Federal Court  Cour fédérale

Date: 20101208

Docket: IMM-1823-10

Citation: 2010 FC 1247

Ottawa, Ontario, December, 8 2010

PRESENT: The honourable Madam Justice Bédard

BETWEEN:

BRIGITTE GARAS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), of a decision of an immigration officer, dated March 15, 2010, denying an application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

Background

[2] Brigitte Garas (the applicant) was born in France on March 11, 1971. In 1994, while still living in France, she began a relationship with Michael Chamas. The two started living together

shortly thereafter and have been together ever since. They have three children: Allen, born November 4, 1995; Ines, born May 3, 2001; and Michael Jr., born April 21, 2008. Allen was born in France while Ines and Michael Jr. were born in Canada. All three children are Canadian citizens, as is Mr. Chamas, who became a Canadian citizen in October of 1995.

[3] The applicant first arrived in Canada on September 16, 1996, as a visitor. She has lived in Canada with Mr. Chamas and their children ever since. There is no official documentation in the tribunal record with respect to the applicant's status during her first 9 years in the country.

[4] An entry was made, however, in the Field Operations Support System (FOSS) on September 24, 2002, by a customs officer at Trudeau International Airport in Montreal who allowed the applicant to re-enter Canada (presumably after a trip abroad). The officer indicated that he had instructed the applicant to take the necessary steps to apply for permanent residence within the following 6 months.

[5] However, the applicant indicates in her affidavit that it wasn't until 2004 that she sought legal advice regarding her temporary status in Canada. She claims that although she paid a lawyer to apply for permanent residence on her behalf in 2004, he neglected to do so.

[6] On July 5, 2006, the applicant was once again stopped by a Canada Border Services Agency (CBSA) officer at Trudeau Airport after returning from another trip abroad. This time, the officer deemed the applicant to be inadmissible based on the fact that she had been living in Canada for 9

years without making a request for resident status. Eventually, she was allowed to enter, but an exclusion order was issued on July 11, 2006, which was to become effective on July 21, 2006.

[7] On July 12, 2006, the applicant applied for a Temporary Resident Permit (TRP). This was granted on August 7, 2006 and was valid until August 6, 2007. The July 11, 2006 exclusion order was not enforced.

[8] On August 11, 2006, the applicant filed an inland application for permanent resident status based on H&C grounds, under subsection 25(1) of the *IRPA*, accompanied by a sponsorship application by her common-law spouse, Mr. Chamas. The applicant based the H&C application on her establishment in Canada, the best interests of her children (more specifically, the learning disability that Allan had been exhibiting for a number of years), and her reliance on her Canadian common-law husband, Mr. Chamas (for financial support, etc.).

[9] The applicant applied for, and received, a renewal of her TRP in the summer of 2007. The renewed permit was valid until August of 2008.

[10] On July 2, 2008, the Applicant submitted a third and final request for renewal of her TRP. On September 19, 2008, the TRP request was refused. The Applicant was instructed to leave Canada and was informed that if she did not "enforcement action may be taken against [her]."

[11] On April 27, 2009, the applicant's permanent residence application was rejected. The rejection of the applicant's H&C application also led to the rejection of the sponsorship application. A distinct decision was rendered to that effect on April 27, 2009. No reasons were initially provided for the rejection of the H&C application.

[12] On May 5, 2009, the applicant filed for leave and judicial review of the decision denying the H&C Application. On May 29, 2009, the applicant received "reasons," which consisted of a few brief FOSS notes; the children's best interests were not mentioned in the notes. On August 14, 2009, the respondent's Minister agreed to have the applicant's application for permanent residence re-examined by a different immigration officer in relation to the H&C grounds.

[13] On March 15, 2010, the applicant's H&C application was, once again, rejected.

The decision under review

[14] In her reasons, the Immigration officer identified the two main H&C grounds put forth by the applicant: a) establishment in Canada and b) the best interests of the applicant's children. She concluded that the grounds submitted were insufficient to warrant an exemption in the applicant's case.

