Federal Court  Cour fédérale

Date: 20190919

Docket: IMM-6337-18

Citation: 2019 FC 1188

Ottawa, Ontario, September 19, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

KULWANT KAUR DAYAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision, dated November 27, 2018, of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IRB] to dismiss an appeal, pursuant to s 69(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In its own *de novo* assessment, the IAD independently concluded that the Applicant

remained ineligible to sponsor her family members, and found insufficient humanitarian and compassionate [H&C] factors to justify a special remedy.

[2] For the reasons that follow, this application is allowed; the IAD's November 27, 2018 decision is set aside and the matter is remitted to a differently constituted IAD for redetermination.

II. Background

[3] The Applicant, Ms. Kulwant Dayal, is a stay-at-home mother to her three dependent children. Since shortly after her arrival in Canada, she has been the victim of domestic abuse.

[4] On May 31, 2007, Ms. Dayal and her spouse co-filed an application to sponsor ["sponsorship application"] her father, her mother, one sister, and, brother [collectively, the "visa applicants"] under the family class. Because of backlogs in the immigration system, her sponsorship application was not referred to the Immigration Division [ID] for a sponsor eligibility hearing until 2015. At the time of the ID hearing, only her father, mother, and brother remained eligible for sponsorship.

[5] Prior to the ID's final determination on the sponsorship application, Ms. Dayal's spouse was convicted of assaulting her with a weapon. Ms. Dayal alleges, and evidence confirms, that this was only one incident in a "perpetuation of a cycle of serious physical [emotional and psychological] abuse that has persisted throughout their time in Canada."

[6] This conviction rendered Ms. Dayal's spouse ineligible to co-sign the sponsorship application, under sections 133(1)(e)(i.1) and 133(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], as amended. The ID therefore considered Ms. Dayal as the sole sponsor when assessing the sponsorship application. The ID concluded Ms. Dayal was not eligible to sponsor the visa applicants because she alone did not meet the mandatory necessary income [MNI].

[7] Ms. Dayal appealed her sponsorship eligibility to the IAD, arguing that sufficient H&C considerations existed for the IAD to overlook her inability to meet the MNI. By the time of the IAD's hearing on October 22, 2018, Ms. Dayal had been separated from her abusive spouse for several years and there were ongoing divorce proceedings. Ms. Dayal provided evidence that she was a victim of domestic abuse, and argued that it would be in the best interests of her and her dependent children for the visa applicants to support and assist her financially and emotionally throughout and after her divorce. She provided and relied on, among other things: her application to the Superior Court of Justice, Family Court for various orders; a supervision order from the Children's Aid Society [CAS] of Toronto to the Ontario Court of Justice; and a copy of a psychological assessment. She also testified at the hearing held before the IAD on October 22, 2018.

III. Decision under Review

[8] In its written decision dated November 27, 2018, the IAD upheld the ID's refusal. The IAD then proceeded to conduct its own *de novo* assessment, examining the application against the *IRPR*, as amended, and considering the proposed H&C factors.

[9] The IAD set the family household size at seven, noting Ms. Dayal's sister no longer sought sponsorship, and that jurisprudence suggested they not include her former spouse. The MNI for a household of 7 was $84,631 (2017), $83,695 (2016), and $82,091 (2015). In contrast, Ms. Dayal's income for those years was $12,966 (2017), $10,006 (2016), and $9,021 (2015).

[10] Finding Ms. Dayal non-compliant with the MNI, the IAD next assessed whether sufficient and compelling H&C reasons existed to justify granting her special relief. Given the significant discrepancies between the MNI and her income, they did so under the *Chirwa* standard for special relief: *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338.

[11] The IAD first assessed her financial and home situation. It found that while Ms. Dayal did not collect social insurance, she was unemployed and had made no efforts to rejoin the formal workforce. Acknowledging she received rental income from her basement unit, the IAD expressed concern this may not continue post-divorce proceedings. It ultimately concluded Ms. Dayal had made insufficient concrete plans for financially supporting, housing, or caring for herself, her children, and the visa applicants post-divorce.

