

Federal Court



Cour fédérale

Date: 20210927

Docket: IMM-2564-20

Citation: 2021 FC 997

Ottawa, Ontario, September 27, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ELIZABETH MAIA FERNANDES

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Elizabeth Maia Fernandes, is a retired architect and a citizen of Brazil. She applied for permanent residence in Canada on humanitarian and compassionate grounds. Her application was refused by a Senior Immigration Officer [Officer] on March 20, 2020. The Applicant seeks judicial review of that decision.

[2] For the reasons that follow, I am granting her application. The Officer erred in failing to properly consider the best interests of the Applicant's grandchildren in the context of the whole of the factual circumstances and by requiring the Applicant to establish an unreasonable level of hardship with respect to the Applicant's adult daughter's mental health and ability to care for her children.

Decision under review

[3] The Officer noted that at the time of her application the Applicant was 68 years old, divorced, in good health, had an established pattern of visiting Canada, and held valid visitor status. The Applicant has been residing in Canada with her only child, her daughter Carolina, since June 2017. Carolina is on medical leave and is a single mother and primary caregiver of her two children, the Applicant's grandchildren, Valentina, age 12, and Noahn, age 11. Carolina and the Applicant's grandchildren are Canadian citizens.

[4] With respect to the Applicant's establishment in Canada, the Officer gave positive consideration to the fact that the Applicant is financially independent. The Officer also gave some positive consideration to the Applicant's participation in community and cultural events and activities in Canada but found that supporting letters concerning her volunteer efforts did not speak to the adversities the organizations would face without the Applicant's contribution or that the organizations would be negatively impacted should the Applicant return to her home country. Similarly, the Officer found that the Applicant's participation in Noahn's classroom was not exceptional in nature nor continuous, and could not conclude that the school was in need of her

service. The Officer concluded that the Applicant did not achieve an exceptional degree of establishment since her arrival in Canada.

[5] As to the Applicant's ties in Canada, the Officer acknowledged the submissions of the Applicant that Valentina is recovering from the emotional distress of her parents' divorce and requires a positive home support system. Further, that Noahn has been diagnosed with developmental and behavioural characteristics consistent with characteristics of Autism Spectrum Disorder [ASD] as well as Attention Deficit Hyperactivity Disorder [ADHD]. Additionally, that Carolina is a single mother, is currently on medical leave and embarking on her own mental health recovery. The Officer found, however, that insufficient evidence had been submitted to demonstrate that the Applicant's return to her home country would have a negative impact on her daughter's mental health. The Officer referred to a joint custody order to find that Noahn and Valentina's father shares in parenting for two consecutive weekends per month and found that this provided some respite for Carolina. Further, that Carolina has support of family services agencies and as a Canadian citizen is eligible for various (unspecified) benefits and services. The Officer stated that they were unable to conclude, on a balance of probabilities, that Carolina would be unable to manage her recovery and raise her children, should her mother return to Brazil.

[6] The Officer then embarked on a consideration of the best interests of the children. The Officer reviewed documentary evidence about Valentina's relationship with the Applicant and a letter from a psychotherapist. The Officer acknowledged that the psychotherapist's letter indicated that Valentina's outcomes are better with the support of the Applicant and gave it some

positive consideration. However, the Officer found that the letter did not indicate that Valentina would be negatively affected in the event of the Applicant's departure from Canada. Further, as citizens of Canada, Valentina and her family will be able to continue accessing a number of family support services offered in Canada.

[7] With respect to Noahn, the Officer acknowledges that the Applicant had provided a number of assessments which discuss the medical, educational and social support that Noahn is receiving. Further, that Noahn was born at 23 weeks gestation and has cognitive and language developmental disabilities. The Officer referenced some of the documentary evidence and accepted that Noahn "requires extra care which is continuously modified for his growing needs". The Officer found, however, that there was insufficient documentation indicating that the Applicant's "role in her grandson's life is [*sic*] detrimental to his progression". The Officer again found that as Canadian citizens the Applicant's daughter and grandchildren have access to all the support programs and services offered to Canadian citizens and permanent residents of Canada.

