Federal Court  Cour fédérale

Date: 20230216

Docket: IMM-989-22

Citation: 2023 FC 225

Ottawa, Ontario, February 16, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

PAULA SUSANA SOUSA BETTENCOURT
JOAO PEDRO PATRICIO CARDOSO
ROSA
BEATRIZ LUCIANA BETTENCOURT
CORREIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of a Senior Immigration Officer [Officer] refusing the Applicants' application for permanent residence. The application was based on humanitarian and compassionate [H&C] grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

Background

[2] The Applicants are citizens of Portugal. They are the Principal Applicant, Paula Susana Sousa Bettencourt, her youngest daughter [Minor Applicant] and her common law spouse [Spouse].

[3] The Principal Applicant claims that she suffered violence at the hands of her former husband who threatened and harmed her even after she ended the relationship. She then moved to Lisbon in 2009, with her three daughters, and a few months later met her now Spouse. The Principal Applicant and her Spouse encountered financial difficulties when the business she worked for closed and her Spouse's business struggled. The Principal Applicant has two sisters who are permanent residents of Canada and they advised her that they could sponsor the Applicants to become permanent residents of Canada. Based on this, the Applicants sold their assets in Portugal and came to Canada in June of 2013. They soon learned that they could not be sponsored by the Principal Applicant's sisters. Regardless, they remained in Canada, worked without authorization and enrolled the Minor Applicant in school. The Principal Applicant claims that in August 2016, she and her daughter returned to Portugal but that her daughter did not adjust well. Concerned for her daughter's mental health, the Principal Applicant and her daughter came back to Canada in February 2017 where her daughter immediately returned to her prior happy, relaxed self. However, the Principal Applicant claims that following a house move and change of schools for the 2018-2019 school year, her daughter was diagnosed with stress and anxiety. The Principal Applicant claims that her daughter was put on medication for migraines and does not cope well with change. In February 2020, the Applicants applied for permanent

residence based on H&C grounds. The application was based on the best interests of the child and hardship related to both the re-traumatization of the Principal Applicant should she return to Portugal and the Applicants' establishment in Canada.

[4] By decision dated January 17, 2022, the Officer determined that an exemption on H&C grounds was not warranted and denied the application. This is the judicial review of that decision.

Decision Under Review

[5] The Officer noted that the Principal Applicant's statement that she is the owner of a cleaning business and found that she appears to be financially independent, based on her business and personal bank accounts. The Officer also found that the Principal Applicant demonstrated that she has access to money and to the support of family in Portugal and, as such, that there is limited hardship associated with re-establishing there. Ultimately, the Officer gave some positive weight to the Principal Applicant's establishment in Canada, but found that this was mitigated by the fact that she made no attempt to obtain the required work authorizations or visitor extensions to remain in Canada.

[6] With respect to the Principal Applicant's submission that she would face undue, undeserved and disproportionate hardship if she were returned to Portugal given the trauma she suffered at the hands of her former husband and associated risk of re-traumatization upon return, the Officer noted the absence of any history of domestic violence, that there was little evidence to support that anyone was willing or able to harm the Principal Applicant upon her return to

Portugal and there was no evidence of any communication or further threats from her former husband. The Principal Applicant had also not provided any evidence of why a relocation to a different part of the country would not be feasible to avoid the possibility of re-traumatization. Given the lack of evidence, the Officer placed little weight on this factor.

[7] The Officer accepted that the Principal Applicant likely developed valuable friendships in Canada, but found that that separation is one of the inherent outcomes arising from the immigration process and, as such, placed little weight on this factor.

[8] With respect to the best interests of the child, the Officer noted the Minor Applicant is 17 years old and came to Canada when she was nine years old. Further, that she suffers from anxiety and depression, noting the clinical assessments submitted in support of the H&C application. The Officer acknowledged that the Minor Applicant has spent the majority of her formative school years in Canada, as well as her academic achievements, and placed some weight on this. However, while the Minor Applicant would struggle with adapting to life upon return to Portugal, the Applicants had not adduced any objective evidence confirming the appropriate treatment needed for the Minor Applicant and the unavailability of that treatment in Portugal.

[9] Moreover, with respect to the Principal Applicant's submissions that it would be extraordinarily difficult for the Minor Applicant to learn the level of Portuguese that would be required to complete grades 11 and 12 in Portugal, the Officer found that an open source online search revealed that there are 48 international schools in Portugal, most of which follow the UK

national curriculum with classes in English. Accordingly, they were not persuaded that a return to Portugal would be detrimental to the Minor Applicant's academic development and found that the Principal Applicant has the necessary financial means to enroll her child in an international school, if necessary. The Officer ultimately concluded that the Applicants had not provided sufficient objective evidence to demonstrate that their removal from Canada would adversely affect the Minor Applicant.

[10] The Officer also noted that there was little evidence to support the Principal Applicant's submission that when she returned to Portugal in 2016, she had made full efforts to reintegrate, such as a house purchase, rental agreement, vehicle purchase and licensing, employment, school enrolment etc., and that there was no evidence of the Minor Applicant's alleged struggles in Portugal. In the absence of such evidence, the Officer placed little weight on this factor.

[11] The Officer accepted that returning to Portugal may pose some difficulties and that there will be a period of adjustment, but found that the Applicants would not be returning to an unfamiliar country, language or a place devoid of family. They had been able to settle in Canada, thereby demonstrating the ability to adapt to new locations, differing cultures and life changes. Further, that the adult Applicants have the necessary skills and financial capacity to successfully re-integrate in Portugal.

[12] In response to the Applicants' submission that they would undergo unusual, undeserved, or disproportionate hardship should they be forced to return to Portugal, the Officer found that the Applicants had provided financial information to show they are financially competent, and

that they have transferrable skills. Based on their ability to adapt well to Canada, the Officer placed little weight on this factor.

[13] Finally, with respect to the country condition documents evidencing Portugal's economic crisis, issues with its health system and the Applicants' concerns of high unemployment rates, high cost of living and taxes, and the associated low monthly income, the Officer noted country conditions in Portugal are not perfect. However, Parliament did not intend for s 25 of the *IRPA* to make up for the difference in the standard of living between Canada and other countries, but rather to provide flexibility to deal with extraordinary situations which are unforeseen by the *IRPA*. Accordingly, the Officer placed little weight on this factor.

[14] The Officer concluded by noting that they had made a global assessment of the factors raised by the Applicants, and that they were not satisfied that the H&C considerations before them justified an exemption under s 25(1) of the *IRPA*. Accordingly, the Officer refused the H&C application.

Issues and Standard of Review

[15] The Applicants raise many arguments, all of which fall within two main issues:

i. Was the decision rendered in breach of a duty of procedural fairness?

ii. Was the decision reasonable?

[16] Issues of procedural fairness are to be reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79 and in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] the Federal Court of Appeal held that although the required reviewing exercise may be best – albeit imperfectly – reflected in the correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances. That is, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at paras 54-56; see also *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Ahousaht First Nation v Canada (Indian Affairs and Northern Development)*, 2021 FCA 135 at para 31).