[12] The IAD next considered the evidence of domestic abuse and the best interests of her dependent children. While acknowledging that it was a difficult case, the IAD found Ms. Dayal was "not entirely without support in Canada despite the physical absence of the applicants." In doing so, the IAD pointed to the help Ms. Dayal received from the police, judiciary, CAS, psychological counselling and other health services, and her father-in-law and sister-in-law. It

also noted Ms. Dayal and her children had daily telephone conversations with, and had once visited, the visa applicants in India. When assessing the *best interests of the child* [BIOC], the IAD concluded there was insufficient evidence that the children depended or relied upon the visa applicants for their physical, learning, or emotional needs.

[13] The IAD concluded by reiterating its concern with Ms. Dayal's potential to support herself and her children, let alone the visa applicants. It found the visa applicants could not improve the family's financial situation: by Ms. Dayal's own admission, they themselves were subsistence farmers who had debt in India, and the IAD found they were unlikely to become self-sufficient quickly once in Canada, given the language and cultural barriers. The IAD held Ms. Dayal would be unable to support the visa applicants, and that their presence would hinder rather than further her ability to do so.

[14] The IAD rejected the sponsorship application, finding the H&C factors were not sufficiently compelling to overcome Ms. Dayal's failure to meet the MNI.

IV. Issues

A. *What was the appropriate standard of review?*

B. *Did the IAD apply the correct test when conducting its assessment and did the IAD conduct its analysis reasonably?*

V. Standard of Review

[15] The appropriate standard of review for reviewing the IAD's assessment of H&C factors, including the BIOC, is reasonableness: *Canada (MCI) v Khosa*, 2009 SCC 12 at paras 57-59. Under a reasonableness standard, this Court cannot intervene in a decision unless there is a lack of "justification, transparency and intelligibility within the decision making process," and the decision was not "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47. To meet the *Dunsmuir* criteria, the decision maker's reasons, when considered as a whole in the context of the record, must "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14-16 [*NL Nurses*].

[16] There is discord in the jurisprudence, however, on the appropriate standard for reviewing the IAD Officer's choice of legal test when assessing H&C factors, including the BIOC. Diner J. recently summarized these conflicting approaches: *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at paras 14-15:

> [14] I agree with the parties that the standard of review to be applied to the selection of a legal test by an H&C officer has been the subject of some disagreement. One line of post-Kanthasamy authorities continues to apply a correctness standard: *Shrestha v Canada (Citizenship and Immigration)*, 2016 FC 1370 (CanLII) at para 6; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 (CanLII) at para 27; *Gomez Valenzuela v Canada (Citizenship and Immigration)*, 2016 FC 603 (CanLII) at para 19; *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382(CanLII) at paras 23-35.

> [15] Other decisions, however, have determined that Kanthasamy directs that the reasonableness standard be applied. For instance, in *Roshan v Canada (Citizenship and Immigration)*, 2016 FC 1308(CanLII) at para 6, Justice Bell stated that "[t]he Court in Kanthasamy never departed from its opinion in Dunsmuir that the reasonableness standard of review applies to questions of law related to the interpretation of a tribunal's home statute". And in *Tang v Canada (Citizenship and Immigration)*, 2017 FC 107 (CanLII) at para 11, Justice McDonald remarked that "jurisprudence from this Court supports the application of a reasonableness standard of review when the issue is whether the correct legal test has been applied to the H&C considerations".

[17] More recently, Norris J., Gleeson J., and Lafrenière J. have all found correctness is the appropriate standard in similar circumstances: *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at paras 31-33, *Cezair v Canada (Citizenship and Immigration)*, 2018 FC 886 at para 14; *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 at para 11.

[18] In this case, it is unnecessary to engage in the debate above. For reasons that follow, the IAD has not met the higher burden imposed by the correctness standard. In doing so, its decision on the appropriate test is *per se* unreasonable.

VI. Relevant Provisions: See Appendix

[19] The IRPA authorizes individuals to enter into sponsorship undertakings, subject to the IRPR: IRPA s 13(1).

[20] Sponsorship undertakings must be approved prior to Immigration, Refugees, and Citizenship Canada issuing a visa for permanent residence: IRPR s 120.