[8] The Officer concluded that there was "insufficient evidence to support that the applicant's departure from Canada will bring developmental concerns to the health of her grandchildren, thus allow for an exemption from the requirements".

Issues and standard of review

[9] The Applicant submits that the Officer's analysis of the best interests of the children is flawed and unreasonable; that the Officer failed to properly consider the totality of the evidence; and, that the Officer's analysis of the Applicant's establishment in Canada was unreasonable.

[10] These issues are all encompassed by the question of whether the Officer's decision was reasonable. As an administrative decision, it is presumptively to be reviewed on the reasonableness standard (*Canada (citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]). When applying the reasonableness standard, a reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 15, 85, 99).

Analysis

[11] As I have previously set out in *Jones v Canada (Citizenship and Immigration)*, 2018 FC 1070, when generally discussing s 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the Supreme Court of Canada in *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [Kanhasamy] stated that there will inevitably be some hardship associated with being required to leave Canada but that this alone will generally not be sufficient to warrant relief on H&C grounds (at para 23). What will warrant relief will vary depending on the facts and context of the case, but officers making H&C determinations must substantively consider and weigh all of the relevant facts and factors before them (*Kanhasamy* at para 25).

[12] As to the requirement under s 25(1) to take into account the best interests of a child directly affected, the Supreme Court of Canada stated that the best interests principle is highly contextual and must be applied in a manner responsive to each child's particular age, capacity, needs and maturity (*Kanhasamy* at para 35). And, as identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker], for the exercise of an officer's

discretion to fall within the standard of reasonableness, they should consider the children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them (*Kanthasamy* at para 38). This does not mean that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying a H&C claim even when children's interests are given this consideration (*Kanthasamy* at para 38 citing *Baker* at paras 74–75).

[13] However, a decision under s 25(1) will be found to be unreasonable if the interests of the children affected by the decision are not sufficiently considered (*Kanthasamy* at para 39 citing *Baker* at para 75). Those interests must be well identified and defined and examined with a great deal of attention in light of all the evidence (*Kanthasamy* at para 39 citing *Legault v Canada (Minister of Citizenship and Immigration)*, [2002] 4 FC 358 (CA) at paras 12, 31; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paras 9–12). And since children will rarely, if ever, be deserving of any hardship, the concept of “unusual or undeserved hardship” is presumptively inapplicable to the assessment of the hardship invoked by or in relation to a child to support an application for humanitarian and compassionate relief (*Kanathasamy* at para 41 citing *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9).

[14] And, as stated by Justice Gascon in *Semana v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 [*Semana*], there is no rigid test to be followed in conducting a best interest of the child analysis. To demonstrate that a decision maker is alert, alive, and sensitive to the best interest of the child, it is necessary for the analysis in issue to address the unique and

personal consequences that removal from Canada would have for the children affected by the decision (*Semana* at paras 25–26; also see *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 25).

[15] Accordingly, based on the jurisprudence, in conducting the best interest of the child analysis the Officer in this matter was required to be alert, alive and sensitive to the best interests of the children, afford these interests significant weight, examine them with care and attention in light of all of the evidence, and to take into account the children’s personal circumstances.

[16] The Applicant submits the Officer failed to consider the documentary evidence that demonstrates that the challenges faced by this family require a caring, stable home environment with predictable routines and adults who understand and support Noahn’s needs as well as his learning and social growth. Further, that the Officer’s reasons demonstrate that the Officer failed to appreciate both the magnitude of Noahn’s challenges and how the Applicant’s presence in Canada has benefitted him, as well as Valentina and Carolina, and the Officer’s reasons do not appreciate the significant challenges arising daily from Noahn’s special needs. The Applicant submits that the Officer failed to appreciate that Carolina is overwhelmed and unable to cope with the demands of parenting two children with high needs while trying to recover from her own mental health struggles. The Applicant submits that the Officer also minimized the evidence as to the Applicant’s contribution to the support of the family and how her leaving Canada would impact each of them. Further, that the Officer’s reliance on the availability of unspecified benefits and services to the Applicant’s family was misplaced and was not based on the evidence before the Officer. The Applicant submits that the Officer also misconstrued the evidence by

finding that the shared custody arrangement provided Carolina with respite, whereas the evidence described the co-parenting dynamic as an additional stressor on the family.

