Federal Court  Cour fédérale

Date: 20220414

Docket: IMM-2484-20

Citation: 2022 FC 544

Ottawa, Ontario, April 14, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

VERONICA ANABELA VIEIRA SEBASTIAO MELO
JOSE FERNANDO DA PONTE MELO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a May 5, 2020, decision of a Senior Immigration Officer refusing the Applicants' request to apply for permanent residence from within Canada on humanitarian and compassionate grounds [the H&C Decision]. The application for humanitarian and compassionate [H&C] relief was based on three grounds: their

establishment in Canada, the best interests of their two children, and the lack of familial support and employment prospects in Portugal, their country of nationality.

[2] The application will be granted. The process leading to H&C Decision was procedurally unfair because of the officer's reliance on extrinsic evidence not put to the Applicants. Furthermore, the H&C Decision is unreasonable, especially with respect to the officer's analysis of best interests of the children directly affected, which is a fundamental aspect of a H&C Decision, as stipulated by subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

Background

[3] The Applicants, wife Veronica and husband Jose, are citizens of Portugal. They entered Canada on a visitor visa on October 23, 2005, two months after their marriage. They were then 17 and 19, respectively. They have been living in Canada without status since then.

[4] The Applicants have two daughters, both born in Canada. The elder daughter Sarah was born in 2007 and the younger daughter Caroline was born in 2017.

[5] The Applicants submitted an H&C application for permanent residence from within Canada in 2015. This application was refused. On April 5, 2018, the Applicants made a second H&C application. It was refused on May 5, 2020, and it is that decision which is under review.

The H&C Decision

[6] The officer states that they were not satisfied that the humanitarian and compassionate circumstances put forward in the application "justify an exemption under section 25(1) of the Act."

Establishment

[7] The officer considered the Applicants' establishment. The officer noted several positive establishment indicators, including the Applicants' good civil records, continuous employment, letters of support from friends and co-workers, volunteerism, involvement with their church, and large extended family residing in Canada, all of whom are Canadian citizens or permanent residents.

[8] However, the officer noted that the Applicants had remained in Canada for over 10 years before attempting to regularize their status. The officer acknowledged that the Applicants may have been misinformed about the immigration process but found that "their family members would likely have been knowledgeable enough, having gone through the immigration process themselves, to inform or advise the applicants." The officer also acknowledged the Applicants' submission that they delayed their first H&C application because they were saving up money for legal counsel. The officer found that there was insufficient evidence to indicate that the Applicants were unable to leave Canada or that their extended stay was beyond their control.

[9] The officer accepted that the Applicants had demonstrated integration into Canadian society but found that "their establishment is at a level that would be expected of a person in their circumstances to obtain." While the officer gave "some positive weight" to the Applicants' establishment, the officer noted that the weight assigned to their employment history "is mitigated by the fact that they did not obtain the required employment authorization." Overall, their establishment was given "little weight."

Best Interests of the Children

[10] The officer considered the best interests of the Applicants' children. The officer acknowledged the Applicants' submission that their daughters do not speak Portuguese and that this would impact the elder daughter's education. However, the officer noted that a Google search for "English language school in Portugal for children" revealed a webpage from InterNations [the InterNations Document] that indicated that international schools are available for children who do not speak Portuguese. The officer therefore found that that the elder daughter "would be able to access education in the language of her choice provided her parents are able to afford the tuition fees."

[11] The officer noted that both daughters were Canadian citizens and would be able to return to Canada as adults. The officer acknowledged that the daughters had established close relationships with family and friends in Canada but found that they would still be able to maintain these relationships remotely. The officer acknowledged that physical separation "may cause some psychological and emotional discomfort" and gave this "some weight."

[12] The officer recognized that the children would need to adapt to a new environment and a new language. However, the officer noted that they would have the love and support of their parents and that it may be easier for the younger daughter to learn Portuguese due to her young age. The officer also noted that the elder daughter performed well in school and that "her natural intellect may facilitate her learning a new language."

[13] The officer acknowledged the Applicants' submissions that their daughters would not have the same quality of life in Portugal. However, the officer noted that it is not the purpose of section 25 of the Act to make up for the difference in standard of living between Canada and other countries and therefore gave these considerations "little weight."

