Federal Court  Cour fédérale

Date: 20160209

Docket: IMM-3216-15

Citation: 2016 FC 175

Ottawa, Ontario, February 9, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

WENBIN LU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

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 [Act] for judicial review of a decision of a visa officer [Officer] dated July 3, 2015 [Decision], which determined that the Applicant did not meet the requirements for immigration to Canada as a member of the family class and refused the Applicant's application for a permanent resident visa.

II. BACKGROUND

[2] The Applicant was born on August 8, 2007 and is a citizen of China. His father, Xuzhao Lu [Sponsor], mother and two siblings all currently live in Canada.

[3] The Sponsor began the permanent residence application process in 2008 through his employer and the Alberta Immigration Nominee Program [AINP]. The Sponsor says he was afraid to report the birth of the Applicant because he feared that were he to include the Applicant, his application would be censored by the Chinese authorities and his family would be subjected to severe repercussions and financial penalties because of China's strict one-child policy.

[4] The Sponsor's permanent residence application included his wife and his first born child, a daughter. After he became a permanent resident of Canada by way of the AINP in 2009, the Sponsor saved enough money from his job as a meat cutter to pay the fine imposed by Chinese authorities to register the Applicant as a member of the family (approximately $15,000 CAD). He then began to make inquiries as to how to process the Applicant for travel to Canada with his mother and sister.

[5] The Sponsor says he was given incorrect information by his employer's human resources department who had instructed him to locate the officer who had dealt with his AINP application and directly report his change in family circumstances to him. The Sponsor claims that he learned that the officer no longer worked with the program and that he was advised that he was better off waiting until after he became a citizen and applying to adopt the Applicant. He

therefore continued with the applications of his wife and daughter (who arrived in Canada in May 2010) without reporting the Applicant's birth to Canadian authorities. The Sponsor traveled to visit the Applicant in China in April 2009.

[6] Soon after the birth of the Sponsor and his wife's third child in Canada, the entire family travelled to China to visit the Applicant in October 2011. The Sponsor says that he has continuously sent money to China for the Applicant and the Applicant's caregivers, his grandparents, and in 2012 he provided them with the profits from the sale of his property in China.

[7] The Sponsor became a Canadian citizen on April 25, 2014. In November 2014, he submitted an application to Citizenship and Immigration Canada to sponsor the Applicant on humanitarian and compassionate [H&C] grounds, focusing on the hardship the Applicant would face if the application was not granted. The Applicant's caregivers in China face serious age-related health concerns and the Sponsor alleged that they are no longer in a position to care for the Applicant. The Sponsor further submitted that the separation from the Applicant has caused the Sponsor's wife to suffer from depression. The Sponsor says he followed the correct processes to arrive in Canada and that the troubling situation his family now faces resulted from following incorrect advice provided by someone he trusted.

III. DECISION UNDER REVIEW

[8] A letter sent by the Officer in response to the Sponsor's application to sponsor the Applicant included the reasons for the Decision dated July 3, 2015. The Officer said that while

s 117(9)(d) may apply in this case, subject to the possible application of s 117(1), the exception in s 117(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] does not apply to the Applicant as he was not disclosed by his sponsor in his application for permanent residence nor at his landing. Due to this non-disclosure, an officer could not make a determination that he was not required by the Act to be examined. Consequently, the Applicant was deemed excluded as a member of the family class.

[9] In addressing the Applicant's request that H&C reasons be considered pursuant to s 25 of the Act, the Officer concluded that the Applicant's application failed to present sufficient grounds to warrant a positive consideration. Specifically, the Officer was not satisfied that the Sponsor did not intentionally exclude the Applicant on his permanent residence application made in March 2009. While the Sponsor indicated that he did not report the Applicant's birth out of fear of potential repercussions, he was able to pay the fee associated with violation of the one child policy in July 2009 and obtained a birth certificate for the Applicant in September 2009. The Officer said that it follows that the Sponsor was able to include the Applicant on his application and yet chose not to.