[17] The Respondent submits that the decision falls within a range or reasonable alternatives, even if the same determination may not have been reached by a different decision maker. The Respondent submits that the decision is reasonable and there is no reason for the Court to intervene with the Officer's exercise of discretion. Further, that the Court should not be swayed by the sympathetic nature of this case but should keep in mind the possibility that there may be other routes open to the Applicant to achieve permanent residence.

[18] Review of the reasons and of the record of the documentary evidence that was before the Officer lead me to conclude that the Officer erred by failing to view the best interests of the children in the context of their family circumstance in whole – including their mother's mental health – as well as their discrete individual circumstances. The Officer also minimized the challenges faced by the family and how the Applicant may contribute to the children's well being.

[19] For example, the Officer does not mention Carolina's letter in which she indicates that she has been off work on sick leave since February 2016 when she left an abusive 11-year marriage and moved into a women's shelter. Further, that being the mother of a special needs child is exhausting. She states that Noahn has been diagnosed with autism, intellectual disability, ADHD and phobia, fine and gross motor skills deficiencies, speech delays and poor vision. He displays aggressive behaviour and defiance, and has been removed from several programs. He is

unable to establish and keep relationships and is doing poorly at school. For safety reasons, Noahn requires constant supervision. He displays unsafe behaviour in public places and displays other feelings such as anger, sadness, fear and frustration in unhealthy ways. Carolina describes spending several hours a day on the phone trying to get appointments or resources to support Noahn. She describes herself being in a constant state of hypervigilance and anxiety and as being exhausted all the time and highly stressed. She states that she sees big changes in her children's behaviour since the Applicant has been in Canada, that the Applicant has cared for and been nurturing to both children, she helps Carolina with Noahn and helps with work at home. I note here that the record also indicates that Carolina holds a Masters of Social Work and, while she is currently on leave for mental health reasons, she is employed as a case manager for the Canadian Mental Health Association.

[20] Carolina's depiction of Noahn's special needs is clearly supported by the materials in the record. In particular, the comprehensive Specialized Development and Behaviour Service Psychological Consultative Report dated and prepared in 2017 by Dr. Jennifer Cometto, Ph. D., C. Psych, Supervising Psychologist, Child and Youth Mental Health Program, McMaster Children's Hospital [McMaster Report]. The Officer does mention this report in the best interest of the child analysis concerning Noahn, drawing from the McMaster Report that Noahn's "current Individual Educational Plan supports all current accommodations for Noahn. Additionally, it is stated that Noahn's curriculum should place an emphasis on developing his daily skills and through ongoing assessment, should be adjusted as he grows; 'students with Intellectual Disabilities are offered the opportunity to continue their public schooling until 21 years of age'".

[21] However, the MacMaster Report is significant in that it deals with far more than the adequacy of Noahn's 2017 Individual Education Plan. It describes Noahn and his special needs. Specifically, that Noahn is a 9 year old boy (at the time of the assessment) who has significant academic delays as well as behaviour and social challenges that have arisen in the context of his extreme prematurity, including development delay (he started to speak and walk at age 4), ADHD and visual impairment. Conceptually, Noahn is able to read only single words and complete basic math calculations and writing is extremely physically taxing for him. Socially, his language is much less complex and well below the level of his peers. Friendships with typically developing peers are likely to be affected by his limitations and "significant need for support across home, community and work settings".