[21] The IRPR, as amended, defined what conditions a proposed sponsor must meet in order to be eligible to sign a sponsorship undertaking: IRPR s 130(1); IRPR s 133(1).

[22] Where a sponsorship application is refused and the sponsor found ineligible to sign a sponsorship application, the proposed sponsor may appeal to the IAD: IRPA s 63(1).

[23] The IAD conducts its analysis *de novo*, and may consider humanitarian and compassionate factors on appeal: IRPA 67(1), IRPA 25(1).

VII. Analysis

A. *Did the IAD apply the correct test when conducting its assessment of the H&C factors, including the BIOC, and did the IAD conduct its analysis reasonably?*

(1) Applicant's Submissions

[24] Ms. Dayal asserts the IAD applied the incorrect legal framework and lens ("hardship rather than compassion") when conducting its H&C analysis. She alleges the IAD focused solely on how hardship could be mitigated, and failed to consider the underlying grounds which warranted the exercise of compassion: *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, [*Kanthasamy*] at paras 13, 25-26. She argues her case is synonymous with *Marshall*¸ where Brown J. found the Officer erroneously discounted the applicant's favourable H&C factors because removal to the USA would not hinder the applicant to continue his positive actions: *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 [*Marshall*] at paras 35-38.

[25] Ms. Dayal further asserts the IAD's finding that she had an adequate support system and does not face significant hardship is "perverse" given that she is a victim of domestic abuse, single mother to three children, and new immigrant with no mastery of either official language. She alleges the IAD not only failed to complete a global assessment of her relevant H&C factors, but it also failed to accept the psychologists' findings that she suffered from significant mental health concerns, that her reliance on her in-laws exposes her to ongoing abuse, and that community supports are insufficient in her case.

[26] Finally, Ms. Dayal asserts the IAD's analysis concerning the BIOC was too narrow, ignored relevant evidence such as the psychologist's report, relied on irrelevant information to draw conclusions, and failed to sufficiently define the children's interests: *Kanthasamy, supra* at para 40; *Chandidas v Canada (Citizenship and Immigration),* 2013 FC 258 at para 69.

(2) Respondent's Submissions

[27] The Minister, asserting the standard of review is reasonableness, submits that Ms. Dayal's application is "clearly untenable" and that it was reasonable for the IAD to conclude that her H&C factors did not outweigh the high bar set in *Chirwa, supra*.

[28] The Minister states there was "virtually no evidence … provided about the best interests of the children besides that they visited India on one occasion and would like to be in the company of their grandparents and uncle." The Minister explains the Applicant bore the onus to flag all H&C concerns clearly: *Owusu v Canada (Minister of Citizenship and Immigration),* 2004 FCA 38 [*Owusu*] at para 8, and *D'Aguiar-Juman v Canada (Citizenship and Immigration),* 2016

FC 6 [*D'Aguiar-Juman*] at paras 16-23. The Minister asserts Ms. Dayal failed to do so, and it was therefore reasonable for the IAD to give less weight to these factors: *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at paras 37-42; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 12; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 [*Hawthorne*].

[29] Finally, the Minister asserts that the IAD reasonably analyzed the BIOC with the information available, and was "alert, alive, and sensitive" to the child's best interests: *Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894 [*Lopez Segura*]; *Webb v Canada (Citizenship and Immigration)*, 2012 FC 1060 [*Webb*] at paras 11-13; *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at para 66; and *Imran v Canada (Citizenship and Immigration)*, 2016 FC 916 [*Imran*] at paras 22-23. While the IAD did not use the term "BIOC" throughout its reasons, the Minister submits it is clear such interests were taken into account, in particular when the IAD considered the impacts of an unstable source of income and concerns of future (un)employability.

(3) Analysis

[30] *Kanthasamy* changed the law on H&C. Instead of the words "unusual and undeserved or disproportionate hardship" framing the test for relief, "[t]he three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the [humanitarian and compassionate] goals of the provision": *Kanthasamy, supra* at para 33.