[10] Furthermore, the Officer did not find that the stated hardship of the Applicant was unusual, undeserved and disproportionate, as it was the direct result of a choice made by the Sponsor who would have been aware of the possible impact of the separation. The Sponsor could have initiated sponsorship immediately after obtaining permanent residence but he delayed this process until he obtained his Canadian citizenship in 2014. There is nothing impeding the

Sponsor's ability to visit the Applicant, and the Applicant is able to apply for a temporary resident visa to travel to Canada to visit the Sponsor and his family.

[11] The Sponsor indicated to the Officer that the Applicant's prospects for a good life are limited given the age and health of the Applicant's caregivers. As such, the best interests of the Applicant as a child can only be met by permitting travel to Canada and family reunification. The Officer responded to these submissions, indicating that "the best interests of a child is only one of the many important factors that need to be considered when making an [*sic*] humanitarian and compassionate decision that directly affects a child."

IV. ISSUES

[12] The Applicant submits that the following are at issue in this proceeding:

1. Was the Officer's Decision unreasonable and made in a perverse and capricious manner?
2. Did the Officer apply the wrong legal test to the best interests of the child analysis?

V. STANDARD OF REVIEW

[13] 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.

[14] The first issue goes to the overall reasonableness of the Decision and will be reviewable on a standard of reasonableness with deference being accorded to the Decision: *Dunsmuir*, above, at para 47. The second issue asks whether an incorrect legal test was applied and as such concerns a pure question of law; it will be reviewed on a standard of correctness: *Dunsmuir*, above, at 128; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *McKenzie v Canada (Citizenship and Immigration)*, 2015 FC 719 at para 52.

[15] 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; *Canada (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

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

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Sponsorship of foreign nationals	**Parrainage de l'étranger**
13. (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national, subject to the regulations.	13. (1) Tout citoyen canadien, résident permanent ou groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial — ou tout groupe de telles de ces personnes ou associations — peut, sous réserve des règlements, parrainer un étranger.

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[17] The following provisions of the Regulations are applicable in this proceeding:

Member	**Regroupement familial**
117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

[…]	[…]
Excluded relationships	**Restrictions**
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
[…]	[…]
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	(d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

VII. ARGUMENTS

A. *Issue 1: Was the Officer's Decision unreasonable and made in a perverse and capricious manner?*

(1) Applicant

[18] The Applicant submits that the Decision was entirely unreasonable. The Officer focused almost exclusively on the Sponsor's failure to disclose the existence of the Applicant, indicating at least five times that the Sponsor made the choice of not including the Applicant in the application, and failed to provide fair and proper consideration of H&C factors as per s 25 of the Act: *Sultana v Canada (Citizenship and Immigration)*, 2009 FC 533 [*Sultana*].

[19] The Federal Court held in *Gan v Canada (Citizenship and Immigration)*, 2014 FC 824 [*Gan*]:

> [9] If H&C applications brought by otherwise ineligible persons are determined on the same or predominantly the same basis as grounded their ineligibility, Parliament's intent in creating a separate H&C process would be defeated. Therefore this H&C required a decision on its merits separated to the extent possible from the mother's serious and repeated misconduct in failing to declare.

[20] An applicant has the right to a genuine and unfettered assessment of their H&C application separate and apart, to the extent possible, from the sponsor's application: *Gan*, above, at para 7; *Weng (Litigation guardian of) v Canada (Citizenship and Immigration),* 2014 FC 778 at para 36 [*Weng*]. In the matter at hand, the Officer failed to conduct such an analysis and, as a result, the Decision cannot stand.

[21] The Applicant further submits that it is incomprehensible that the Officer concluded that an 8-year-old boy did not suffer disproportionate hardship from what has been essentially a permanent separation from his parents. The fact that his parents have not visited the Applicant since 2011 should not be interpreted as something that detracts from the Applicant's suffering. In concluding as much, the Officer failed to genuinely assess the H&C considerations. The Applicant says that the Officer faulted him with the mistakes of his parents to such a degree that the Decision was made in a perverse and capricious manner.