[22] In addition to meeting criteria for intellectual disability, the assessment indicates that Noahn's persistent challenges in social communications and social interaction, as well as his repetitive and restricted patterns of behaviour (e.g. persistent questioning, unusual insistence on collecting paper, wood chips and rocks) are consistent with Autism Spectrum Disorder. At the time of the assessment, Noahn required support in the areas of social communication and restricted, repetitive behaviours. The complexity of Noahn's history was found to underscore the continued importance for his caregivers and service providers to continue coordinating and collaborating to help Noahn live his life to the fullest capacity. As to Noahn's emotional well-being, he was described as having several normative fears, and an unusually strong fear of bathrooms, consistent with the diagnosis of situational Specific Phobia. His fear of bathrooms was causing significant impairment at the time of the assessment and limited his ability to participate in extra-curricular activities in the community. The report also notes that Noahn

detects the strong negative emotions between his parents and that this distresses him. He does not have the cognitive skill set to cope with such stress and often feels overwhelmed, helpless, sad, and angry in relation to the co-parenting dynamic. Such an emotionally-charged home environment would be difficult for any child but is even more difficult for Naohn given his significant medical, emotional and behavioural needs, cognitive rigidity, and limited social skills.

[23] The recommendations section of the McMaster Report deals with a number of areas, including school-based academic programming. Among other things, this recommends that Noahn's Individual Education Plan [IEP] be updated to recognize him as a student with Multiple Exceptionalities, due to his need in the area of communication (i.e. Autism) and Intellectual (i.e. Developmental Disability), in addition to his existing exceptionality in Physical Disability (i.e. Visual Impairment). As noted by the Officer, it also states that Noahn's current, 2017 IEP supports all current accommodations in place for Noahn. The McMaster Report strongly recommends that Noahn be enrolled in a Special Education Classroom for students with intellectual disabilities and suggests that his academic assessment be ongoing because, although his diagnoses will not change, as he grows his learning needs will change. With respect to Autism Spectrum Disorder, the recommendation section notes that Noahn has been referred to the Ontario Autism Program through the Erin Oaks Kids Centre for Treatment and Development and that a family support worker will assigned to orient Noahn's family to the Ontario Autism Program and collaborate with Noahn and his family to decide the most appropriate services for Noahn's needs. It recommends that services focus on developing connections with other families (e.g. family nights), speech and language therapy, the assistive resources service and social opportunity or social skills building groups for Noahn.

[24] The evidence before the Officer also included the following:

- A September 23, 2015 assessment by Rosemarie Freigang, a clinical psychological associate with Norfolk Psychological Services which was conducted to assist with Noahn's programme planning at school and with suggestions for helping him function adaptively at home. The assessment states that Noahn will continue to require special education resources at school as well as professional consultation and interventions from the community well into young adulthood. And, like all children with special needs, that he will benefit from a caring home environment with stability, the provision of predictable routines and expectations, and adults who understand the need to support his learning and social growth;
- An August 12, 2016 Assessment and Referral Report prepared by Front Door, Carizon Family and Community Services notes that Valentina has been having significant relational difficulty with her mother which has deteriorated since the separation of her parents. These difficulties appear in the form of defiance and non-compliance when Valentina is not allowed to engage in a preferred task or when her mother tries to establish consequences. Valentina frequently threatens to break her mother's belongings, steal things, or call her father when conflict arises. Her mother is having difficulty addressing this in part due to Valentina's threats of suicide and self-harm;
- A September 5, 2017 letter of support from Sue Simpson, Executive Director of the Waterloo Regional Family Network, a support network for families of children, youth, and adults with special needs. Ms. Simpson states that she has known Carolina for several years and that raising a child with Noahn's special needs is "extremely challenging" and is often isolating for the whole family. Further, that it can be particularly stressful for a single parent such as Carolina and for siblings as well. Ms. Simpson states that Carolina and her children are especially isolated because of not having family close by to support them. Ms. Simpson notes that the family has experienced many challenges over the past few years which takes its toll. She states that the presence and involvement of the Applicant would add mental and emotional support for Carolina and her children. Further, that Carolina would like to return to work and find balance between her professional life and personal life. Her role as a caregiver can be very difficult. Her mother would be able to provide long-term childcare support while Carolina is working. The cost for specialized childcare for Noahn is very high and difficult to

find. His grandmother [the Applicant] would be able to provide this specialized care;