[15] The officer started by considering the applicant's degree of establishment in Canada. While the applicant had been living in Canada for a significant amount of time (i.e. since September of 1996), the officer gave significant weight to the fact that the applicant had failed to comply with immigration laws and regulations by remaining in Canada throughout this period without applying for permanent resident status until August of 2006. The officer specifically pointed to the applicant's failure to comply with the September 24, 2002 instruction to apply for permanent residence within 6 months.

[16] The officer also noted that the applicant claimed to be financially dependent on her common-law husband, Mr. Chamas, a Canadian citizen. However, Mr. Chamas was in a precarious financial situation with respect to unpaid income tax and, in any event was quite mobile. Given his mobility, the officer determined that he would continue to support the applicant even if she had to leave Canada. In terms of support from family and friends, while the officer recognized that the applicant has family and friends in Canada, she pointed out that the applicant also has family in France. Specifically, the officer indicated that the applicant had kept in contact with her mother, her sister, and her half-brother in France. The officer determined that, as such, it would be possible for the applicant to receive moral and logistical support from these family members were she required to return to France. The officer further noted that as a frequent traveler (10 separate dates of entry into Canada were recorded on her French passport since it was issued in December of 2004), traveling to France for the purposes of submitting her application from abroad would not represent an unusual hardship.

[17] Ultimately, on the topic of establishment, the officer indicated that even if she were to give some weight to the applicant's establishment in Canada, the applicant had not demonstrated that submitting her application for residency from outside of Canada would amount to unusual and undeserved, or disproportionate hardship.

[18] Next, the officer considered the best interests of the applicant's children. She noted Allen's learning disability and the claim that future changes in his life might cause him harm. In this regard, the officer referenced the various reports regarding Allen's learning disability. She highlighted the report of July 13, 2009, which indicated that Allen was experiencing anxiety and had difficulty

coping with change. However, the officer noted that the applicant did not specify the harm that would be caused to Allen if he were to accompany his mother outside of Canada. Further, the report of July 13, 2009 was not specific as to what past traumatizing events had triggered Allen's anxiety. The officer also indicated that Allen had recently managed to work through a significant change, by moving successfully from elementary to secondary school. The officer further pointed out that the French school system is similar to the Canadian one, and that the care Allen had been receiving in Canada would be available to him in France. Ultimately, the officer concluded that it was reasonable to believe that, with proper planning and supervision, Allen would be able to adapt to living in France, should the family decide that he should leave Canada with his mother.

[19] The officer then moved on to briefly consider the applicant's other two children. She indicated that Ines was not having any difficulty at school, and that since the French system is similar to the Canadian one, she would likely do well if she moved to France with her mother. As for Michael Jr., the officer indicated that for a baby location is not important – so long as he is with his mother.

[20] The officer concluded her reasons by indicating that she was not satisfied that the applicant had demonstrated that her situation was so exceptional as to make the requirement to obtain a permanent resident visa from abroad amount to unusual and underserved, or disproportionate hardship.

The Issues

[21] The applicant alleges that the officer made several reviewable errors. She essentially faults the officer for an unreasonable assessment of her establishment and her children's best interests. Therefore, this application raises the following issue:

1) Was the officer's decision to refuse the request for exemption unreasonable?

Standard of review

[22] It is well established that when reviewing H&C decisions, which are highly discretionary, the Court will apply the deferential standard of reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, at para. 62; *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 at para 18). The same standard applies with respect to the decision-maker's assessment of the evidence (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53; *Martinez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 798 (available on CanLII) at para 7; *Ndam v Canada (Minister of Citizenship and Immigration)*, 2010 FC 513 (available on CanLII) at para 4). The court must not re-assess the evidence, re-weigh the factors applied by the decision-maker or substitute its own appreciation of the evidence unless there are gross errors or perverse findings of fact.

[23] The Court's role when reviewing a decision under the standard of reasonableness had been set out in *Dunsmuir*, above at para 47:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the

> process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Legislative framework

[24] An H&C exemption applies as an exception to the principle that a foreign national who wants to apply for Canadian permanent resident status must do so from abroad. This requirement derives from subsection 11(1) of the *IRPA* which states:

Application before entering Canada **11.** (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	Visa et documents **11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[25] Subsection 25(1) of the *IRPA* reads as follows:

Humanitarian and compassionate considerations — request of foreign national **25.** (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and	Séjour pour motif d'ordre humanitaire à la demande de l'étranger **25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente

may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[26] In *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 ACWS (3d) 1057, Justice De Montigny outlined the exceptional character of an exemption under subsection 25(1). He indicated, at para 20:

> One of the cornerstones of the *Immigration and Refugee Protection Act* is the requirement that persons who wish to live permanently in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent resident visa. Section 25 of the Act gives to the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy, as is made clear by the wording of that provision.