[31] In *Salde,* Ahmed J. emphasized the need for H&C officers to consider all *compassionate* factors, even where those factors did not result in hardship or directly speak to establishment, family reunification, or other H&C factors: *Salde v Canada (Citizenship and Immigration),* 2019 FC 386 at para 23-24. Ahmed J. expressly cautioned that a reasonable H&C analysis is not confined to a checklist.

[32] In *Marshall,* the IAD concluded the resulting hardship from removal was not sufficient to grant a special H&C remedy despite the compelling H&C factors presented. Rejecting this approach, Brown J. found the appropriate approach to assessing H&C factors post-*Kanthasamy* is to weigh and balance all relevant factors. Officers should not discount positive factors that support the application simply because the proposed action (in this case, removal) would not increase hardship: *Marshall, supra* at para 36. In other words, where a decision maker awards substantial weight to positive H&C factors, that the proposed action would not cause undue hardship is not an appropriate reason to reject the application. Instead, the decision maker must balance positive H&C factors as originally assessed against other countervailing factors before arriving at a conclusion.

[33] With the above in mind, I find nonetheless that the IAD applied the correct H&C test when assessing Ms. Dayal's compassionate factors. The IAD correctly identified the relevant compassionate factors (Ms. Dayal as a victim of domestic abuse and single mother with health concerns), and proceeded to balance these against her (prospective) economic outcomes. That the IAD afforded her compassionate factors less weight because of perceived mitigating circumstances is not synonymous with erroneously applying a "hardship" approach. The IAD did

not require Ms. Dayal to demonstrate she would face continued and undue hardship if the application were not granted, and nor did the IAD fail to consider and balance her compelling H&C factors, with the exception of BIOC. It simply concluded the adverse (prospective) economic evidence was too significant to justify a remedy on Ms. Dayal's H&C factors. In balancing these factors, the IAD applied the correct test.

[34] Despite utilizing the correct approach for Ms. Dayal's situation, the IAD did not apply the correct test when assessing the BIOC. On this basis, its decision cannot stand.

[35] The Minister alleges Ms. Dayal provided virtually no evidence on the BIOC in relation to the visa applicants and, therefore, the IAD was not obliged to consider it: *Owusu supra* at para 5; *D'Aguiar-Juman, supra* at paras 16-23. As stated in Federal Court of Appeal's decision in *Owusu, supra* at para 5:

> [5] An immigration officer considering an H & C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paragraph 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless. [Underlining added.]

[36] It is important to contextualize these cases, however, before determining what information and evidence is adequate versus what it is not. In *Owusu, supra*, the applicant's main focus was on his perceived risks because of political affiliations; his only reference to the best

interests of the child was one sentence suggesting he would have no way to support his family financially. He did not explain how his family relied on him, nor provide evidence that he sent remittances. In *D'Aguiar-Juman, supra*, the applicants failed to adduce evidence demonstrating that Barbados could not accommodate the child's learning disability; therefore, it was reasonable for the Officer to assign this factor less weight in their global assessment.

[37] In contrast to the above examples, Ms. Dayal describes in part, and provided evidence supporting, the physical and psychological impact their situation has on the children. The record demonstrates the children were sometimes witnesses to and victims of her spouse's abuse, and have been affected by the absence of a stable father figure and familial household. Therefore, the IAD had an obligation to consider these factors robustly along with their relationship to the visa applicants: *Saidoun et al v Canada*, (Citizenship and Immigration), 2019 FC 1110 at paras 24-25.

[38] In its analysis, the IAD limited its BIOC assessment to the proximal relationship between the children and the visa applicants. By classifying the BIOC in this manner, the IAD erroneously required the children demonstrate not only dependence or reliance on the visa applicants for physical, learning or emotional needs but also hardship resulting from separation. Consequently, the IAD failed to define and consider other relevant BIOC aspects, such as the impact their mother's depression and mental health struggles following the abuse and divorce (as noted in Dr. Pilowsky's psychological assessment dated September 17,2018) had on them. This was incorrect and unreasonable. The correct approach required the IAD to define and consider the applicable BIOC factors (including hardships the children currently faced, which may originate from their mother's mental health), prior to weighing these against other perceived

countervailing measures. While lack of dependency is one countervailing factor the IAD could consider, its perceived presence did not permit the IAD to fail to consider other relevant aspects of the BIOC. This is especially so since the IAD found "the best interests of the appellant's children would be for the children to remain in the care of the appellant for continued parental support and guidance."