- A November 7, 2016 letter of support from Sharon Owen, Family Services Worker, Family & Children's Services of the Waterloo Region. This letter states that Family Services is involved for a number of reasons: Valentina has been presenting with mental health issues including self-harming behaviours; Noahn struggles with his cognitive abilities as well as emotional regulation; and, Carolina's separation from her husband and on-going conflict in the relationship has been a stress on her and the family. The letter states that Carolina has limited support in Canada from family or friends and that it does not appear that Carolina's ex-husband is seeing the children on a regular basis to provide Carolina with any consistent support. It states that the Applicant's "assistance with the children's behaviour as well as providing you with emotional support, would definitely be beneficial for your family.";
- A June 7, 2017 psychological progress report from Michelle Lucci, MA, C. Psych. of the Cambridge Psychology Centre indicates that Carolina had been off work since February 8, 2016 due to trauma, anxiety and depression and had then completed six of eleven recommended sessions of psychological treatment. This report describes the circumstances leading up to Carolina going off work and states that she was "completely overwhelmed" and that the "building demands of her high needs children combined with the trauma of abuse in her marriage and subsequent chaos in leaving the marriage exacerbated the stress she was experiencing in the workplace and she completely decompensated";
- A September 18, 2017 letter from Gillian Inksetter, MA, Registered Psychotherapist, that states that Carolina appeared to parent her children more effectively, to exhibit improved coping skills and to be more able to manage her emotions when she had support, and that she and Valentina appeared interested in the Applicant providing family support for the family;
- A letter of support from Julianne Kells, an educational assistant who has tutored Noahn states that as an EA she knows how important support is when you have a child with special needs and that having the Applicant in Canada permanently would provide Carolina with that support and would benefit both children immensely;

- A letter for support from Laura Johnson, a neighbour of Carolina's who describes the difficulties Carolina faces noting that with no family support and little social support for the high needs of her family it became impossible for Carolina to balance work and home and that the resultant stress caused her to seek mental health leave from her employment. This letter describes Noahn's high needs, that Valentina has expressed suicidal ideation and states that the Applicant has provided nurturing love to her grandchildren, that the author sees a difference in Valentina since the Applicant has been caring for her and that the Applicant spends a lot of time and is patient with Noahn and possesses the skills and love that Noahn needs for a safe daycare option. The letter states that this support will allow Carolina to return to work;
- Valentina provided a supporting letter describing the Applicant as very kind, patient and very helpful, and that she is the kind of person the family needs in their house. She describes activities they have done together. Also, that Noahn has special needs and is often bullied which makes Valentina and the Applicant very sad. Valentina states that it would help Noahn if the Applicant stayed because as the Applicant helps Noahn with how he should behave, helps Carolina with Noahn, and helps around the house. Valentina states that she would be devastated if her grandmother cannot stay in Canada and that her family would be very lonely because they have no other family in Canada;
- In her Statutory Declaration dated February 1, 2018, among other things, the Applicant describes the family's circumstances and states that: Carolina is slowly preparing to go back to work and, when she does so, the Applicant can provide the children with nourishment and specialized care that they need; the Applicant acts as an intermediary in the volatile relationship between Carolina and her ex-husband sheltering the children from exposure to their conflicts; the Applicant provides practical help such as grocery shopping, cooking and cleaning; and, provides Carolina with a "respite from her never ending duties". Her presence permits Carolina to spend quality time with each child, not at the expense of the other. The Applicant states that she is involved with Carolina in the children's medical and therapy decisions, at home she helps Noahn with his eye exercises, speech training, homework, and discipline strategies as recommended by his doctors and therapists. She also helps him develop life skills such as making his bed and doing dishes as well as his

personal hygiene. The Applicant states that she can see changes in the children since she arrived in Canada.