[17] In assessing the merits of the Officer's decision, there is a presumption that, as the reviewing court, this Court will apply the standard of review of reasonableness (*Canada (Minister of Immigration and Citizenship) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). The parties do not submit that there are circumstances in this matter that would warrant a departure from that presumption and I find that there are none.

[18] On judicial review on the reasonableness standard, the Court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the 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 para 99).

The Decision was Not Made in Breach of the Duty of Procedural Fairness

Applicants' Position

[19] The Applicants submit the decision was procedurally unfair as it was predicated on unforeseeable credibility findings. They submit that the duty of procedural fairness requires that applicants be given an opportunity to respond to concerns that relate to credibility, accuracy or genuine nature of information submitted by the applicant. Further, that this duty also arises where extrinsic evidence is relied upon by an officer.

[20] Specifically, the Applicants submit that the Officer doubted that the Principal Applicant has suffered from domestic violence by noting the absence of any history of domestic violence in the H&C application. However, she had addressed this in her affidavit and it is also referenced in a report by a psychotherapist [Psychotherapist Assessment], both filed in support of the H&C application. The Applicants submit that it is unclear why, unless the credibility or veracity of these documents were doubted, this was insufficient to establish that the Principal Applicant suffered domestic violence in Portugal.

[21] The Applicants also submit that the Officer improperly relied upon extrinsic evidence, without notice to the Applicants, to undermine the credibility of their claim that the Minor Applicant's education would suffer serious setbacks upon return to Portugal as her Portuguese is

not at the level of her peers of the same age. Had the Applicants been aware that the Officer had reviewed this information, they could have clarified that the international schools are generally only available to students who are not Portuguese nationals, tuition costs are very high, and the course offerings are limited.

Respondent's Position

[22] The Respondent submits that the Officer did not render a credibility finding on the issue of whether the Principal Applicant was a victim of gender-based violence. Rather, the Officer only noted there was an insufficiency of evidence. This was a not an unreasonable finding given the lack of objective evidence to confirm the Principal Applicant's assertions. There was also insufficient evidence to establish that when the Principal Applicant returned to Canada in 2017, that she did so because of threats of domestic violence from her former husband or because of the psychological effects of the abuse suffered during her previous marriage. Moreover, the Officer was not obliged to simply accept, as fact, the statements of an applicant that are recounted in the context of a report of a psychologist or psychiatrist (referencing *Demberel v Canada (Minister of Citizenship and Immigration)*, 2016 FC 731 at para 47 [*Demberel*]).

[23] With respect to the extrinsic evidence referred to by the Officer, the Respondent cites *Adewole v Canada (Citizenship and Immigration)*, 2014 FC 112 [*Adewole*] for the principle that the issue comes down to determining whether the person concerned was aware, or was deemed to have been aware, of the evidence in question (paras 27-28). In this instance, given the Applicants' implied assertion that accessing English language high school education was impossible in Portugal and the absence of any evidence submitted by them on the point, the

Applicants knew or should have known about the availability of English language high school education. The Officer therefore did not err.

Analysis

[24] The Officer considered the Principal Applicant's submission that she would suffer hardship if she were returned to Portugal given the risk of re-traumatization arising from the abuse she previously suffered at the hands of her former husband. The Officer acknowledged the submission by the Applicants' counsel that the risk "is real" as supported by the Psychotherapist Assessment. However, the Officer noted the absence of any history of domestic violence in the H&C application and that the Applicants had not provided evidence of domestic violence such as a divorce certificate, police records, or official medical records. The Officer found that there was little evidence to support that anyone is willing or able to harm the Principal Applicant upon return to Portugal as there was no evidence of an ongoing relationship, a significant period of time had passed, and there was no evidence of any communications of further threats by the Principal Applicant's former husband. The Applicants also had not provided evidence explaining why a relocation to a different part of Portugal is not feasible to avoid the possibility of re-traumatization. Given the lack of evidence, the Officer placed little weight on this factor.

[25] The Applicants take issue with the Officer's finding that there was an absence of any history of domestic violence within the H&C application as they submit that this disregards the affidavit of the Principal Applicant outlining the alleged abuse and the Psychotherapist Assessment.

[26] In my view, by addressing the claim of a risk of potential re-traumatization, the Officer was clearly aware of the Principal Applicant's submission in that regard which was based on her narrative as found in her affidavit and as she reported it to the psychotherapist. The Officer also explicitly acknowledged the Applicants' reliance on the Psychotherapist Assessment in support of this hardship claim. The Officer's concern was with the sufficiency of supporting objective evidence to support the claim of risk of re-traumatization, as is demonstrated by the Officer's next sentence noting the absence of "a divorce certificate, police records, and official medical records".

[27] In that regard, the Applicants point to what appears to be an entry on the Principal Applicant's birth certificate which indicates that her marriage was dissolved by declared divorce in February 24, 2011. However, this document does not speak to domestic violence or give any reason for the divorce. No other objective evidence was submitted in support of the claim of a risk of re-traumatization. I would also note that while in her affidavit the Principal Applicant states that she did not report an alleged attack after she separated from her former husband to the police as domestic violence is considered normal in Portugal and, even when reported the police do not act, no objective documentary evidence was filed to support that assertion in her H&C application.

[28] The Officer also found that there was no evidence of an ongoing relationship, that a significant period of time has passed, and there was no evidence of any communications of further threats by the Principal Applicant's former husband or any evidence as to why she could not relocate to a different part of Portugal to avoid potential re-traumatization.

[29] In that regard, the Principal Applicant's affidavit evidence was that the domestic violence ended when she moved to Lisbon in 2009, over 13 years ago. Her affidavit does not suggest, and there is no evidence in the record, that her former husband has subsequently had any contact with her or made threats against her. I note that she lived in Lisbon from 2009 to 2013 but provided no evidence of either any contact by her former husband or that during this period she was re-traumatized by past abuse. There was also no evidence in the record before the Officer that she sought treatment or counselling for trauma during this 13-year period. Further, she and Minor Applicant returned to Portugal in 2016 for six months and there was no evidence before the Officer suggesting that that the Principal Applicant was concerned about or was re-traumatized by that visit. Her affidavit evidence was that she returned to Portugal because "[t]he stress of living without legal immigration status was wearing" on her and that she and the Minor Applicant ultimately returned to Canada because of the mental health of the Minor Applicant. There was no evidence before the Officer suggesting that the Principal Applicant returned to Canada because of a fear of violence by her former spouse or because she was re-traumatized by being in Portugal as a result of prior abuse during her marriage.

[30] As to the Psychotherapist Assessment, it is not objective evidence and reaches its conclusions based on the recounting of events by the Principal Applicant. It cannot establish those events as fact.

[31] When appearing before me, the Applicants submitted that if the Officer had any doubt about the Principal Applicant's submission, then they should have put this to her for clarity. However, this ignores that the onus was on the Applicants to support their H&C application with

sufficient evidence. I also do not agree with the submission that the Officer subtly raised credibility as an issue evidenced by the "tone" of the reasons.