Indeed, relief under subsection 25(1) is an exceptional and discretionary remedy (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 at para 15; *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717 (available on CanLII) at para 15.

[27] In *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, the Supreme Court of Canada clearly defined the Court's role when reviewing a discretionary decision such as the one at issue here:

> **37** The passages in Baker referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. Baker does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors. . . .
>
> **38** This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.

[28] Neither the *IRPA* nor the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*] specify what "humanitarian and compassionate considerations" entail. As such, the Supreme Court of Canada in *Baker*, above, at para 74 indicated (with respect to the predecessor of subsection 25(1)) that an H&C applicant has no right to the application of a particular legal test (see also *Hinzman .v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 177, 405 N.R. 275, at para 39).

[29] Nonetheless, this Court has routinely held that in order to be successful on an H&C application for permanent residence from within Canada, the applicant must show that he or she would suffer unusual and underserved *or* disproportionate hardship if required to apply from abroad (*Rachewiski v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 244, 365 F.T.R. 1, at para 26; *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1006 (available on CanLII) at para 9; *Pashulya v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1275, 133 ACWS (3d) 1039, at para 43, *Monteiro v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322, 166 ACWS (3d) 556, at para 20).

[30] Citizenship and Immigration Canada publishes administrative guidelines to assist its officers in exercising discretion under subsection 25(1). These guidelines are not legally binding and are not intended to supersede the discretion of the officers (*Rogers v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 26, 339 FTR 191, at para 34; *Legault*, above, at para 20). However, they are considered to be of "great assistance" to the Court when conducting judicial review (*Legault*, above, at para 20; *Baker*, above, at para 72). The applicable guidelines are found in Manual IP 5 ("Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds"). These guidelines indicate that "hardship is assessed by weighing together all of the H&C considerations submitted by the Applicant." They refer to two discrete types of hardship, "unusual and undeserved" and "disproportionate", which are defined in section 5.6 as follows:

> **The assessment of hardship**
>
> The assessment of hardship in an H&C application is a means by which CIC decision-makers may determine whether there are

> sufficient H&C grounds to justify granting the requested exemption(s).
>
> Individual H&C factors put forward by the applicant should not be considered in isolation when determining the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant.
>
> **Unusual and undeserved hardship**
> The hardship faced by the applicant (if they were not granted the requested exemption) would be, in most cases, unusual. In other words, a hardship not anticipated by the Act or Regulations; **and**
>
> The hardship faced by the applicant (if they were not granted the requested exemption) would be, in most cases, the result of circumstances beyond the person's control.
>
> **OR**
>
> **Disproportionate hardship**
>
> Sufficient humanitarian and compassionate grounds may also exist in cases that would not meet the "unusual and undeserved" criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances.

[31] In *Irimie v. Canada (Minister of citizenship and immigration)*, [2000] F.C.J. No. 1906, 10 Imm. L.R. (3d) 206, Justice Pelletier discussed the meaning of "unusual and undeserved" hardship in the following manner:

> **12** If one then turns to the comments about unusual or undeserved which appear in the Manual, one concludes that unusual and undeserved is in relation to others who are being asked to leave Canada. It would seem to follow that the hardship which would trigger the exercise of discretion on humanitarian and compassionate grounds should be something other than that which is inherent in being asked to leave after one has been in place for a period of time. Thus, the fact that one would be leaving behind friends, perhaps

> family, employment or a residence would not necessarily be enough to justify the exercise of discretion.
>
> . . .
>
> **26** I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test is to make the H & C process an ex post facto screening device which supplants the screening process contained in the Immigration Act and Regulations. This would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. The H & C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship. . . .

Was the officer's decision to refuse the request for exemption unreasonable?

[32] The applicant argues that the officer's decision is reviewable because of a number of alleged errors and omissions.

