclusion order against Mr. Eberhardt before the proceeding." I have no reason to doubt or reject this evidence and Mr. Eberhardt's assertions to the contrary have little to support them.

[51] Besides these procedural fairness arguments, Mr. Eberhardt raises two other issues that need to be addressed.

[52] He says that the Officer, in making the Exclusion Order, was under a legal obligation to consider H&C factors and, in particular, the best interests of his 13-year-old daughter, Latecia.

[53] The notes of the Officer show that at the meeting which preceded the Exclusion Order, Mr. Eberhardt's immigration consultant asked the Officer to consider H&C factors. The Officer explained that the review proceedings were not an H&C application and that he had limited discretion.

[54] Mr. Eberhardt also says that the Officer should have referred the matter to an admissibility hearing rather than deciding the matter himself. Once again, the notes confirm that this was raised at the hearing and that the Officer took the position that the "violation in this case falls on the jurisdiction of MD [meaning Minister's Delegate] not the refugee board."

[55] The relevant statutory provisions and the jurisprudence of the Court confirm the position of the Officer. For example, Justice Blais dealt with both points in *Lasin*, above:

> 13 The applicant claims that the immigration officer fettered her discretion by issuing an exclusion order rather than referring the case to the Immigration Appeal Division (IAD) for an admissibility hearing. I find however, that pursuant to Regulation 228, the officer was not authorized to refer the case to an admissibility hearing of the IAD, but rather she was mandated to issue an exclusion order.

44(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

228(1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

> *(c)* if the foreign national is inadmissible under section 41 of the Act on grounds of
>
> > (iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order

29(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

* * *

44(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

228(1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

> *(c)* en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :
>
> > (iv) l'obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l'exclusion
>
> 29(2) Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

14 Upon being satisfied that the applicant was an inadmissible person pursuant to subsection 29(2) of the Act, Regulation 228 states that the immigration officer may issue an exclusion order, which is what happened in the present case.

15 Finally, the failure of the immigration officer to provide a reasonable opportunity for the applicant to present evidence on mitigating factors over the course of the subsection 44(2) proceeding, such as his two-year marriage to a Canadian citizen and his outstanding H&C application does not constitute a breach of procedural fairness.

16 Justice von Finckenstein in *Leong v. Canada (Solicitor General)* (2005) 256 F.T.R. 298, states at paragraph 21:

> [...] decisions under ss. 44(1) and 44(2) are routine administrative decisions. Issues relating to humanitarian and compassionate considerations or the safety of the Applicant are obviously vital to the Applicant. They have no place in these routine administrative proceedings. Rather the Act sets out specific procedures for dealing with them in ss. 25, and 112 respectively.

17 Justice von Finckenstein has clearly stated that there exist separate and parallel schemes for H&C applications and exclusion orders. H&C factors are considered in a separate H&C application under subsection 25(1) of the Act which states:

> 25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is

> of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.
>
> * * *
>
> 25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger -- compte tenu de l'intérêt supérieur de l'enfant directement touché -- ou l'intérêt public le justifient.

> 18 As such the immigration officer was not called upon to take into consideration H&C factors for her decision concerning the issuing of an exclusion order. The only question before the immigration officer in determining whether to issue the order, was whether the information regarding the applicant's inadmissibility was accurate.
>
> 19 The immigration officer only had to conclude, based on the facts that the applicant did not have the proper status in order to remain in Canada. The standard of review for this type of administrative fact finding decision is that of patently unreasonable. I am convinced that the immigration officer followed the process set out in the Act and made a reasonable determination.

[56] Mr. Eberhardt has provided no authority or compelling argument that would cause the Court to question what *Lasin* clearly establishes.

[57] All in all, Mr. Eberhardt has failed to establish any reviewable error contained in the Decision, which means that I am obliged to dismiss this application.

[58] Mr. Eberhardt has suggested the following question for certification:

> In making an exclusion order in proceedings under section 44 of IRPA, is the Minister's Delegate obliged to consider H&C factors and, in particular, the best interests of any affected child?

[59] My view is that the answer to this question is well-settled by the jurisprudence of the Court and Mr. Eberbardt has suggested no reason why it might be decided otherwise. See *Lasin*, above, and *Rosenberry v Canada (Minister of Citizenship and Immigration)*, 2010 FC 882 at paras 36 and 37, and *Laissi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 393 at paras 18 and 19.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

3. The style of cause is amended to remove the Minister of Citizenship and Immigration as a Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-828-13
STYLE OF CAUSE:	RICHARD LEE EBERHARDT v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 18, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
DATED:	OCTOBER 24, 2013

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