[32] In light of the evidence that was before the Officer, I am not persuaded that the Officer made credibility findings concerning the alleged prior abuse. Rather, the Officer was simply not satisfied that the Principal Applicant had adduced sufficient evidence to support her claim of a risk of re-traumatization. In that regard, the Principal Applicant failed to provide sufficient evidence of past trauma as she provided no objective evidence to support this – or even any supporting affidavits of others. Nor did she assert or did her evidence support that there was any risk of future abuse. And, significantly, her evidence did not support that she suffered re-traumatization based on her alleged prior abuse during the years she resided in Lisbon prior to coming to Canada or when she returned there with the Minor Applicant in 2016.

[33] The Officer assessed the evidence submitted and its probative value and neither believed nor disbelieved the Principal Applicant. Rather, the Officer was simply not satisfied that she had provided sufficient evidence that she would be re-traumatized, based on past abuse, should she return to Portugal (see *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at paras 23, 27, 34; *Gao v Canada (Minister of Citizenship and Immigration)*, 2014 FC 59 at para 32). Further, fact-finders are entitled to significant deference where findings of sufficiency are concerned, so long as they are explained and not used to make a disguised credibility finding (*Singh v Canada (Citizenship and Immigration)*, 2022 FC 339 at para 35; *Williams v Canada (Citizenship and Immigration)*, 2022 FC 695 at para 24).

[34] While the Officer's reasons could certainly have been clearer, viewed together with the evidence in the record before them, the Officer reasonably concluded that the Principal Applicant had not met her onus of providing sufficient evidence to support her claim of hardship based on re-traumatization. I am not persuaded that the Officer made a credibility finding and, therefore, that the Principal Applicant was denied procedural fairness. Rather, because of the lack of objective evidence, the Officer afforded little weight to that factor. I see no error in that regard.

[35] The Applicants also assert that they were denied procedural fairness because of the Officer's reliance on extrinsic information. They specifically take issue with the finding that "[a]n open source search online reveals that there are 48 international schools in Portugal and that most schools follow the UK national curriculum with classes in English".

[36] In *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 [*Shah*], the applicants argued that the officer breached procedural fairness by relying on his own internet research with respect to the services available in Bangladesh to support children with autism. Justice Kane found that the officer did not breach the duty of procedural fairness owed in the circumstances of that case by referring to sources not submitted by the applicants and that an officer's reference to online resources does not automatically trigger a duty to provide the applicant with an opportunity to respond. Rather, the jurisprudence has evolved and establishes that a more contextual approach to the treatment of such evidence is required (*Shah* at paras 34- 43; *Alves v Canada (Citizenship and Immigration)*, 2022 FC 672 at paras 29-30). Further, the onus remains at all times on the applicants to support their H&C application with sufficient evidence, including with respect to the best interests of the child (*Shah* at para 42).

[37] In applying a contextual approach to the facts before her in *Shah*, Justice Kane referred to *Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294 [*Majdalani*], which is factually similar to the matter now before me. In her H&C application, the applicant in *Majdalani* raised concerns about her daughter's ability to complete her education in their country of origin, Lebanon, as she was no longer fluent in Arabic. There, the officer had consulted extrinsic sources to conclude that Lebanese students may request an exemption from the Arabic curriculum and pursue their studies in a different educational system. With respect to the applicant's claim of procedural unfairness, although the Court found that the officer was clearly concerned with the sufficiency of evidence put forth by the applicants to support their concerns of the Lebanese education system, it also held as follows:

> [53] Further, I am also of the view that in both cases, the information came from standard and well-known public sources, and it would have been easily accessible to the applicants. Besides, in the context of the applicants' allegations regarding Mrs. Gedeon's needs and Tracy's education, the information referenced by the Officer is the type of information the applicants could have expected the Officer to consult.
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> [54] Both of these websites are official and widely available sources the applicants could reasonably be expected to know about. Moreover, there is nothing particularly novel or significant in the information, which is of public knowledge.

[38] Similarly, here, the type of information referenced by the Officer – that is, the availability of high school classes in English – is the type of information the Applicants could have expected the Officer to consult given their claim that the Minor Applicant lacked the level of Portuguese that would be required for her to complete grades 11 and 12 in Portugal. While the exact sources considered by the Officer are not identified, the accuracy of the information contained in those sources has not been disputed by the Applicants. Nor do the Applicants appear to dispute the

availability of information pertaining to classes in English, or its novelty or significance. The only point of dispute appears to be the accessibility of these classes to the Minor Applicant. However, as the burden was on the Applicants to support their H&C application with sufficient evidence, the Officer did not breach the duty of procedural fairness by conducting an open source search as to the availability of English language schools in Portugal. Rather, the Applicants did not meet their burden of demonstrating in their H&C application that such schools exist but are not accessible to the Minor Applicant, as they now suggest in their submissions on judicial review.

[39] I would also observe here, in passing, that while the Principal Applicant states in her affidavit that the Minor Applicant cannot participate in advanced conversation in Portuguese and, should they return to Portugal, that she would not be able to find employment or complete advanced schooling given her limited language skills, earlier in her affidavit the Principal Applicant states that the Minor Applicant very quickly picked up English when she came to Canada – completing an English as a Second Language course that normally takes seven years within two years. It is not apparent from the record why the Minor Applicant would be unable to similarly improve her Portuguese language skills while attending high school in Portugal.

The Decision was Reasonable

[40] The Applicants make a number of submissions as to the reasonableness of the decision. I will address these below.

i. Best Interests of the Child

[41] The Applicants submit that the Officer applied an incorrect test for the best interests of the child by explicitly referring to a hardship analysis and focusing on the ways in which hardship could be mitigated and basic needs could be met in Portugal. Specifically, that the Officer failed to undertake a contextual analysis of the "multitude of factors that may impinge on the [children]'s best interests", and merely considered whether the Minor Applicant would suffer hardship or be "adversely affected" should she return to Portugal (citing *Nagamany v Canada (Minister of Citizenship and Immigration),* 2019 F C 187 at para 38; *Vincent v Canada (Minister of Citizenship and Immigration),* 2022 FC 1022 at para 35 [*Vincent*]; *Williams v Canada (Minister of Citizenship and Immigration),* 2012 FC 166 at paras 65-67 etc.). The Applicants submit that the Officer incorrectly focussed on the adaptability and the availability of supports in Portugal, despite acknowledging: the Minor Applicant's academic achievements, her strong family ties in Canada, her medical history, including that she suffers from stress and anxiety related to change, and a clinical assessment finding that the Minor Applicant would likely suffer further psychological distress if she is removed from Canada and that she would likely benefit from having a sense of stability and routine, continuing her studies, and seeing a counsellor.

[42] The Applicants also submit that the Officer failed to even mention the Principal Applicant's two grandchildren in Canada, and did not identify, assess, or balance their interests as required by law.

[43] The Respondent submits that the Officer did not err in their best interests of the child analysis as the Officer was cognizant of the Minor Applicant's state of mental health, but their assessment was necessarily hampered by the lack of evidence concerning the recommended or implemented treatment regiment to address the Minor Applicant's health problems or the availability of that regime in Portugal. The Respondent also notes that although the Applicants rely on *Williams* to assert that the Officer erred by assessing whether the Minor Applicant's basic needs would be met, this Court has subsequently held that there is no requirement to apply the test articulated in *Williams* and that an officer's statement that applicants did not show that a concerned child would be "adversely and significantly affected" did not equate to using the wrong lens identified in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 35 [*Kanthasamy*] (*Zlotosz v Canada (Minister of Citizenship and Immigration)*, 2017 FC 724 at paras 22-23 [*Zlotosz*]).