[14] With respect to the best interests of the children, the officer stated:

> I am alert, alive and sensitive and acknowledge that it is an important factor and should be given significant weight in the assessment of a humanitarian and compassionate application. However, I am also aware that it is not necessarily a determinative factor. Having carefully assessed all the evidence presented by the applicants, I give this factor some weight.
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> [emphasis added]

Country Conditions

[15] The officer considered the Applicants' submissions that they would be unable to transfer their skills obtained in Canada to Portugal, and that, due to Portugal's low employment rate, they would not be able to support themselves should they return. The officer noted that there was little evidence to demonstrate how their skills would not be transferrable. With respect to the

employment rate, the officer conducted a Google search of “Portugal employment rate” and “Canada employment rate” and found webpages from Trading Economics [the Trading Economics Documents] indicating that in January 2020 Portugal’s employment rate was 55.3%, compared to 61.8% for Canada. The officer found that Portugal’s employment rate was not significantly lower than Canada’s, and so gave “little weight” to these submissions.

[16] The officer considered submissions that the Applicants would be ostracized in Portugal because of their religion. In Canada, they are members of the International Assembly of God. In their application they noted that Veronica’s religion was unacceptable to Jose’s parents and that they are estranged from them as a result. However, the officer, relying on a report from the United States Department of State, found that Portugal allows for religious freedom and protection against discrimination, and so gave this factor “little weight.”

[17] The officer found that there was no evidence to establish that the Applicants would be unable to re-establish themselves in Portugal. The officer noted that the Applicants would be returning to a country in which they were born and raised and that Veronica’s mother may be able to provide some support upon their return. The officer also found the Applicants to be resourceful, noting that they were both able to find employment within a month of arriving in Canada, despite lacking knowledge of the Canadian language and culture. The officer found that the Applicants’ knowledge and skills obtained through employment in Canada would be transferrable to Portugal. The officer also noted that the Applicants were close to their family in Canada and that there was little evidence to suggest that their family would not offer short-term support upon their return.

Issues

[18] The following issues have been raised on this Application:

1) Whether the officer breached the Applicants' right to procedural fairness by failing to provide them with an opportunity to respond to extrinsic evidence;

2) Whether the officer failed to apply the proper approach in assessing the Applicants' evidence;

3) Whether the officer failed to be alert, alive, and sensitive to the best interests of the children; and

4) Whether the officer's assessment of the Applicants' establishment is reasonable.

Analysis

[19] The Applicants submit, and I agree, that the standard of review for the substance of the H&C Decision is reasonableness, while for issues of procedural fairness the question is whether the procedure was fair having regard to all of the circumstances. Therefore, the standard of review is reasonableness for all issues, save for the first issue. Justice Pentney in *Kambasaya v Canada (Minister of Citizenship and Immigration)*, 2022 FC 31 at paragraph 19, astutely described that standard to be used when analyzing questions of procedural fairness:

> Questions of procedural fairness require an approach resembling the correctness standard of review that inquires "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107). As noted in *Canadian Pacific* at paragraph 56, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond", and at paragraph 54, "[a] reviewing court… asks, with a sharp focus on

> the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed".

(1) *Use of Extrinsic Evidence without Providing an Opportunity to Respond*

[20] The Applicants point to the officer's reliance on the InterNations and Trading Economics Documents which are extrinsic evidence. They submit that their right to procedural fairness was breached by the officer's failure to disclose these documents and to provide them with an opportunity to respond.

[21] Where extrinsic evidence is not disclosed, the Applicants submit that the "question is whether meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond or comment upon these facts" (*Yang v Canada (Minister of Citizenship and Immigration*), 2013 FC 20 at para 17). The Applicants point to several cases where this Court has found that documents obtained by an independent Internet search by an officer must be disclosed where those documents are not "standard documents" such as the ones available in a national documentation package (see *Zamora v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1414 [*Zamora*]; *Mazrekaj v Canada (Minister of Citizenship and Immigration)*, 2012 FC 953 [*Mazrekaj*]).