[39] Having concluded the IAD applied the wrong test when assessing the BIOC, it is unnecessary to further examine the reasonableness of its decision. That said, because the result of this finding is that the matter will be re-determined, I note briefly the ways in which I believe the IAD's decision was unreasonable.

[40] Notably, the IAD failed to consider key evidence relevant to Ms. Dayal's status as a victim of domestic abuse and single mother prior to balancing these factors against her (prospective) economic outcomes. In particular, the IAD concluded Ms. Dayal had adequate institutional support in Canada, pointing to the police, CAS and the multitude of services they provide, and her in-laws. The evidence is clear, however, that neither the police, CAS, nor her in-laws were capable of supporting her other than on a reactive, short-term basis, let alone removing or shielding her and her children from the continued cycle of violence. For example, while the IAD did recognize her spouse's criminal history, it did not consider that Ms. Dayal's former spouse had breached, on multiple occasions, the no-contact order from the CAS, thereby rendering CAS' protection role illusory. The IAD further unreasonably equated institutional support with familial support, without considering the different roles each play in helping victims of domestic abuse.

[41] The IAD further referenced Ms. Dayal's relationships with her father-in-law and sister-in-law, and specifically how her in-laws watched the children when she travelled to India. It failed to consider how these same in-laws facilitated her spouse's access into the home despite a no-contact order, nor how they continued to support family reconciliation despite multiple incidents of violence. Nor does it consider her father-in-laws' limited ability to assist or intervene, given his age.

[42] Finally, the IAD neglected to consider the impact the physical presence of family members willing to assume childcare has on the ability of single parents like Ms. Dayal to seek work. The IAD concluded Ms. Dayal had not sought employment and therefore could not support additional individuals, but failed to consider whether Ms. Dayal could seek employment once she had appropriate childcare options.

[43] Decision makers conducting H&C assessments are given significant discretion to determine what factors are sufficiently compelling to justify a special remedy. Therefore, what lies within the range of reasonable outcomes is quite broad: *Dunsmuir*, *supra* at para 151. As indicated above, this Court does not reweigh evidence or draw its own conclusions. It does look closely, however, at this decision-making process to ensure the decision makers' conclusions are intelligible on the facts and the law: *Dunsmuir, supra* at para 47. The more important a piece of evidence is, the higher the onus for the decision maker to consider it robustly: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17. This Court also will not supplement reasons where it is unreasonable to do so: *Canada v Kabul Farms Inc*, 2016 FCA 143 at para 35.

[44] Evidence of domestic abuse and the after-effects of such is certainly relevant in the context of assessing compassionate factors, as is the impact that a failed sponsorship may have on Ms. Dayal's mental health despite these support systems: *Saidoun et al v Canada*, (Citizenship and Immigration), 2019 FC 1110 at paras 24-25. The IAD was entitled to diminish the weight they gave Ms. Dayal's status as a victim of domestic abuse and single mother as a compassionate H&C factor if there was evidence of adequate social supports and childcare. The IAD was not entitled, however, to do so when the evidence did not support these conclusions.

[45] As I already have found, the IAD failed to engage in a rigorous analysis of Ms. Dayal's H&C factors, including the BIOC. Instead, the IAD assumed the availability of social supports and safety nets without regard to relevant evidence that narrowed or negated their scope or effectiveness. Further, the IAD failed to consider the impact that additional support may have on the economic activities of a single parent. In my view, this renders the IAD's analysis and subsequent decision unreasonable.

VIII. Conclusion

[46] The IAD erroneously applied the pre-*Kanthasamy* "hardship" test when examining the BIOC in relation to the visa applicants and failed to define and consider other relevant aspects of the BIOC. This is both an error of law and *per se* unreasonable. The application for judicial review, therefore, is allowed; the IAD's decision of November 27, 2018 is set aside and the matter is remitted to a differently constituted IAD for redetermination.