[44] The Respondent also submits that the Officer did not err in omitting the Principal Applicant's two grandchildren in the best interests of the child assessment, as the Principal Applicant's closeness to her grandchildren was barely, if at all, mentioned in her submissions pertaining to that H&C factor. The Officer's treatment of the grandchildren was commensurate with the amount of emphasis and information provided by the Applicants.

[45] Finally, the Respondent notes that there is no magic formula to an assessment of the best interests of the child. The assessment is highly contextual and officers are not required to follow any one specific test (citing *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2015

FC 1295 at paras 14, 16; *Semana v Canada (Minister of Immigration and Citizenship)*, 2016 FC 1082 at paras 25, 31 [*Semana*]).

Analysis

[46] Section 25(1) of the *IRPA* requires that the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible (other than under section 34, 35 or 37), or who does not meet the requirements of the *IRPA*, examine the circumstances concerning the foreign national. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of the *IRPA* if the Minister is of the opinion that it is justified by H&C considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[47] In this regard, jurisprudence establishes that an H&C exemption is an exceptional and discretionary remedy, which is intended to provide a flexible and responsive exception to the ordinary operation of the *IRPA*, or, a discretion to mitigate the rigidity of the law in an appropriate case. There will inevitably be some hardship associated with being required to leave Canada, but this alone will not generally be sufficient to warrant relief on H&C grounds under s 25(1). Nor is s 25 an alternative immigration scheme. Rather, s 25 is intended to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at paras 13, 19, 21, 23; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 12, 15, 16; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 31; *Del Pilar Capetillo Mendez v Canada (Citizenship and Immigration)*, 2022 FC 559 at para 49).

[48] The analysis of the best interests of a child directly affected is highly contextual and must be applied in a manner responsive to each child's particular age, capacity, needs and maturity (*Kanthasamy* at para 35). Officers 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). To demonstrate that a decision maker is alert, alive, and sensitive to the best interests 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*; see also *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 25). That said, the burden is on an applicant to advance meaningful evidence in support of an analysis of a child's best interests (*Osorio Diaz v Canada (Citizenship and Immigration)*, 2015 FC 373 para 29 [*Osorio Diaz*]; *Celise v Canada (Citizenship and Immigration)*, 2015 FC 642 at para 35 [*Celise*]; *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 at para 11 [*Louisy*]; *Huong v Canada (Citizenship and Immigration)*, 2021 FC 1210 at para 26 [*Huong*]; *Semana* at para 37).

[49] I do not agree with the Applicants that the Officer erred by applying an incorrect test for the best interests of the child analysis. The Officer stated that, with respect to the best interests of the child considerations, they were alert alive and sensitive and acknowledged that this is an important factor that should be given significant weight in the assessment of the H&C application, although it is not necessarily a determinative factor.

[50] The Officer then specifically considered that the Minor Applicant came to Canada when she was nine years old, that she is now 17, and that she has spent the majority of her formative

school years in Canada. The Officer accepted that she suffers from anxiety and depression and states that they had taken note of the clinical assessments that were submitted with the application. The Officer also noted the assertion that her Portuguese language ability is limited, as well as her academic achievements in Canada. The Officer acknowledged that the Minor Applicant will struggle with adapting to life upon return to Portugal but found that the Applicants had not provided sufficient objective evidence to demonstrate that their removal from Canada would "adversely affect the child".

[51] In my view, the Officer did not fail to undertake a contextual analysis. Further, stating that sufficient objective evidence to demonstrate that their removal from Canada would "adversely affect the child" does not, in and of itself, demonstrate that a wrong test was applied by the Officer. As held by Justice Diner in *Zlotosz:*

> [22] Here, the Officer observed that the Applicants did not show the child would be "adversely and significantly affected". This does not equate to using the wrong lens identified in *Kanthasamy*. It is perfectly clear that while the Applicants would have preferred that the Officer come to a different conclusion, the Officer's approach was justifiable based on the evidentiary record presented. The Federal Court of Appeal has rejected the notion that consideration of the BIOC simply requires that the officer determine whether the child's best interests favours non-removal, as this will almost always be the case (see for instance *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 at para 11 [*Louisy*]; *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at paras 46-47; *Nguyen* at para 7). Rather, the law is clear that the onus rests squarely with the applicant to provide sufficient evidence on which to exercise positive H&C discretion. Here, the Officer applied a contextual approach to BIOC and found that the Applicants failed to provide such evidence.
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> [23] Contrary to the arguments of the Applicants, there was no requirement to apply the test articulated in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*]: in *Kanthasamy*, the Supreme Court had the opportunity to

> adopt *Williams* or any other particular test, but stayed away from that. To deviate now from the SCC and the FCA's guidance would be inappropriate, as it would offend the doctrine of *stare decisis*.
>
> [24] As a result, the Court has consistently held since *Kanthasamy* that there is no formula that must be used in considering BIOC. The framework for BIOC analysis remains largely unchanged since *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, in that the legal test is whether the officer was alert, alive and sensitive to child's best interests (*Ordonez* at para 19).

[52] In my view, the Officer did not did not examine the best interests of the child through a basic needs and hardship lens and did not apply the wrong test. The Officer's treatment of the clinical assessment(s) is discussed below within the analysis of health considerations.

[53] As to the Officer's consideration of the Principal Applicant's grandchildren, it is significant to note that in the submissions made by her counsel in support of the H&C application, the best interests of the child submissions make no reference to the Principal Applicant's grandchildren and are solely concerned with the Minor Applicant. In her lengthy affidavit filed in support of the H&C application, the Principal Applicant merely states that her eldest daughter and her husband and two children are now in Canada, having been issued work permits as the husband is employed by a Canadian company. The Principal Applicant states that she wants to be a part of her grandchildren's lives and it would break her heart to know they are in Canada as she is far away with little chance of being able to return to Canada if she is removed.

[54] The burden is on an applicant to advance meaningful evidence in support of an analysis of a child's best interests (*Fouda v Canada (Immigration, Refugees and Citizenship*), 2017 FC

1176 at para 35; *Osorio Diaz* at para 29; *Celise* at para 35; *Louisy* at para 11). In that regard, it is significant to note that the Applicants in this matter not only did not specifically raise the best interests of the grandchildren as an H&C factor, they also submitted very little documentary evidence to support the grandchildren would be detrimentally impacted by the Applicant's removal to Portugal.

[55] Although the Applicants rely on *Shubar v Canada (Citizenship and Immigration)*, 2022 FC 186 at paragraph 2 [*Shubar*] to support their submission that the Officer failed to mention the Principal Applicant's two grandchildren in Canada in their best interests of the child analysis, which rendered the decision unreasonable, *Shubar* is clearly distinguishable on its facts. There, and contrary to this matter, the best interests of the applicant's grandchildren was a central submission made by the applicant:

> 12 The Supreme Court of Canada in *Vavilov* recognized that an administrative decision maker cannot be expected to respond to every argument or submission made by a party, "however subordinate": *Vavilov* at para 128. However, it underscored the importance of administrative decision makers showing through their reasons that they have "meaningfully grapple[d]" with the key issues or central arguments raised: *Vavilov* at paras 127-128**.** In the present case, Ms. Shubar's particular involvement in the third grandchild's life and care, and the specific impact on that child of her removal, was not merely a subordinate or passing submission. It is mentioned as part of the BIOC in the summary of "Relevant Factors" in counsel's submissions in support of the H&C application; it is described again in the discussion of "Background"; it constitutes effectively the entirety of the section of the submissions on "Best Interests of the Children Directly Affected"; it is mentioned separately in Ms. Shubar's personal statement, as well as in the support letters of her son, daughter-in-law, and eldest grandchild; and it is described in a medical report from a pediatrician.
>
> [Emphasis added.]