[22] The Applicants submit, citing Justice O'Reilly in *Kablawi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 283 at paragraph 12, that:

> The public availability of the material is only one of the relevant factors to consider in deciding whether a decision-maker has treated an applicant fairly. One must also consider whether the applicant was aware of the material or could reasonably have anticipated that the decision-maker would seek it out.

[23] The Applicants further submit that the general rule is that when the documents contain "novel and significant" information, they must be disclosed, and that this is generally the case for documents found on the Internet (see *Lopez Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778).

[24] The Applicants also point to Immigration, Refugees and Citizenship Canada's online Operational Instructions and Guidelines which state under the heading "The applicant's right to be heard" that:

> The "right to be heard" requires that the applicant is advised of significant facts that are likely to affect the outcome of the application. For example, if a decision-maker relies on extrinsic evidence (i.e. evidence received from sources other than the applicant), they must advise the applicant of this and give the applicant an opportunity to respond to such evidence.

[25] While the Applicants acknowledge that this guidance is not binding, they submit that it should not be departed from without substantial and compelling reasons.

[26] The Applicants submit that both the InterNations and Trading Economics Documents, while available publicly, are new and significant, and the Applicants could not have reasonably expected the officer to rely on them. As a result, the Applicants submit that they were denied a meaningful opportunity to respond.

[27] The Respondent submits that the officer did not breach the Applicants' right to procedural fairness. The Respondent submits that the InterNations Document was cited in direct response to the Applicants' submission that their daughter would have to learn Portuguese to

engage with the school curriculum, while the Trading Economics Documents were cited in response the Applicants' submission regarding Portugal's allegedly low employment rate. The Respondent submits that since these issues were raised by the Applicants, the officer was entitled to research them.

[28] The Respondent relies on two cases. In *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 904 [*Joseph*], it was found that an officer did not breach procedural fairness by relying on an independent search that led to the officer citing a UNESCO report. In *Bradshaw v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 632 [*Bradshaw*], Justice Kane found that an officer did not err by relying on documents from the website of the Government of Jamaica. In doing so, she reviewed the jurisprudence on extrinsic evidence and found that there were two schools of thought: In some cases, documents from credible, reliable, and well-known sources were considered not to be extrinsic. In other cases, the test applied was more contextual and considered whether the information in the document cited would have been known by an applicant, including whether it could have been found elsewhere.

[29] Although the Respondent relies on *Bradshaw*, which reviews two approaches regarding extrinsic evidence, the Respondent does not offer any submission as to which approach should be followed. Instead, the Respondent simply argues that the officer relied on the documents in direct response the Applicants' submissions. This is not the test in either approach discussed in *Bradshaw*. Just because a party has raised a specific point does not mean that a decision maker is entitled to rely on any information that they find to rebut this point. This approach would

allow for virtually unfettered independent research without asking for input from the applicant so long as it was marginally related to the submissions.

[30] I agree with the Applicants that the primary question is whether they could have reasonably anticipated the information contained in the documents. What is relevant in that regard is the nature of the information, its source, and the submissions made to which it is responsive.

[31] It is a fundamental proposition that if an officer will not be seeking submissions from a party regarding information obtained from independent searches, it must be reliable. As the jurisprudence shows, this is usually the case for "standard documents" such as those included in national documentation packages or from other authoritative sources, including government websites, the United Nations, and well-established non-government organizations like Human Rights Watch and Amnesty International (see *Zamora* at para 18; *Mazrekaj* at para 12). The reliability of these documents is generally beyond question, they are publicly available, and it is generally understood that officers may rely on them.

[32] However, even if the document relied on by the officer is not a "standard document," the information it contains may still be reliable if the information comes from an authoritative source. This is because, as the jurisprudence shows, what is important is not the document itself, but the information it contains. For example, an Internet site that reproduces official government statistics is not necessarily extrinsic with respect to those statistics. While it may be preferable for an officer to rely on the actual official sources for this information (e.g. Statistics Canada for

Canadian employment figures), it is understandable that at times other sources may be relied on, for example for the purpose of citing a single source for aggregated information or in order to avoid relying on documents that are not in English or French.