[22] The Applicant argues that the Officer failed to mention, let alone analyze, several central H&C factors of the claim, including: the genuineness of the relationship between the Applicant and the Sponsor; the financial dependency of the Applicant on the Sponsor; and the emotional

needs of the family. The Sponsor and his family have continuously sent money home for the Applicant, provided him with the proceeds from the sale of their property in China and visited him just four months after the birth of their third child in Canada. Furthermore, the Applicant's mother has been overcome with remorse from the separation of her family unit and was clinically diagnosed with depression. These matters are clearly demonstrative of strong family ties.

[23] Also unaddressed were several other positive factors such as the Sponsor's conduct at the time of his own application: *Sultana*, above. The Sponsor went through the proper channels to arrive in Canada as a temporary foreign worker and worked hard for his family to become a successful applicant of the AINP.

(2) Respondent

[24] The Respondent submits that the Officer's assessment of the evidence was reasonable and in line with s 11 of the Act. The burden was on the Applicant to present evidence regarding the Applicant's, and not the Sponsor's, circumstances in order to satisfy the Officer that the exercise of discretion was warranted. The Applicant did not meet this burden and has failed to demonstrate that the Decision was based on a finding of fact that was truly erroneous, made capriciously and without regard to the evidence.

[25] Neither s 117(9)(d), nor the result of the Officer's Decision are punitive in nature. Subsection 117(9)(d) does not conflict with the objective of reuniting families articulated in s 3 of the Act . Furthermore, its operation in this Decision does not prevent the Applicant from

ultimately reuniting with his parents as there are other means of achieving permanent resident status in Canada.

[26] The Respondent says that the Applicant's arguments are an attack on the manner in which the Officer exercised his discretion to weigh the evidence. While family reunification is one of several purposes of the Act, an officer is entitled to give the Sponsor's behaviour, including his misrepresentations, significant weight: *Legault v Canada (Citizenship and Immigration)*, 2002 FCA 125.

[27] The Respondent says that there is nothing in the evidence to suggest that the Applicant's H&C submissions were not considered. The Officer considered, or is presumed to have considered, all of the circumstances of the Applicant and his family and was aware of the evidence relevant to H&C considerations including: the Applicant's tender age; the employment situation and status of the family in Canada and China; and the genuineness of the Applicant's relationship with the Sponsor and other family members. By explicitly referencing the Applicant's "H&C evidence," the Respondent submits that the Officer satisfied *Dunsmuir's* requirement of "justification, transparency and intelligibility."

[28] The Officer was under no obligation to consider the future best interests of the Applicant. Not only was there no evidence or submissions regarding any future risks or potential negative impact that could be considered, but future impact is a consideration of family law that does not necessarily apply in an immigration context: *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*].

(3) Applicant's Reply

[29] The Applicant indicates in further submissions that it is not clear where the Respondent found authority for the proposition that the only relevant evidence to be considered was that of the Applicant's circumstances and not the Sponsor's. The Applicant can find no authority that indicates that the Sponsor's circumstances are not also relevant, particularly where H&C factors are based on a family sponsorship application due to family separation.

[30] While the Respondent asserts that the Applicant has merely disagreed with the Officer's findings, something which cannot constitute unreasonableness, the Applicant submits that he has detailed multiple H&C factors that were not addressed by the Officer. The Applicant says that simply because the Officer was "aware of the evidence" does not mean that he engaged in the required analysis of that evidence. The Applicant is not arguing inadequacy of reasons; rather, it is asserted that simply explicitly referencing evidence without further analysis will not satisfy the *Dunsmuir* standard of justification, transparency and intelligibility. Reasons must still allow the reviewing court to understand why the decision was made and permit it to determine whether the conclusion falls within the range of acceptable outcomes. Here, the Officer's scant assessment of the H&C factors raised by the Applicant does not permit such an assessment.

[31] The Applicant may have pointed to case law that states one of the objectives of s 25 is to alleviate the harsh effects of s 117(9)(d), but has not, as the Respondent suggests, argued that s 117(9)(d) conflicts with the objective of family reunification: *Sultana*, above, at para 25.