[47] Counsel were provided with an opportunity to submit a question for certification. None was submitted.

JUDGMENT in IMM-6337-18

THIS COURT'S JUDGMENT is that:

1. The judicial review application is allowed.

2. The November 27, 2018 decision of the IAD is set aside.

3. The matter is remitted to a differently constituted IAD for redetermination.

4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Appendix: Relevant Provisions

Immigration and Refugee Protection Act (S.C. 2001, c. 27)	**Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)**
…	…
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.
…	…
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	**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

considerations relating to the foreign national, taking into account the best interests of a child directly affected.

tenu de l'intérêt supérieur de l'enfant directement touché.

…

…

63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

63 (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

…

…

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(a) the decision appealed is wrong in law or fact or mixed law and fact;

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(b) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Immigration and Refugee Protection Regulations, SOR/2202-227

Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

130 (1) Subject to subsections (2) and (3), a sponsor, for the

130 (1) Sous réserve des paragraphes (2) et (3), a qualité

purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or permanent resident who	de répondant pour le parrainage d'un étranger qui présente une demande de visa de résident permanent au titre de la catégorie du regroupement familial ou une demande de séjour au Canada au titre de la catégorie des époux ou conjoints de fait au Canada aux termes du paragraphe 13(1) de la Loi, le citoyen canadien ou résident permanent qui, à la fois :
(a) is at least 18 years of age;	**a)** est âgé d'au moins dix-huit ans;
(b) resides in Canada; and	**b)** réside au Canada;
(c) has filed a sponsorship application in respect of a member of the family class or the spouse or common-law partner in Canada class in accordance with section 10.	**c)** a déposé une demande de parrainage pour le compte d'une personne appartenant à la catégorie du regroupement familial ou à celle des époux ou conjoints de fait au Canada conformément à l'article 10.
…	…
133 (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	**133 (1)** L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
(a) is a sponsor as described in section 130;	**a)** avait la qualité de répondant aux termes de l'article 130;
(b) intends to fulfil the obligations in the sponsorship undertaking;	**b)** avait l'intention de remplir les obligations qu'il a prises dans son engagement;
(c) is not subject to a removal order;	**c)** n'a pas fait l'objet d'une mesure de renvoi;
(d) is not detained in any	**d)** n'a pas été détenu dans un

penitentiary, jail, reformatory or prison;

pénitencier, une prison ou une maison de correction;

(e) has not been convicted under the *Criminal Code* of

e) n'a pas été déclaré coupable, sous le régime du *Code criminel* :

(i) an offence of a sexual nature, or an attempt or a threat to commit such an offence, against any person,

(i) d'une infraction d'ordre sexuel ou d'une tentative ou menace de commettre une telle infraction, à l'égard de quiconque,

(i.1) an indictable offence involving the use of violence and punishable by a maximum term of imprisonment of at least 10 years, or an attempt to commit such an offence, against any person, or

(i.1) d'un acte criminel mettant en cause la violence et passible d'un emprisonnement maximal d'au moins dix ans ou d'une tentative de commettre un tel acte à l'égard de quiconque,

(ii) an offence that results in bodily harm, as defined in section 2 of the Criminal Code, to any of the following persons or an attempt or a threat to commit such an offence against any of the following persons:

(ii) d'une infraction entraînant des lésions corporelles, au sens de l'article 2 de cette loi, ou d'une tentative ou menace de commettre une telle infraction, à l'égard de l'une ou l'autre des personnes suivantes :

(A) a current or former family member of the sponsor,

(A) un membre ou un ancien membre de sa famille,

(B) a relative of the sponsor, as well as a current or former family member of that relative,

(B) un membre de sa parenté, ou un membre ou ancien membre de la famille de celui-ci,

(C) a relative of the family member of the sponsor, or a current or former family member of that relative,

(C) un membre de la parenté d'un membre de sa famille, ou un membre ou ancien membre de la famille de celui-ci,