[33] The submissions made by an applicant is also relevant. As noted by Justice de Montigny, as he then was, in *De Vazquez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 530 at paragraph 28, "it is not the document itself which dictates whether it is 'extrinsic' evidence which must be disclosed to an applicant in advance, but whether the information itself contained in that document is information that would be known by an applicant, in light of the nature of the submissions made."

[34] Taking these considerations into account, the Trading Economics Documents are not extrinsic. These documents set out economic data regarding Canada and Portugal. The sources of these data are listed as "Statistics Canada" and "Statistics Portugal." As noted above, while it may be preferable to use the actual sources of these statistics, there are various reasons for not doing so and the data remain reliable. Furthermore, this information could have reasonably been anticipated by the Applicants in light of their submissions. While the Applicants would not necessarily be aware of the particular website relied on by the officer, given that they relied on Portugal's employment rate as part of their submissions, it is reasonable to conclude that this information was known to the Applicants. Given that the Applicants did not provide this statistic to the officer, it would have also been reasonable to expect the officer to conduct research into the employment rate of Portugal and how it compares to that of Canada.

[35] However, in my view, the InterNations Document should have been disclosed. The document itself is not a "standard document," and it does not cite to any official source. Based on the content of the document itself, it appears that it is taken from the website of a private organization that assists individuals with relocating abroad.

[36] The information in the InterNations Document on international schools, while responsive to the Applicants' submissions, goes beyond what would have reasonably known to the Applicants in light of their submissions. Reviewing the InterNations document, it raises several points which one can easily imagine the Applicants might wish to respond to. Most significantly, the InterNations Document says the following:

> If you are thinking of enrolling your kids at an international school, be prepared to pay plenty in tuition fees. Monthly fees are usually around 800 EUR (880 USD). The minimum you would pay at an international school in Portugal is 400 EUR (440 USD), but prices can go as high as 1,800 EUR (2,000 USD) a month. Prices tend to go up the higher the school level, even at the same schools.
>
> For most of these schools, you pay a nonrefundable fee for submitting an application, between 30 and 70 EUR (33–77 USD). Besides this, you must pay annual enrollment fees of 200 to 500 EUR (220–550 USD). Besides books and other school supplies, some schools require the use of a uniform, so consider those added costs as well.

[37] Based on this information, and assuming a 10-month school year, the InterNations Document suggests that the cost of English-language education for a single child would be approximately €8,000. It was unfair for the officer to rely on the availability of private English-language education in Portugal without providing the Applicants with an opportunity to respond to the information regarding the cost of this option and their ability to pay.

[38] I acknowledge that the officer's finding is that "Sarah would be able to access education in the language of her choice provided that her parents are able to afford the tuition fees." [emphasis added] As a direct result of this finding, the officer gives the consideration of Sarah's continuing education "some weight." However, what weight might the officer have given had the Applicants been able to respond that their financial ability made this merely an academic possibility and not a real one?

[39] As is discussed below, the failure to account for this expense was also in my view unreasonable, and seeking submissions on this point would have allowed the officer to properly consider whether English-language education was a viable option.

(2) *The Approach Taken in Assessing the Evidence*

[40] The Applicants submit that the officer failed to properly apply the *Chirwa* approach, as endorsed by the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], which calls for empathy and compassion by H&C officers.

[41] The Applicants submit that the officer unduly focused on the fact that the Applicants had been in Canada without authorization for over 14 years and, in doing so, minimized positive factors such as establishment. The Applicants point to cases in which this Court has found the purpose of section 25 of the Act is to deal with people without status and that an officer should not "simply invoke the non-compliance as an obstacle to the granting of relief" (*Garcia Balarezo v Canada (Minister of Citizenship and Immigration)*, 2020 FC 841 at para 47; see also *Benyk v*

Canada (Minister of Citizenship and Immigration), 2009 FC 950 at para 14; *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1185 at para 9).