[32] The Applicant submits that the Respondent's suggestion that s 117(9)(d) does not prevent the Applicant from reuniting with his family because there are other means to apply for permanent residence, borders on the absurd. The Applicant is barred from being sponsored under the family class because of s 117(9)(d) and, as a child of 8, cannot apply for permanent residence in any other way other than through family sponsorship.

B. *Issue 2: Did the Officer apply the wrong legal test to the best interests of the child analysis?*

(1) Applicant

[33] As regards the second issue, the Applicant submits that an incorrect legal test was applied by the Officer, requiring that the Applicant demonstrate hardship "unusual and undeserved or disproportionate," rather than considering the best interests of the Applicant and weighing that against the other H&C factors.

[34] Children will rarely, if ever, be deserving of any hardship and, as such, the concept of "underserved hardship" is not suited to the assessment of a child's best interests: *Hawthorne v Canada (Citizenship and Immigration)*, 2002 FCA 475 at para 9. While the use of the word hardship by an officer will not automatically mean that a hardship threshold analysis was applied, the Applicant argues that, in this case, its repeated use and the failure to engage in a proper best interests of a child [BIOC] analysis – in fact, only one direct mention of the BIOC analysis is made – indicate that the Officer did in fact apply the incorrect legal test: *Weng*, above, at paras 22-23.

[35] A BIOC analysis requires that an officer be alert, alive and sensitive to the interests of a child: *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 [*Kolosovs*]. The Officer said that the BIOC analysis is only one of the factors that need be considered when making an H&C decision, but did not turn his mind to what the other factors are. It is extremely problematic that the issue of the BIOC analysis received no due consideration by the Officer after it had been raised by the Applicant, and by applying the hardship test the Officer failed to remain alert, alive and sensitive to the Applicant's best interests.

[36] The Applicant further argues that the Officer did not consider or weigh the long-term care of the Applicant in China against the other H&C factors. This is of particular concern because the health of the Applicant's current caregivers is waning, as the Sponsor's father is exhibiting stroke-like symptoms and the Sponsor's mother suffers from diabetes and hypertension. The Sponsor's younger sister also resides in China but has no interest in caring for the Applicant and there is no other potential long-term caregiver for the Applicant in China.

[37] While a visa officer must consider family reunification in Canada when considering the BIOC factors, the Officer in the present case failed to consider and weigh reunification with others: *Phyang v Canada (Citizenship and Immigration)*, 2014 FC 81 at para 20 [*Phyang*]. The Decision does not make it clear whether it is in the Applicant's best interests to remain in China without his family and only see them when they are able to travel there, or to have his family remain in Canada.

[38] The Applicant says that the Officer also did not address the best interests of the Applicant's two siblings, who, as children, ought to have been considered separately: *Weng*, above, at para 32. Both of the Applicant's siblings, aged roughly 12 and 4, are dependent and directly affected by the Applicant's current residence in China.

[39] The Applicant argues that overall, the Officer demonstrated an extreme lack of sensitivity and empathy in this Decision. He did not acknowledge the suffering that the Applicant would experience from a negative decision, but continued to remind the Applicant that his parents *chose* to leave him in China. A proper BIOC analysis, in line with the requirements of the *Kolosovs*, above, test was never conducted and the Decision should be quashed.

(2) Respondent

[40] The Respondent submits that the jurisprudence indicates that consideration of the BIOC is not separate from the issue of hardship; the consideration of the Applicant's personal circumstances as a child affected by the disposition of his application for permanent residence are not practically severable. There was no failure on the Officer's part to consider the Applicant's personal circumstances and to require him to make a set of parallel findings regarding the BIOC would be impractical and tantamount to asking that a reasonable finding be based thereon.

[41] This case, says the Respondent, can be distinguished from *Kolosovs*, above. In *Kolosovs*, the applicant was both the child affected and the applicant, and there has been much less

evidence submitted in the present case. Furthermore, although the best interests of a child are an important factor, they are not determinative of the issue before the Officer.