(D) a current or former conjugal partner of the sponsor,

(D) son partenaire conjugal ou ancien partenaire conjugal,

(E) a current or former family member of a family member or conjugal partner of the sponsor,

(E) un membre ou un ancien membre de la famille d'un membre de sa famille ou de son partenaire conjugal,

(F) a relative of the conjugal partner of the sponsor, or a current or former family member of that relative,	**(F)** un membre de la parenté de son partenaire conjugal, ou un membre ou ancien membre de la famille de celui-ci,
(G) a child under the current or former care and control of the sponsor, their current or former family member or conjugal partner,	**(G)** un enfant qui est ou était sous sa garde et son contrôle, ou sous celle d'un membre de sa famille ou de son partenaire conjugal ou d'un ancien membre de sa famille ou de son ancien partenaire conjugal,
(H) a child under the current or former care and control of a relative of the sponsor or a current or former family member of that relative, or	**(H)** un enfant qui est ou était sous la garde et le contrôle d'un membre de sa parenté, ou d'un membre ou ancien membre de la famille de ce dernier,
(I) someone the sponsor is dating or has dated, whether or not they have lived together, or a family member of that person;	**(I)** une personne avec qui il a ou a eu une relation amoureuse, qu'ils aient cohabité ou non, ou un membre de la famille de cette personne;
(g) subject to paragraph 137(c), is not in default of	**g)** sous réserve de l'alinéa 137c), n'a pas manqué :
(i) any sponsorship undertaking, or	**(i)** soit à un engagement de parrainage,
(ii) any support payment obligations ordered by a court;	**(ii)** soit à une obligation alimentaire imposée par un tribunal;
(h) is not in default in respect of the repayment of any debt referred to in subsection 145(1) of the Act payable to Her Majesty in right of Canada;	**h)** n'a pas été en défaut quant au remboursement d'une créance visée au paragraphe 145(1) de la Loi dont il est redevable à Sa Majesté du chef du Canada;
(i) subject to paragraph 137(c), is not an undischarged bankrupt under the Bankruptcy and Insolvency Act;	**i)** sous réserve de l'alinéa 137c), n'a pas été un failli non libéré aux termes de la *Loi sur la faillite et l'insolvabilité*;
(j) if the sponsor resides	**j)** dans le cas où il réside :
(i) in a province other than a	**(i)** dans une province autre

province referred to in paragraph 131(b),

qu’une province visée à l’alinéa 131b) :

(A) has a total income that is at least equal to the minimum necessary income, if the sponsorship application was filed in respect of a foreign national other than a foreign national referred to in clause (B), or

(A) a un revenu total au moins égal à son revenu vital minimum, s’il a déposé une demande de parrainage à l’égard d’un étranger autre que l’un des étrangers visés à la division (B),

(B) has a total income that is at least equal to the minimum necessary income, plus 30%, for each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application, if the sponsorship application was filed in respect of a foreign national who is

(B) a un revenu total au moins égal à son revenu vital minimum, majoré de 30 %, pour chacune des trois années d’imposition consécutives précédant la date de dépôt de la demande de parrainage, s’il a déposé une demande de parrainage à l’égard de l’un des étrangers suivants :

(I) the sponsor’s mother or father,

(I) l’un de ses parents,

(II) the mother or father of the sponsor’s mother or father, or

(II) le parent de l’un ou l’autre de ses parents,

(III) an accompanying family member of the foreign national described in subclause (I) or (II), and

(III) un membre de la famille qui accompagne l’étranger visé aux subdivisions (I) ou (II),

(ii) in a province referred to in paragraph 131(b), is able, within the meaning of the laws of that province and as determined by the competent authority of that province, to fulfil the undertaking referred to in that paragraph; and

(ii) dans une province visée à l’alinéa 131b), a été en mesure, aux termes du droit provincial et de l’avis des autorités provinciales compétentes, de respecter l’engagement visé à cet alinéa;

(k) is not in receipt of social assistance for a reason other than disability.

k) n’a pas été bénéficiaire d’assistance sociale, sauf pour cause d’invalidité.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Rachel Hepburn	FOR THE RESPONDENT

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