[42] The Applicants submit that they explained that they delayed their application because they were saving up for legal representation, but the officer did not say why this explanation was insufficient, which demonstrates a lack of empathy and compassion. The Applicants further submit that the officer's finding that they could have relied on their family members to inform them as to immigration process is speculative, unsupported by the evidence, and still does not account for the Applicants' inability to afford legal counsel.

[43] The Respondent submits that remaining in Canada without status is a relevant factor in considering establishment (citing *Melgoza v Canada (Minister of Citizenship and Immigration)*, 2014 FC 649; *Gonzales v Canada (Minister of Citizenship and Immigration)*, 2019 FC 519; *Joseph*, above; *Aguilar Sarmiento v Canada (Minister of Citizenship and Immigration)*, 2017 FC 481). The Respondent notes that the officer gave some positive weight to the Applicants' establishment, but the Respondent submits that this was reasonably balanced by their breach of Canada's immigration laws.

[44] The officer's treatment of Applicants' circumstances is reasonable and consistent with the law. In effect, the Applicants are taking issue with the officer's reliance on the fact that they did not attempt to regularize their status in Canada for 10 years. While it is true that non-compliance with immigration laws cannot be treated as a barrier to H&C relief, as the cases relied on by the Respondent demonstrate, non-compliance remains a relevant consideration. The

officer did not treat non-compliance with Canada's immigration laws as a barrier to H&C relief in the sense that nothing could overcome the non-compliance. The non-compliance was weighed as a negative factor among the several factors relevant to the analysis. The officer weighed their establishment against their non-compliance.

[45] The role of a court on a judicial review is not to reweigh and reassess the evidence (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). In my view, the Applicants' submissions on this point are a request to reassess the evidence and do not justify intervention by this Court.

(3) *Best Interests of the Children Affected*

[46] Before moving to the issue of best interests of the children, I wish to firmly point out that that remaining in Canada without status is a relevant factor only in considering establishment. It most definitely is not relevant to the consideration of best interests of the children. The officer here did not make that error; however, some submissions of the Respondent's counsel seemed to me to imply that the best interests of the children should be assessed keeping in mind the illegal conduct of their parents. As I said to counsel, the sins of the parents are not to be visited on their children.

[47] What is required of an officer is to make an independent assessment separately of each of the relevant factors (establishment, country conditions, best interests of the children) and then collectively weigh those to decide whether there are circumstances "which would excite in a

reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another" (*Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, as quoted by *Kanthasamy* at para 13). Contrary to the submission of the Respondent, it is quite possible that one of those factors alone may be sufficient to warrant the H&C relief sought.

[48] Specifically, the impact on the children in being removed from Canada with their parents may be so significant that relief is warranted, even where their parents have illegally overstayed their time in Canada by more than a decade, and even where they arrived without children but gave birth to two Canadian children during their illegal stay in Canada.

[49] The view of Canadian courts as to how to assess a child's best interests, and the importance of so doing, has not changed much in the two decades plus since the Supreme Court of Canada issued its judgment in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. In so saying, I do not intend to suggest that this is not a factor of primary significance in an H&C analysis. At paragraph 40 of *Kanthasamy*, Justice Abella of the Supreme Court of Canada recognized the important place this factor holds: "Where, as here, the legislation specifically directs that the best interests of a child who is 'directly affected' be considered, <u>those interests are a singularly significant focus and perspective</u>" [emphasis added].

[50] As was noted by the Supreme Court of Canada in paragraphs 38-39 of *Kanthasamy*, *Baker* preceded the statutory requirement of the Act to consider the best interest of any child affected by the decision which was first found in section 25.1 of the *Immigration and Refugee Protection Act*. SC 2001, c 27, which came into effect on June 28, 2002:

> [38] Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:
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> > . . . attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [a humanitarian and compassionate] decision to be made in a reasonable manner. . . .
> >
> > . . . for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying [a humanitarian and compassionate] claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [paras. 74-75]
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> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.
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> [emphasis added]

[51] What it means to be alert, alive and sensitive to children's best interests was described by Justice Campbell in *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165,

[*Kolosovs*] at paragraphs 9-12, which were referred to and specifically referenced by the Supreme Court of Canada in *Kanthasamy* at paragraph 39.