[56] An applicant bears the onus of establishing a child's circumstances and "the intensity and scope of a BIOC analysis …will depend on the length and strength of the applicant's submissions and on the evidence adduced" (*Semana* at para 37; see also para 16; *Huong* at para 26). Given that the Applicants did not submit that the best interests of the grandchildren were a basis for their H&C claim and mention the grandchildren only in passing in their evidence, the Officer did not err in failing to conduct a best interests of the child analysis pertaining to them (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 3, 5, 8; *Gorelova v Canada (Citizenship and Immigration)*, 2022 FC 1751 at para 24; *Harder v Canada (Citizenship and Immigration)*, 2022 FC 1260 at para 41).

[57] And, in any event, based on the very limited and general evidence before them, the Officer could not have made a finding that the grandchildren's best interests were adversely affected by the removal of the Applicants so as to warrant H&C relief. This is not a situation, for example, where the evidence established a close and dependant relationship between a grandparent subject to removal such that their grandchild child in Canada would be directly affected by the grandparents removal (see e.g. *Le v Canada (Citizenship and Immigration)*, 2022 FC 427 at para 22; *Fernandes v Canada (Citizenship and Immigration)*, 2021 FC 997). The evidence in this matter was limited to assertions that the family is close and would miss each other if the Applicants were removed to Portugal. As the Officer noted, there will inevitably be some hardship associated with being required to leave Canada but this alone will generally not be sufficient to warrant relief on H&C grounds. This includes family separation (*Toor v Canada (citizenship and Immigration)*, 2022 FC 773 at para 30; *Khaira v Canada (Citizenship and*

Immigration), 2018 FC 950 at para 25; *Tran v Canada (Citizenship and Immigration)*, 2018 FC 210 at para 11; *Gao v Canada (Citizenship and Immigration)*, 2019 FC 1238 at paras 30-31).

ii. Health considerations

[58] The Applicants submit that the Officer erred by overlooking health considerations. Specifically, they submit that the Officer did not meaningfully grapple with evidence adduced pertaining to the Applicants' medical histories and the plethora of issues with health care in Portugal, such as the under-staffing, overworked nurses and doctors, long wait times, increased out-of-pocket spending, and barriers to accessing public healthcare services or the challenges the Applicants would face in accessing health care in Portugal. Rather, with respect to the Minor Applicant, the Officer focussed on the lack of evidence adduced by the Applicants confirming the unavailability of treatment in Portugal – in other words, they applied a basic needs test. The Applicants also submit that the Officer ignored findings in clinical assessments for each of them indicating how detrimental the disruption of their lives in Canada would be on their mental health if they had to return to Portugal, thereby reducing this significant factor to a conditional one, which is inconsistent with *Kanthasamy* (citing paras 47-48).

[59] The Respondent submits that the Officer considered the Applicants' evidence of the limits of the health care system in Portugal and the challenges of accessing health care in that country but that the Officer correctly found that the H&C regime is not intended to ameliorate the different standards of living that exists between countries. The Respondent also submits that the Applicants are incorrect to impugn the Officer's analysis based on the fact that the Officer did not agree with the Applicants' assessment of the evidence presented. The Officer was aware

of the Minor Applicant's anxiety and accepted that she would struggle re-integrating in Portugal, but this is not necessarily determinative in the Officer's weighing of the evidence. The Respondent submits that the Psychotherapist Assessment must be considered by the Officer but disagreeing with the clinical impressions contained in the assessment does not make the decision reviewable (citing *Chehade v Canada (Citizenship and Immigration)*, 2017 FC 293 [*Chehade*]).

Analysis

[60] I would first observe that the actual medical evidence before the Officer was limited to the record of William Osler Health Centre emergency room visit on November 12, 2018, by the Minor Applicant and another visit on November 16, 2018, during which a CT scan was conducted. This evidence does not indicate any mental health diagnosis or follow-up treatment.

[61] In her affidavit, the Principal Applicant states that after the Minor Applicant fainted on November 12, 2018, they attended at the emergency room and that:

> The doctors ran all sorts of tests test but could not find a physical cause. They referred her to a pediatric specialty clinic, and they eventually diagnosed her with anxiety and stress…. The doctor has given her medical for migraine headaches and she has homeopathic medicines for when she has panic attacks, but the doctor does not want to prescribe anti-anxiety or anti-depressant medication because she is still growing and her brain is still developing. The doctor has recommended that she attend counselling and the school has offered to make services available but she refuses to attend because she does not want to be different, and the thought of counselling triggers the very stress she is trying to avoid. For the time being we are at an impasse and left to manage her symptoms as best we can.

[62] However, the Applicants provided no evidence of a referral to or attendance at a pediatric clinic by the Minor Applicant, of any diagnosis at that clinic, or at all.

[63] There were no medical reports concerning the Principal Applicant or her Spouse on the record before the Officer.

[64] Thus, although the Applicants submit that they set out in extensive detail the medical histories, inclusive of PTSD, depression, and anxiety, there was no supporting objective medical evidence before the Officer.

[65] The Applicants take issue with the Officers statement made within their analysis of the best interests of the child, accepting that the Minor Applicant suffers from medical conditions pertaining to her mental health, but then finding that "…the applicants have not adduced any objective evidence confirming the appropriate treatment needed for the child and the unavailability of that treatment in Portugal". The Applicants submit that this runs afoul of the Supreme Court of Canada's decision in *Kanthasamy*.

[66] In *Kanthasamy* the Supreme Court found that an officer had accepted the applicant's psychological diagnosis but then discounted it by finding that the applicant had provided insufficient evidence that he had or was currently in treatment, or that he could not obtain treatment if required in his country of origin. The Supreme Court held that by exclusively focusing on whether treatment was available in the applicant's country of origin, the officer ignored what effect removal from Canada would have on the applicant's mental health.

[67] However, as noted above, in this matter here there is no medical evidence diagnosing the Minor Applicant, or any of the Applicants, with any mental health conditions. Rather, the record contains two "clinical assessments" prepared by a social worker for each of the Minor Applicant and the Spouse for the purpose of the H&C application [Social Worker Assessments]. These Social Worker Assessments were based on one meeting with each of those Applicants conducted on September 28, 2019 and self-reported events. With respect to the Minor Applicant, the social worker's clinical impression states: "After hearing and observing Ms. Correia's narrative and self-reported symptoms, it *appears that she is likely* experiencing feelings of anxiety connected to a potential loss of a familiar environment and friendships" and that "… my work with this population has enhanced my understanding of the importance of identifying and accommodating their specific needs. I have learned that providing a sense of stability is essential in nurturing further development. Moreover, I have observed that stability, for adolescents, often entails being in school, having a home to live in, developing stronger relationships and having a routine. Therefore I believe that exposing Ms. Correia to further displacement would significantly increase her symptoms of psychological distress". The social worker recommended that the Minor Applicant see a counsellor to help her process her feelings and anxiety.