[25] The Officer in considering the Applicant's ties to Canada states that they acknowledged "the challenges that Carolina faces as a single mother raising two children and embarking on her own mental health recovery". The Officer referred to medical advice dated February 2016 and states that this advised Carolina "that a combination of pharmacology, as well as psychological treatment would produce the best efficacy in assisting [her] to returning to her employment". This, presumably, is a reference to the report of Dr. Alfonso Marino, C. Psych, SOMA Medical Assessment Corp which was prepared for Crawford-Fenchurch Insurance and describes the "date of loss" as February 8, 2016. This is a comprehensive report, the purpose of which is stated to evaluate the nature and extent of the psychological difficulties that Carolina was experiencing. More specifically, to address whether she was disabled for the purposes of her employment. The report found that Carolina's emotional condition was such that she would be disabled from performing the essential tasks of her employment. The report also answers specific, posed questions. When asked to comment on the factors which would be affecting the examinee's motivation to return to work, the report responded that Carolina had relayed that she was interested in returning to gainful employment once medically cleared to do so and "Certainly her level of depression and anxiety and feelings of being over whelmed, as well as, poor sleep and daytime fatigue, are actors that would continue to preclude her from returning back to work at this time".

[26] In answer to the question "Does the medication the examinee is taking impact his/her ability to work?" the report responded:

Commenting on medication falls outside the scope of the practice of a psychological assessment; however, I do understand that Ms. Hepfner has been consulting with a psychiatrist with respect to psychotropic medication. It is my opinion that, in order to assist Ms. Hepfner, that a combination of pharmacology, as well as, psychological treatment would produce the best efficacy in assisting Ms. Hepfer in returning to her employment.

[27] The Officer appears to interpret this report, and in particular the response to this last question, as suggesting that the medical advice given to Carolina did not indicate that she required support beyond pharmacological and psychiatric counselling. To the extent that the Officer is relying on this report to support the finding that there was insufficient evidence to demonstrate that the Applicant returning to her home country would negatively impact Carolina's mental health, it must be noted that the report was not concerned with that issue. Further, the subsequent Cambridge Psychology Report, also prepared for Crawford for Fenchurch General Claims and which was also concerned with Carolina's ability to return to work, noted that Carolina had fled an abusive marriage and was living in a shelter with her two children whose developmental and psychological needs are high. Faced with this, Carolina had "pulled in her resources" and began working with her family doctor, children's services, other community supports and, that family was travelling intermittently from Brazil to help her. Significantly, this report states that Carolina was completely overwhelmed.

[28] In the ties to Canada analysis, the Officer also states that two, unspecified, letters of support from family services agencies acknowledge that Carolina was facing many challenges in raising her children. However, the Officer found that although the children's primary residence is with Carolina, the divorce granted joint custody and that the children are to spend two weekends a month with their father. According to the Officer, this offers some respite to Carolina. In my

view, this finding ignores the evidence as to the fraught co-parenting relationship and that it exacerbates rather than mitigates stresses on the family. More significantly, it effectively minimizes the significance of the constant heavy demands that Noahn's special needs place on Carolina – which needs are clearly demonstrated by the record.

[29] The Officer also finds that Carolina has the support of family services agencies as evidenced by “the letters on file”. However, as indicated above, these very letters demonstrate the heavy demands that are placed on Carolina, which she describes as unrelenting and overwhelming. Indeed, Carolina's inability to return to work because of her mental health is well documented and unchallenged. I also agree with the Applicant that the Officer's finding that, as a Canadian citizen, Carolina is eligible for various unspecified “benefits and services” is unresponsive to the record.