[52] To be alert to a child's best interests, the officer's reasons must "demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated" (*Kolosovs* at para 9). To be alive to a child's best interests, the officer's reasons must "demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can [be] reasonably determined" (*Kolosovs* at para 11). To be sensitive to a child's best interests, the officer's reasons must "clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief" (*Kolosovs* at para 12).

[53] No analysis can properly be undertaken of a child's best interests unless the decision maker has "well identified and defined" those interests (see *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*] at para 12). Additionally, unless the officer has well identified and defined those interests, it is impossible for a reviewing court to assess the reasonableness of the officer's decision as to the child's best interests or the overall analysis of whether there are sufficient circumstances to warrant a positive H&C decision.

[54] In *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*], Justice Russell at paragraph 63 offered guidance to officers in their task of assessing the child's best interests:

> When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
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> [emphasis in original]

[55] In *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060, Justice Mosley accepted the submission by the Minister that the approach in *Williams* is not required by the governing authorities, citing *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 [*Hawthorne*] at paragraph 7: "When this Court in *Legault* stated at paragraph 12 that the best interests of the child must be 'well identified and defined', it was not attempting to impose a magic formula to be used by immigration officers in the exercise of their discretion." Nevertheless, Justice Mosley observed: "In my view, the *Williams* formula provides a useful guideline for officers to follow where it may be helpful in assessing a child's best interests but it is not mandated by the governing authorities from the Supreme Court and the Federal Court of Appeal."

[56] I agree with Justice Mosley. Officers would do well to follow the guidance offered in *Williams*, because first identifying a child's best interest before embarking on the assessment of the weight to be given them is the message provided by all levels of court in Canada (see e.g. *Legault* at para 12; *Kanthasamy* at para 39). What is abundantly clear from the jurisprudence that an officer need not strictly apply the *Williams* approach, "so long as the officer identifies and defines the best interests and gives them considerable weight" (*Patousia v Canada (Minister of Citizenship and Immigration)*, 2017 FC 876 [*Patousia*] at para 55).

[57] It is also clear, in my view, that having identified those best interest, an officer must then engage in a comparative analysis: What is the impact on those interests if the children remain in Canada and the impact if they do not remain in Canada?

[58] Appeal Justice Décary of the Federal Court of Appeal in *Hawthorne* at paragraphs 5–6 explains that there is a presumption that remaining in Canada is in the child's best economic and social interest, but the comparative analysis must be carried out:

> [5] The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons must, of course, be carefully examined by the officer.
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> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial—such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.
>
> [emphasis added]

[59] It is obvious that every child's circumstances and characteristics are unique. Accordingly, the affected child's unique circumstances will dictate their interests which are to be

identified and assessed. In *Kanthasamy* at paragraph 34, the Supreme Court of Canada identifies several possible interests that may be considered including "such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections" (citing *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 41). The Supreme Court also notes at paragraph 35 that the assessment must "be responsive to each child's particular age, capacity, needs and maturity" (citing *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30).

[60] The Minister's Guidelines on factors to consider when assessing the best interests of a child reflect this:

> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account when raised. Some examples of factors that applicants may raise include but are not limited to:
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> - the age of the child
> - the level of dependency between the child and the H&C applicant
> - the degree of the child's establishment in Canada
> - the child's links to the country in relation to which the H&C assessment is being considered
> - the conditions of that country and the potential impact on the child
> - medical issues or special needs the child may have
> - the impact to the child's education
> - matters related to the child's gender.

> The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born.

[61] Because each child is unique, the particular matters that go to their best interests will generally have to be provided by the H&C applicant(s). Some circumstances may not require such direct information, for example, where the country to which the applicant(s) are being removed is in the midst of war or civil unrest.

[62] In this case, the Applicants submit that nowhere in the decision does the officer consider whether the children's best interests lie in remaining in Canada. Rather than considering what is in their best interests, the Applicants submit that the officer instead treated relocation as a foregone conclusion and then improperly performed a hardship analysis. The Applicants rely on *Osun v Canada (Minister of Citizenship and Immigration)*, 2020 FC 295 [*Osun*], where Justice Diner found at paragraphs 23-24 that hardship cannot be conflated with the best interests of the child and that "[a] hardship analysis interwoven with – and indistinguishable from – [a] BIOC analysis is not transparent, because the Court cannot assess the weight afforded to these factors" (see also *Patousia*).