[68] The social worker's clinical impression for the Spouse was that "*it appears likely* that he is experiencing symptoms of anxiety and depression. According to his narrative, it seems that these symptoms are connected to the uncertainty he and his family have been facing regarding their future in Canada". The author states her belief that if the Spouse is sent back to his country of origin, his symptoms of psychological distress will increase, and will disrupt the opportunity to attend to his mental health and cause further duress within the family system. She

recommended that he seek “adequate support for the ways in which he has been impacted, as I believe it will improve his quality of life”.

[69] As to the Psychotherapist Assessment concerning the Principal Applicant, it was generated based on a meeting on September 24, 2019, for purpose of the H&C claim. It outlines the Principal Applicant’s narrative and self-reported symptoms. The clinical assessment portion of the document states that the Principal Applicant’s “account of her experience and her self-reported symptoms indicate that she was indeed a victim of gender based violence from which she has been traumatized”. Further, that it is essential for her to have the freedom to continue to build a fulfilling and peaceful life for herself and her daughters in Canada. The author states her belief that if the Principal Applicant returns to Portugal, it will very likely cause her mental and psychological stress symptoms to increase considerably, and for her psychological and emotional state to deteriorate, “given the fear she holds for her own and her youngest daughter’s safety and well being. It is essential for Ms. Bettencourt to access comprehensive trauma-informed therapy, and to develop a strong supportive network, in order to rebuild her sense of self-worth and process her experiences of trauma”. Further, that she “cannot begin to work through the impacts of the past events and trauma as long as there is an imminent threat of being sent back to Portugal”.

[70] I pause here to note that although the psychotherapist refers to a likely increase in the Principal Applicant’s stress symptoms because of the fear she has for her own and the Minor Applicant’s safety, nothing in the Principal Applicant’s narrative as described by the psychotherapist raises any safety concerns. Nor does the Psychotherapist Assessment suggest

that the Principal Applicant was re-traumatized, due to prior abuse, when she and the Minor Applicant returned to Portugal in 2016. Rather, the narrative as described in the assessment states that the Minor Applicant was bullied in Portugal causing the Principal Applicant to return to Canada to ensure the Minor Applicant's well being.

[71] It is also of note that the psychotherapist did not meet with the Minor Applicant and her assessment is based on the Principal Applicant's narrative asserting that upon the return to Canada, the Minor Applicant's mental health improved but she was subsequently diagnosed with an anxiety disorder. However, the record before the Officer contains no medical evidence of such a diagnosis for the Minor Applicant. Nor does the psychotherapist make any diagnosis but, based on the Principal Applicant's narrative of domestic abuse, opines that it would be in the Minor Applicant's best interests to remain in Canada and access trauma-informed therapy as counselling could interrupt the potential of intergenerational transmission of trauma.

[72] As I have noted above, it is significant that, unlike the facts of *Kanthasamy*, in this matter there is no evidence of any medical diagnosis for any of the Applicants, only clinical impressions. The social worker's clinical impressions extended only to finding that it appeared likely that the Minor Applicant and the Spouse were experiencing symptoms of anxiety. There is also no objective evidence that any medical professional prescribed any medication or any treatment for any of the Applicants. Further, with respect to the Minor Applicant, the Officer accepted that she suffers from anxiety and depression (although the latter is not mentioned in her clinical assessment) and that because of her anxiety and stress, she will struggle with adapting upon return to Portugal. This is in keeping with the Principal Applicant's affidavit evidence that

the Minor Applicant does not adapt well to change. However, there was no objective medical evidence of any recommended treatment. Therefore, and unlike the officer in *Kanthasamy*, here a diagnosis was not discounted and the Officer did not focus exclusively on what treatment was available in Portugal to the exclusion of the impact that removal would have on the Minor Applicant's mental health.

[73] The Officer also noted that there was little evidence that the Minor Applicant had struggled to adapt to her new school in Portugal when she returned there for six months with the Principal Applicant, or that the longer she stayed there, the more pronounced the mental health consequence became as the Principal Applicant asserted.

[74] As stated in *Chehade*, although an officer must consider the a psychotherapist report, disagreeing with the clinical impression does not make the decision reviewable:

> [14] The report was from a psychotherapist, who after one appointment concluded that "it would be in Mr. Chehade's best interest to allow him to remain in Canada where he can build upon the life he now has which is helping him to learn and thrive." She then goes on to say that if he stayed then a plan could be made to help him work through the "depression, anxiety and trauma he currently feels."
>
> [15] A physiotherapist cannot usurp the role of the officer. In this case contrary to Mr. Chehade's arguments, the officer did consider the report's conclusions which are almost a repetition of the overview. There is a concern that someone who is: 1) not a psychiatrist or psychologist; 2) only has one appointment with a person; 3) writes about their "clinical impressions" rather than a diagnosis; 4) has no treatment plan or follow-up for the individual; and 5) bases a report specifically drafted for CIC on what they are told by the person should be the definitive answer on whether someone should remain in Canada. The officer must of course consider the report but it is not supportable that to disagree with the clinical impressions or weigh the comments in the report with other factors makes the decision reviewable.

[75] In my view, here, the Officer weighed the clinical impressions along with all of the other factors, including that s 25 is not intended to make up for the difference of in the standard of living between Canada and other countries such as financial, medical, educational, economic, and social supports and reasonably concluded that H&C exemption was not warranted. The Applicants, in essence, would have preferred that the evidence be weighed differently. However, that is not the role of the Court on judicial review.

iii. Establishment

[76] The Applicants submit that the Officer unreasonably viewed the Applicants' adaptability, skills, and financial stability achieved in Canada as a negative H&C factor, contrary to *Singh v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1142 at paragraph 37 [*Singh (2019 FC 1142)*].

[77] In their reasons, the Officer states that they give some positive weight to the Principal Applicant's establishment in Canada, and the fact that she has been adapting in Canada. However, her prolonged stay was in contravention Canada's immigration laws. The Officer states that the weight assigned to the Principal Applicant's establishment was mitigated by the fact that she made no attempt to obtain work authorization or visitor extensions to remain in Canada.

[78] Later in their reasons, the Officer responded to the Applicants' submission that they would suffer "unusual, undeserved, or disproportionate" hardship (this was the terminology utilized by the Applicants and the Officer explicitly acknowledged that this is not the test which

they applied earlier in their reasons) should they be forced to return to Portugal. The Officer noted that the Principal Applicant has employment skills, including, being a chef, business owner and personal support worker, and had provided information showing that she is financially competent. Her Spouse has developed knowledge in the IT field, which is easily transferable. Given the Applicants' ability to adapt well in Canada, the Officer placed little weight on their assertion of hardship on return to Portugal. The Officer also acknowledged that because the Applicants have been living away from Portugal for about 6.5 years, returning may pose some difficulties and that there will be a period of adjustment. However, the Applicants would not be returning to an unfamiliar country, language or place devoid of family. The Officer stated that "the applicants have been able to successfully resettle in a different country, thereby demonstrating an ability to adapt to new locations, differing cultures and life changes, such as starting up a business, enrolling in education and finding employment". The Officer found that while the Principal Applicant claimed that she sold everything in Portugal in 2013 to move to Canada, the adult Applicants have the necessary skills and financial capability to make a successful reintegration in their home country, the Principal Applicant's bank balances could be used in order to re-establish herself, and the Applicants have immediate family members in their home country which would help in the reintegration process.