[30] Also in the ties to Canada part of the analysis, the Officer states that they accept that it has been beneficial to Carolina to have the Applicant's support but that the Officer cannot conclude, on a balance of probabilities, that Carolina “would not be able to manage her recovery and raise her children” should the Applicant return to Brazil. However, the Officer does not consider whether Carolina's mental health – and her coping and parenting abilities and ability to return to work – would be improved by the Applicant's presence and, significantly, how this may relate to the best interests of the children.

[31] To be clear, I recognize that Carolina is an adult. However, in my view the Officer erred by compartmentalizing Carolina's mental health and failing to consider how the loss of the

support of her mother would, in turn, impact her parenting ability and, therefore, the best interests of the children. Put otherwise, was it in the children's best interests that their mother continue to benefit from the support provided to her by the Applicant? And while the Officer depicts this assistance primarily in terms of the Applicant providing household chores, this fails to address the emotional support and respite that the Applicant provides to Carolina, the love and care that the Applicant provides to Noahn and Valentina, and the Applicant's evidence as to the support she provides beyond helping to run the household.

[32] Further, while hardship is a factor to be assessed with respect to s. 25 applications, the Officer's reasons suggest that in the absence of explicit evidence that Carolina will not recover from her mental health crisis and will not be able to raise her children unless the Applicant is permitted to stay in Canada, then there will be insufficient evidence to support the Applicant's H&C request. In my view, this is an unreasonably high hardship bar.

[33] Similarly, the Officer seems to suggest, in the best interest of the child analysis concerning Noahn, that the fact that Noahn attends school offers Carolina sufficient respite and negates the need for support at home by the Applicant. It is true that the McMaster Report states that Noahn may avail of schooling until he is 21 years old as the Officer finds. However, Noahn's needs extend well beyond the school day, and the report states that his significant need for support extends across home, community and work settings.

[34] The Officer states that current supportive documentation indicates that Noahn has been referred to the Ontario Autism Program. This is presumably a reference to the McMaster Report.

The Officer states that they accept that Noahn “requires extra care which is continuously modified for his growing needs” but finds that there was insufficient documentation of the Applicant’s role in Noahn’s life to demonstrate that if she were to leave Canada his developmental progression would be detrimentally affected. This is also reflected in the conclusion section of the reasons where the Officer states that there is insufficient evidence to support that the Applicant’s departure from Canada “will bring developmental concerns to the health of her grandchildren” which would thus allow the granting of the requested s 25 exemption.

[35] In the analysis, the Officer does not address the Applicant’s statement that she is involved with Carolina in the children’s medical and therapy decisions; at home she helps Noahn with his eye exercises, speech training, homework, and discipline strategies as recommended by his doctors and therapists. She also helps him develop life skills such as making his bed and doing dishes as well as his personal hygiene. The Applicant states that she can see changes in the children since she arrived in Canada. The Officer also appears to fail to have considered that there is a vast distinction between the love, care and support provided by a grandmother who lives in the home with children who have special needs and the support and services that can be provided by paid support workers in the context of a school-based individual education programme or an autism support programme – regardless of how dedicated the latter may be. Nor that those services have a limited reach – be it during school hours and when other support may be available – while the significant challenges faced by Noahn are with him all day, every day, for life. Nor that Carolina is overwhelmed and unable to work and has no other family in Canada to support her and the children. And, as noted above, the Officer also did not consider

how the Applicant's support of Carolina factors into the best interests of the children analysis. That is, if the support provided to Carolina by the Applicant will permit her mental health to improve, permitting her to better cope, parent, and return to work.

[36] Further, much of the documentary evidence summarized above frames the impact of the Applicant's presence in Canada on Carolina's mental health, and on the interests of the children, in a positive light. That is, the documentation confirms that her presence benefits them, rather than explicitly stating that they will be negatively impacted should the Applicant return to her home country. Yet the Officer does not consider the best interests of Noahn in that context. Rather, the Officer appears to suggest that in order for the best interests of Noahn to support the Applicant's H&C application she would have to establish that her departure from Canada would cause a detriment to his development – that is – that he would suffer significant hardship. In my view, this approach is not in keeping with *Kanthasamy*.