[63] The Applicants also submit that it was unreasonable for the officer to rely on the fact that their eldest daughter is doing well in school to support the contention that she would be able to adjust and learn Portuguese. The Applicants submit that this is speculative and that the officer improperly uses a positive factor against the Applicants (citing *Singh v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1633).

[64] In response, the Respondent submits that the Applicants have shown no error in the analysis of the best interests of the children. The Respondent submits that the children's best interests were given some weight, but this factor is not determinative (citing *Huang v Canada (Minister of Citizenship and Immigration)*, 2019 FC 265 at para 24).

[65] I find the officer's analysis and discussion of the best interests of the Applicants' children to be flawed and lacking. It is telling that only once does the officer state what is in their best interests, and that is when the officer writes "I further find that it would be in the children's best interests to have access to both parents." Frankly, this is little more than a motherhood statement, as it will be the exceptionally rare case where a child being with the parents will not be in their best interests.

[66] Few submissions were provided in the H&C application regarding Caroline, as she was only 8 months old when the application was made. By the time the decision was made, she was nearly 3 years old. A review of the submissions made by the Applicants discloses the following regarding their children which, at a minimum, required the attention of the officer:

- Sarah does not speak Portuguese and "it would take her at least 1 or 2 years to first learn the language before she could start learning any actual education curriculum."

- This delay would result in Sarah being a few years behind in her grade for her age.

- The children have had the benefit of an extended family in Canada related to their mother Veronica (7 brothers and sisters, 15 nieces and nephews, 4 aunts, and a number of cousins). They have no family or friends in Portugal other than Veronica's mother.

- Sarah would experience a particular loss related to separation from her Aunt Marlene who has been her caregiver since birth, and her many cousins with whom she has been raised "as siblings."

[67] Nowhere in the decision does the officer seek to identify the children's best interests. Instead, the officer merely points to potential hardship caused by relocation and various circumstances that would serve to mitigate that hardship. Any consideration of the children's best interests are interwoven with and indistinguishable with this hardship analysis. As in *Osun*, this causes the decision to lack transparency.

[68] The approach the officer adopted in this case is very similar to that in *Osun*. In *Osun*, the officer simply noted that the interests of the children "are better served in Canada" without elaboration and then proceeded to explain why the disruption caused by removal would be minimized (see *Osun* at para 20). Justice Diner found this approach "resonant of a hardship analysis" and that "[t]his approach erroneously substitutes findings on hardship for assessing BIOC in determining what course of action is most appropriate in the circumstances." (*Osun* at para 21) Justice Diner held that "a lack of hardship cannot serve as a valid substitute for a BIOC analysis." (*Osun* at para 21).

[69] Even if I were to accept the officer's approach, I would have concerns with how it was conducted. In response to the Applicants' concern that their children do not speak Portuguese, and would therefore struggle in school, the officer suggested that one or both of the children could attend a private international school. As set out above, the evidence cited by the officer on this point established that tuition at such a school would cost approximately €800 euros a month. Assuming a 10-month school year, this would be a total cost of €8,000 euro per year, per child.

[70] There is no consideration from the officer as to whether the Applicants would be able to afford these tuition fees. The evidence before the officer was that Jose makes $41,000 per year. There was no evidence of Veronica's income, but her employment is listed as "Restaurant Manager" which suggests it is not significantly greater. The Applicants explained in their submissions that they delayed applying for permanent residence as they were unable to afford a lawyer. Altogether, this evidence is not indicative of a family that is able to afford annual tuition fees of €8,000 for Sarah.

[71] Additionally, the officer does not even consider the consequences to Sarah if she has to first learn Portuguese before attending school. A loss of one to two years in school and being placed behind children of her own age is no small matter.