[42] As regards the burden of proof when H&C considerations are involved, it undeniably rests on the Applicant to support the request with submissions: *Kisana*, above, at para 35. There is no duty on an officer's part to consider all possible submissions that might have been made. The submissions made in this case were mostly about the Sponsor, and not the Applicant. No submissions were made (other than a general statement of hardship) regarding why life in Canada would provide better opportunities than life in China, or relating to why separation from his family would constitute undue hardship for the Applicant.

(3) Applicant's Reply

[43] The Applicant concedes that a BIOC analysis is not always determinative and further submits that he does not rely on *Kolosovs* for the proposition that the BIOC must always be paramount. Rather, the case is cited for the critical factors it lays out that must be acknowledged by an officer in considering BIOC, instead of relying on a hardship analysis. It is not the case that *Kolosovs* has been overruled by *Kisana*; on the contrary, it remains valid law that has been cited over 100 times by the Court.

[44] The Applicant takes issue with the Respondent's assertion that a BIOC analysis does not have to be separate and apart from the issue of hardship where the applicant is a minor. It is settled law that the opposite is true: *Phyang*, above, at para 25. Whether a child's best interests were considered is not an easy question to answer and requires careful review of an officer's

analysis or lack thereof. The consideration must be overt and the officer must analyze the overall circumstances of the applicant with a specific view of the BIOC factors. The following factors were submitted by the Applicant and went completely ignored by the Officer: the Applicant cries constantly and asks for his family; the Applicant's grandparents are elderly and are rapidly losing their ability to care for him (corroborating medical reports have been submitted); telephone contact with his parents and sisters cannot replace family reunification; and the best interests of the child in this case can only be met by reuniting with his family in Canada. The Applicant submits that his suffering can be inferred from these facts alone and it is evident in the Decision that the Officer simply failed to be alert, alive and sensitive to the Applicant's interests.

VIII. ANALYSIS

[45] The portion of the Decision which deals with the Applicant's s 25(1) submissions, in essence, can be reduced to the following:

a) The Applicant (an 8-year-old boy) will not suffer any unusual or disproportionate hardship if he remains in China because the separation from his parents and siblings "was a direct result of [his] sponsor's personal choice"; and

b) "While factors affecting children should be given substantial weight, the best interests of a child is only one of the many important factors that need to be considered when making a humanitarian and compassionate decision that directly affects a child."

[46] The second reason (apparently intended to be the BIOC analysis) is simply a general statement of the law. It does not even attempt to engage the specifics of this case or try to explain why, given what this child faces if he remains in China, there are insufficient grounds to warrant a positive consideration. The Officer might just as well have said "I have considered your application and I don't think it presents sufficient grounds to warrant a positive consideration

under humanitarian and compassionate grounds." If that were adequate, then no H&C decision that used these general words would ever be set aside on judicial review. The jurisprudence of this Court tells us that more is required.

[47] In *Kim v Canada (Citizenship and Immigration)*, 2006 FC 244, the Court quashed an officer's decision where the reasons contained "no line of analysis that could lead the reader from the evidence to the conclusions reached by the decision maker and no tenable explanation that satisfies the reasonableness standard" (at para 28).

[48] The submissions of the Applicant and the evidence that was before the Officer were sufficient to at least draw attention to the considerable number of issues in existence related to H&C grounds. The Decision in this regard constitutes a series of bald and unreasonable statements that were not grounded in a judicious evaluation of the evidence. The Officer's mind was essentially closed to an appreciation of the reality and best interests of the Applicant. The Applicant and his family deserved more here.