[37] For these reasons, I agree with the Applicant that the Officer was not sufficiently alert, alive and sensitive to Noahn's best interests.

[38] As to Valentina, the Officer accepted that the Applicant had developed a loving relationship with Valentina and that the Applicant assists the family with day-to-day chores. The Officer refers to the Front Door report indicating that it states that Valentina is encouraged to develop management skills which will help her facilitate her emotional expression in a positive manner. This would appear to be a reference to one of the Recommended Goal Areas which states that Valentina will increase her ability to manage her emotions by learning how to

recognize, regulate and express her emotions in an appropriate manner. The Officer also referred to the letter of Gillian Inksetter and stated that it was afforded some positive consideration. The Officer stated that they acknowledged that the Applicant provides extra support for Carolina's home but that the Inksetter letter did not indicate that Valentina would be negatively affected in the event of the Applicant's departure from Canada.

[39] I note that the Front Door report is an intake report. The statement referenced by the Officer is a goal; it is aspirational. It is not clear, therefore, how it supports the Officer's conclusion. And, as the Applicant points out, the Officer makes no reference to the reported threats by Valentina of suicide and self harm, either in this report or elsewhere in the documentation, and does not factor this into the best interests analysis. Nor did the Officer address Valentina's letter describing how the Applicant helps her deal with the way Noahn is treated by others and that she would be devastated and lonely if the Applicant were removed from Canada. Accordingly, in my view, the Officer was also not sufficiently alert, alive and sensitive to her best interests.

Conclusion

[40] In my view, the Officer failed to sufficiently consider the best interests of the children in the context of all of the evidence in the record.

[41] I also agree with the Applicant that, throughout the reasons, the Officer overly focused on hardship in the context of whether the Applicant's removal from Canada "will bring developmental concerns" and failed to consider, holistically, how the Applicant's removal from

Canada would affect the children. As stated in *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 [*Osun*] “while officers may consider hardship as a factor in assessing the BIOC, a hardship analysis cannot supplant a complete and contextual BIOC analysis”. Reviewing courts should have reason to believe that officers “considered not just hardship but humanitarian and compassionate factors in the broader sense” (emphasis added, *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33; *Osun* at paragraph 19).

[42] Here, with respect to the best interest analysis of both children, as stated in *Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516:

[27] the analysis the Officer was called upon to undertake was not whether the grandchildren would manage or survive in the absence of their grandmother but how they would be impacted, both practically and emotionally, by the departure of the Applicant in the particular circumstances of the case. To that end, the interests of each grandchild...needed to be “well identified and defined” and examined “with a great deal of attention”. The Officer’s BIOC analysis falls well short of this standard. In particular, the emotional and practical hardship these children would face if the Applicant is forced to leave the country is not discussed to any appreciable degree despite evidence of such hardship on record.....

[43] In my view, this also captures the Officer’s best interests of the child analysis in this case. Given the complex needs and significant challenges facing this family, more was required. Nor is this a situation such as *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082, relied upon by the Respondent, where the applicant had a distant involvement with her cousin’s two developmentally challenged children, babysitting them for a few hours once every two weeks (*Semana* at para 32 and 35).

[44] I conclude that the decision is not reasonable because the interests of the children affected by the decision were not sufficiently considered (*Kanthasamy* at para 39) and as the decision is not justified in relation to the relevant factual and legal constraints (*Vavilov* at para 101).

JUDGMENT IN IMM-2564-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. There shall be no order as to costs; and
3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2564-20

STYLE OF CAUSE: ELIZABETH MAIA FERNANDES v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM

DATE OF HEARING: SEPTEMBER 20, 2021

JUDGMENT AND REASONS: STRICKLAND J.

DATED: SEPTEMBER 27, 2021

APPEARANCES:

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