[72] This shortcoming in the decision further demonstrates the importance of providing all relevant documents to applicants. Had the officer disclosed the InterNations Document, the Applicants may have been able to provide submissions as to their ability or inability to afford English language education. The officer could have then considered those submissions and

properly analyzed this aspect of the decision. Providing an opportunity to respond not only provides natural justice to applicants, but also leads to better reasoning on the part of decision makers.

[73] In addition to these concerns, there is no analysis of the likely harm to the children in being separated from a very large extended family in Canada and being removed to a country where they have no virtually family members (as Jose's parents are estranged from him) or friends.

[74] The Applicants also raised the issue of a substantial decrease on the standard of living they would have in Portugal and, as a consequence, a lower standard for their children. Again, this is not addressed.

[75] Lastly, it is most perplexing to me that while the officer acknowledges that the best interests of the children "should be given significant weight" the officer concludes that this factor was only given "some weight."

(4) *Assessment of the Applicants' Establishment*

[76] The Applicants submit that the officer erred by expecting them to demonstrate a higher threshold of establishment and by using positive establishment factors against them.

[77] The Applicants note that the officer indicated that their level of establishment was what would have been expected given their time in Canada. The Applicants submit that it was

unreasonable for the officer to discount their establishment because it was at a level that is generally expected, and that the officer failed to explain why their establishment was insufficient or what level would have been accepted.

[78] The Applicants also submit that the officer used positive establishment factors against them by stating that their ability to integrate in Canada and the skills that they had obtained would assist them upon their return to Portugal. The Applicants point to a number of cases, in particular *Lopez Gallo v Canada (Minister of Citizenship and Immigration)*, 2019 FC 857, where such reasoning was found to be unreasonable.

[79] With respect to the Applicants' submission that the officer held their establishment to a higher threshold, the Respondent points to several cases in which similarly worded reasons where upheld by this Court (*Bagatnan v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1188 at paras 27 & 30; *Ketjinganda v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1072 at paras 23& 25.) The Respondent has made no submissions regarding the use of positive establishment factors as grounds to deny H&C relief.

[80] I agree with the Applicants that it is unreasonable to discount an applicant's establishment because it is only at the level that one would normally expect to be achieved. Even if it is at a level typical of others, 15 years of establishment is still something that should weigh in favour of an applicant. What is important is the level of establishment and not the time taken to achieve it.

[81] However, in this case, the Applicants had obtained their establishment while in Canada without authorization. As set out above, the officer was entitled to weigh this against the Applicants. In light of these circumstances, it is reasonable to require a higher-than-normal level of establishment in order to outweigh the negative weight of the circumstances through which it was obtained.

[82] On the other hand, I agree with the submission of the Applicants regarding the officer's use of positive factors to deny H&C relief.

[83] In the H&C Decision, the officer finds that the Applicants are resourceful, were able to quickly obtain employment in Canada despite little knowledge of the language and culture, and that they have obtained knowledge and skills through their employment. As a result, the officer finds that this will assist them in the Portuguese labour market. The officer also finds that the Applicants have several supportive family members in Canada and suggests that these family members would be able to provide short-term financial support if the Applicants must relocate to Portugal.

[84] As set out in the cases relied on by the Applicants, it is unreasonable for an officer to take factors that would generally be seen a positive consideration in an H&C analysis and apply them as grounds to deny relief. In *Lauture, v Canada (Minister of Citizenship and Immigration)*, 2015 FC 336, Justice Rennie, as he then was, noted at paragraph 26 that if this reasoning were permitted, "the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed." I agree with Justice

Barnes' description of this reasoning in *Aguirre Renteria v Canada (Minister of Citizenship and Immigration)*, 2019 FC 134 at paragraph 8 as "Catch-22 thinking." The reasoning regarding the Applicants' family is particularly perplexing, because the fact that they have a large supportive family in Canada is being used to justify separation from that family.

Conclusion

[85] For these reasons the application is allowed. Neither party proposed a certified question, nor is there one on this record.

JUDGMENT IN IMM-2484-20

THIS COURT'S JUDGMENT is that this application is allowed, the decision on the Applicants' humanitarian and compassionate application is set aside, their application is referred to another officer for redetermination in keeping with these reasons, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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