[49] The problems with this Decision are fairly set out in the Applicant's submissions and can be summarized as follows:

a) The Officer was fixated on the Sponsor's failure to declare the Applicant as a family member to the exclusion of all else. This prevented him from genuinely assessing the H&C factors submitted by the Applicant, which is a reviewable error. See *Sultana*, above, at para 30, and *Gan*, above, at paras 34-35;

b) The Officer's reasoning that there can be no disproportionate hardship to the Applicant because his Sponsor could have visited him in person but had chosen not to do so for the last three and a half years is not reasonable. An 8-year-old boy has no control over when his parents visit him, or how their choice not to visit him impacts the hardship he suffers if they do not;

c) The Officer fails completely to identify and address the principal H&C factors put forward by the Applicant. These are:

   i. The Applicant's genuine relationship with his Canadian family which includes both of his parents and two siblings;

   ii. The Applicant's financial dependency upon his Sponsor/father;

   iii. The emotional needs of the whole family. His mother in particular is suffering from severe depression because of having to leave the Applicant behind in China. The Applicant cries because he wants to be reunited with his family;

   iv. The regular communication between the family in Canada and the Applicant in China and their strong desire and need to be reunited as a family unit in one place;

   v. The Sponsor's conduct at the time of his own application;

   vi. The fact that the family was able to leave the Applicant behind in China because his grandparents could look after him temporarily until the Applicant could be reunited with his family in Canada. Those grandparents are now growing old and infirm and cannot continue to look after him. Furthermore, because there is no one else in China who is willing to take on this 8-year-old boy, the Applicant has no long-term caregiver there;

   vii. The Officer fails to consider how his refusal will affect the Applicant's welfare, (see *Phyang*, above, at para 22); and

   viii. The Officer fails to identify and balance the Applicant's need and desire to be reunited with his family in Canada against other possible scenarios.

[50] Quite apart from these general points, the Officer's BIOC analysis of the Applicant is no more than a generalized statement of the law, and there is no BIOC consideration given to the Applicant's young siblings in Canada. See *Weng*, above, at para 32.

[51] In short, this Decision is far from what an H&C decision involving three children ought to be. Meanwhile a young boy remains in China, with aging grandparents who are in poor health, with no prospect of long-term care and without the immediate family who yearn to be reunited with him. The Officer in this case appears to think that this is an acceptable situation, by and

large, because his father chose to leave him behind when he himself came to Canada with the family to establish himself. But a very young boy can do nothing about the hard choices his family feels it had to make to leave China. As the Court said in *Sultana*, above, at para 36:

> [36] …While an immigration official should not be left to speculate as to how a child will be impacted by his or her decision, it would be preposterous to require from an applicant a detailed and minute demonstration of the negative consequences of such a decision when they can be reasonably deducted from the facts brought to his or her attention.

[52] The choices made by his parents have nothing to do with present hardship that the Applicant faces. This Decision is full of reviewable errors under the old law, and would need reconsideration in any event. That law has now changed considerably since the Supreme Court of Canada rendered its decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

[53] It is troubling to the Court that the Minister would choose to defend a decision that contains such obvious reviewable errors and is so inhumane in its impact upon a young child, as well as his immediate family.

[54] In my view, the Officer could only have reached the conclusions he did by ignoring the evidence in this case and being wilfully blind to the facts before him that support this H&C application.

[55] Subsection 18.1(3)(b) of the *Federal Courts Act*, RSC, 1985, c F-7 grants the Court the ability to set aside a decision with such directions as it considers appropriate. The power to

include directions in the nature of a directed verdict is included in the authority of s 18.1(3)(b), but is of course a truly exceptional one: *Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31. While it is not the role of the Court to substitute its own view for the preferred outcome for that of a previous decision-maker, given the circumstances and the recent Supreme Court of Canada jurisprudence, the current Decision falls so far out of the range of possible outcomes that could be considered defensible in respect of the facts and law, that I think I would be remiss not to point out that, on the facts before me, this is an extremely compelling case that needs to be dealt with urgently in order to ensure that this young Applicant is not left in China without the long-term protection of close family. Also, there does not appear to be anything in the evidence before me that would disallow a positive decision on H&C grounds.

[56] The parties agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Decision is quashed;
2. Within 30 days of the date of this order, a different H&C Officer will reconsider and decide this matter in accordance with my reasons;
3. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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