[79] The Applicants rely on *Singh (2019 FC 1142)* to assert that the Officer unreasonably considered their adaptability, skills and financial stability achieved in Canada as a negative H&C factor. Specially, Justice Ahmed's finding that:

> [37] In any case, this Court has consistently admonished officers who have held the fact that an individual is "resourceful" and "enterprising" against them. Following the Officer's reasoning, "the more successful, enterprising and civic minded an applicant is

> while in Canada, the less likely it is that an application under section 25 [of the IRPA] will succeed" (*Lauture v Canada (Citizenship and Immigration*), 2015 FC 336 at para 26; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 35; *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at para 53; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2019 FC 134 at para 8). One would expect that the message has been received at this point.

[80] In *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*], referred to in *Singh (2019 FC 1142)*, this Court held that an officer must assess the applicants' degree of establishment, which cannot be based on whether they can carry on similar activities in their home country, and also examine whether the disruption of that establishment weighs in favour of granting H&C exemption:

> [26] In other words, an analysis of the applicants' degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, 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. My colleague Justice Russel Zinn made the point well in *Sebbe v The Minister of Citizenship and Immigration*, 2012 FC 813 (*Sebbe*) at para 21:
>
> > … However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.

[81] In referring to *Lauture*, Justice Diner in *Singh v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1633 at para 23 held that, "To turn positive establishment factors on their

head is unreasonable. The officer cannot, as s/he does here, use the Applicants' shield against them as a sword" (para 23). He also found, however, that establishment in Canada is to be treated separately from other considerations such as hardship, or the lack thereof, that an applicant may face upon removal. And, that including considerations of establishment in Canada when assessing an applicant's hardship upon return does not, by itself, render a decision unreasonable. It is only when an officer "commingles" the positive weight ascribed to establishment and then uses those positive attributes to attenuate future hardship that a decision becomes problematic:

> [25] Effectively, establishment means establishment in Canada. Establishment should be treated as a unique category, separate from other considerations such as the hardship (or lack thereof) an applicant may face upon removal. An officer should assess the establishment factor on its own and determine whether it weighs in favour of or against the application (*Lauture* at para 23).
>
> [26] An officer should not evaluate hardship under the label of "establishment" lest these two factors be amalgamated into one, and the establishment factor be rendered meaningless. As this Court observed in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 35, to do so improperly filters establishment through the lens of hardship.
>
> [27] Including considerations of establishment in Canada when assessing an applicant's hardship upon return does not, by itself, render the Decision unreasonable *(Zhou v Canada (Citizenship and Immigration*), 2019 FC 163; see also *Brambilla*). Commingling becomes problematic, however, when an officer ascribes positive weight to an applicant's establishment on the one hand but, on the other, uses the positive establishment attributes (resiliency, drive and determination), to attenuate future hardship.
>
> [28] Here, the Officer committed this error by applauding the Applicants' successful ability to assimilate to the Canadian milieu, but then using those positive skills to their detriment, by asserting the ability to adapt and assimilate to the Indian milieu. This use of the positive establishment factor to turn the Applicants' skills against them was precisely the type of reasoning cautioned against by Justice Rennie in *Lauture* above. And the Officer committed a

> further unreasonable error in using similar logic in the BIOC analysis.
>
> (Emphasis original)

[82] Here, the Officer had already discretely dealt with establishment, affording this H&C factor some positive weight, but found that this was mitigated by the fact that the adult Applicants had worked and stayed in Canada without authorization. The Officer did not commingle or conflate the establishment analysis with their consideration of hardship, as was the case in *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582:

> [53] It is also problematic that the Officer conflated establishment with hardship. The Officer dismissed significant positive signs of establishment by stating the Applicants could continue their religious activities, friendships, and extracurricular activities in South Korea. The Officer's task was not to determine whether the Applicants would have access to similar activities in South Korea, thereby diminishing hardship, but whether they are established in Canada (*Lauture v Canada (Citizenship and Immigration*), 2015 FC 336 at paras 21 to 26 [*Lauture*]). The Officer's analysis of the Applicants' degree of establishment in Canada should not have been based on whether they could carry on similar activities in South Korea. Under this type of analysis, "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" (*Lauture* at para 26).

[83] Nor is it a circumstance such as *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 where the officer in that matter assessed the applicant's establishment through a hardship lens:

> [35] In my respectful view, the Officer's assessment of the Applicant's establishment was indeed filtered through the lens of hardship. The Officer gave significant weight to the support he received in respect of his years of community volunteer work, radio work and music – but immediately discounts it by referring to his ability to do volunteer work in the USA, i.e., he will not

> suffer much hardship. In my view, this focus on what he can do in the USA also runs afoul of what Justice Rennie, then of this Court, said in *Lauture v Minister of Citizenship and Immigration* 2015 FC 336 at 25: "… an analysis of the applicant's degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, 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.

[84] Later in their reasons, the Officer dealt with the Applicants' claims of hardship if removed to Portugal. However, it is not clear to me that the Officer, in doing so, was using the Applicants' degree of establishment to undermine hardship faced on removal. Rather, the Officer appears to be acknowledging the claimed hardship that would be caused by disruption to the Applicants' establishment in Canada and finding that the disruption would be mitigated, in part, by the Applicants' familiarity with Portugal and its culture, their family's presence in Portugal, their demonstrated ability to adapt to new places, and their financial resources. And while the Officer did refer to the Applicants' ability to adapt when they came to Canada, this was not within their establishment analysis and was not the only factor considered in assessing the Applicants' claim of hardship upon return to Portugal. Their employment skills, financial circumstances, familiarity with and family in Portugal all came into play – which factors spoke not just to hardship due to removal from Canada but to the Applicants' ability to re-integrate in Portugal.

[85] This would appear to be a situation more like *Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163 where Justice Locke held that it is open to an officer to assign

positive weight to establishment and then later in their reasons find that the skills the applicants gained in Canada could attenuate potential hardship upon their return to the home country:

> [15] The applicants argue that the Officer erred in basing her decision partly on their ability to adapt to new locales, differing cultures, life changes and new language (all as demonstrated from their activities since arriving in Canada) when she concluded that they could re-establish themselves in China. The applicants argue that this reasoning goes counter to the principle set out in *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*].
>
> [16] In *Lauture*, the Court criticized the assessment of an H&C application on the basis that the applicants' ability to establish themselves successfully in Canada indicated that they would also be able to establish themselves successfully upon return to their country of origin. The Court concluded that this was erroneous reasoning in that it turned a factor that should weigh in favour of granting an H&C exemption (establishment in Canada) against the applicants (by applying it to minimize the issue of hardship in their home country).
>
> [17] I recognize the principle set out in *Lauture*, and I accept that, in assessing the applicants' hardship upon return to China, the Officer considered their activities since arriving in Canada. However, I am not convinced that the Officer strayed into impermissible reasoning. The Officer has not turned an otherwise positive factor into a negative factor. In fact, in discussing the applicants' establishment in Canada, the Officer accepted that "the applicants have several positive elements towards their establishment and integration into Canadian society." In the concluding paragraph of the impugned decision, the Officer repeated that she gave positive weight to the applicants' establishment and integration in Canada. However, that positive weight was balanced against the RAD's negative credibility findings and the applicants' familiarity with China. In my view, despite concluding that the applicants' establishment and integration in Canada was a positive factor, it remained open to the Officer to consider that some of the skills the applicants had acquired in Canada could reduce the potential hardship of their return to China. The Officer's assessment of the applicants' establishment was not improperly "filtered through the lens of hardship" as it was in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 35.

[86] Similarly, here, the Officer discretely dealt with establishment and afforded that factor some positive weight. In separately assessing the Applicants' claim of hardship upon return to Portugal, the Officer considered whether some of their skills demonstrated or gained in Canada could mitigate, in part, hardship upon return.

[87] In my view, the jurisprudence establishes that officers cannot use an applicant's resourcefulness and adaptability – which helped them to become established in Canada and may have enhanced the degree of that establishment – to diminish the weight to be afforded to that positive factor (establishment) or to turn a positive factor into a negative one. However, I am not persuaded that officers cannot consider those same attributes when separately assessing whether they will serve to mitigate an applicant's hardship on return. Ultimately, the officer must weigh and balance all of the factors in making the determination of whether the applicant's circumstances warrant an exemption under s 25(1) of the *IRPA* and I am not persuaded that in this case the Officer's reasons give rise to a reviewable error.

iv. Ignoring Evidence as to Establishment

[88] The Applicants submit that the Officer unreasonably ignored evidence regarding the Applicants' establishment in Canada. The Officer found that the Principal Applicant's tax returns indicated that she has a Social Insurance Number [SIN] and ignored evidence indicating the number entered into the identification area of the Principal Applicant's tax return was not a SIN but rather a temporary tax number assigned for temporary purposes. They also submit that the Officer ignored the existence of the Principal Applicant's two minor grandchildren, who are the Minor Applicant's niece and nephew, and their strong relationships. Further, that the Officer's

finding that relationships with “friends and others in Canada [can be maintained] through mail, telephone and via the internet” has been rejected by the Court (citing *Epstein v Canada (Citizenship and immigration),* 2015 FC 1201 at para 16; *Martinez Mendes v Canada (Immigration and Citizenship)* 2022 FC 816 at paras 38-39). Lastly, the Applicants submit that the Officer ignored evidence that the Spouse remained in Canada while the Principal Applicant and Minor Applicant returned to Portugal between 2016 and 2017 to attempt reintegration, thus indicating the low level of care and attention afforded to the assessment of the H&C application.

[89] The Officer did state that the individual tax returns submitted by the Principal Applicant for 2013, 2016 and 2017 have a SIN. The Officer apparently failed to note two letters from Canada Revenue Agency [CRA] to the Principal Applicant concerning her 2013 and 2016 returns indicating that the number entered in the identification area of the returns is not a SIN but rather is a temporary tax number. CRA pointed out that because every person who files a tax return has to have a valid SIN, CRA may not be able to process those returns. However, in my view, nothing turns on this. The Officer was responding to the Applicants’ submission that the Principal Applicant diligently files her business taxes each year but that she is unable to file personal taxes because she does not have a SIN. While the Officer erred in finding the three returns submitted by the Principal Applicant have a SIN, this error of fact is not material. As stated by Justice Gascon in *Rinchen v Canada (Citizenship and Immigration),* 2022 FC 437: “administrative decisions need not be perfect and that an imperfect decision with immaterial errors can still be reasonable, if other parts of a decision maker’s analysis are sound and the errors are not determinative of the final outcome” (at para 21; see also *Tiben v Canada (Citizenship and Immigration),* 2020 FC 965 at para 24*; Vavilov* at para 100).

[90] Similarly, while the Officer states that it is unclear whether the Spouse accompanied the Principal and Minor Applicant to Portugal while the Principal Applicant's affidavit evidence was that he did not, nothing turns on this. Indeed, later in the reasons, the Officer states that the Spouse appears to have stayed in Canada based on his Schedule A submission.

[91] As to the failure to mention the Principle Applicant's two grandchildren within the establishment analysis, the submission made to the Officer addresses the grandchildren under the heading "Strong Interpersonal Connections", which includes references to friends and family. This section states that the majority of the Applicants' immediate family now lives in Canada, including her daughter, her daughter's husband and their two children followed by the statement that "[t]he family are very close and they support the present application whole heartedly". And, as noted above, in her affidavit filed in support of the H&C application, the Principal Applicant mentioned her grandchildren only in passing. The Spouse's affidavit states that he is very attached to all of his nieces and nephews and that spending time with her cousins has also helped the Minor Applicant come out of her shell.

[92] While it is true that the Officer did not mention the grandchildren in the establishment analysis, the reasons acknowledge the Principal Applicant's family members in Canada, including her daughter (and her husband and two children) who are here on temporary status. The Applicants seem to acknowledge this, but point out that the Officer mistakenly states that the daughter born in 1994 is in Canada while in fact it is the daughter born in 1991. Again, nothing turns on this very minor point. Ultimately, the Officer afforded positive weight to the Applicants'

establishment in Canada and I am not convinced that the Officer failed to grapple with a central submission of the Applicants in this regard.

[93] Finally, I also disagree with the Applicants that the Officer erred by finding that the Applicants' relationships with friends and others in Canada could be maintained through mail, telephone and the internet, as the cases they cite to support their position are clearly distinguishable from the facts at hand.

Conclusion

[94] Upon review of the evidence in whole, it is apparent that the main thrust of the Applicants' H&C submissions were that they were struggling financially in Portugal but they are doing better in Canada. Further, that Canada has preferable social support systems, their lives would be disrupted, they would not fare as well financially, and they would be distressed upon their return to Portugal. They would prefer to stay here. These are all understandable and sympathetic concerns and are, no doubt, common to many persons in Canada without status. However, the role of the H&C Officer was to assess whether the H&C factors and supporting evidence of the Applicants was sufficient to warrant an exemption to the normal immigration requirements by way of s 25(1) of the *IRPA*. For the reasons above, I find that the Officer reasonably concluded, in a manner that was procedurally fair to the Applicants, that their circumstances do not warrant such an exemption.

JUDGMENT IN IMM-989-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs;

3. There shall be no order as to costs; and

4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-989-22
STYLE OF CAUSE:	PAULA SUSANA SOUSA BETTENCOURT, JOAO PEDRO PATRICIO CARDOSO ROSA, BEATRIZ LUCIANA BETTENCOURT CORREIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	FEBRUARY 1, 2023
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	FEBRUARY 16, 2023

APPEARANCES:

Athena Portokalidis	FOR THE APPLICANTS
Michael Butterfield	FOR THE RESPONDENT

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