[33] First, the applicant claims that the officer erred by failing to consider the hardship her children would face in the event that they stayed behind in Canada. The applicant points to the Court of Appeal decision in *Hawthorne v. Canada (Minister of Citizenship and Immigration),* 2002 FCA 475, [2003] 2 F.C. 555, as creating an obligation to consider both "the hardship the child would suffer from either her parent's removal from Canada or [the child's] own voluntary departure should [the child] wish to accompany her parent abroad" (*Hawthorn,* above at para 4).

[34] Second, the applicant submits that the officer also erred by failing to consider as a "factor" that the applicant may not be *able* to return as an independent immigrant should she be denied

permanent residence on H&C grounds. The applicant points out that this was considered by the Federal Court of Appeal (FCA) in *Hawthorn*, above at para 21.

[35] Third, the applicant argues that the officer made a reviewable error in relying on the supposed similarity of the French and Canadian school systems in order to make her assessment of the best interests of the children. The applicant points out that there was no evidentiary basis for coming to a conclusion regarding the nature of the French school system.

[36] Fourth, the applicant submits that the officer glossed over numerous expert reports in order to conclude that the applicant's eldest son, Allen, would be able to adapt to moving to France. The applicant argues that the officer based her assessment in this regard solely on the fact that Allen was able to handle the transition from elementary to secondary school. As such, she contends that the officer was not alive, alert or sensitive to Allen's best interests.

[37] Fifth, the applicant claims that the officer erred by not considering either the applicant's common-law relationship with Mr. Chamas, a Canadian citizen, or the spousal sponsorship form submitted in support of the H&C application. She argues that this was a main factor in her application and its non-consideration is contrary to sections 5.13, 5.15, 12.1 and 12.3 of the IP5 Manual.

[38] Finally, the applicant argues that the officer erred in finding that she circumvented Canadian immigration law by staying in Canada for a long period of time without applying for residence. The applicant submits that she was repeatedly allowed to enter Canada as a visitor and that, as such, she maintained legal status throughout (up until very recently). She points to subsection 22(2) of the

IRPA, which indicates that "an intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay." This error is important, the applicant argues, because the officer stated that she gave it considerable weight in her establishment analysis.

The Best Interests of the Children

[39] The applicant argues that the officer failed to appropriately evaluate the best interests of her children because the officer only considered the impact on the children of leaving Canada to go to France with their mother. The applicant claims it was incumbent upon the officer to also discuss the impact on the children of staying in Canada and being separated from their mother. In support of this proposition, the applicant points to *Hawthorne*, above at para 4, where the FCA indicated:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.

[40] However, the Court in *Hawthorne* went on to say that no "magic formula" should be imposed on immigration officers regarding the exercise of their discretion when considering the best interests of the child and that form should not be elevated over substance (*Hawthorne*, above at paras 7 and 37).

[41] It is well established that it is incumbent upon an applicant for H&C consideration to set out the basis of his or her application and to put forward evidence to establish that basis. In *Owusu v.*

Canada (Minister of Citizenship and Immigration), 2004 FCA 38, [2004] 2 F.C.R. 635, at para 8, Justice Evans outlined the applicant's responsibility in that regard:

> . . . since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril. In our view, Mr. Owusu's H & C application did not adequately raise the impact of his potential deportation on the best interests of his children so as to require the officer to consider them.

[42] The same principle was reiterated by the FCA in *Kisana*, above.

[43] In *Ahmad v. Canada (Citizenship and Immigration)*, 2008 FC 646, 167 ACWS (3d) 974, the applicant had argued that the immigration officer had failed to consider the fact that her daughter would face discrimination if she was required to return to Pakistan. Justice Dawson rejected this argument because the applicant had not raised it in her original H&C application. At paras 36 and 37, Justice Dawson wrote the following:

> **[36]** The applicants do not point to any factual error in the officer's analysis, but instead argue that the analysis was too narrow. The applicants say that the officer should have considered the discrimination the applicants' now eight-year-old daughter would face in Pakistan.
>
> **[37]** In my view, this submission is not consistent with the fact that it is the applicants who had the burden of specifying that their application was based, at least in part, upon the best interests of the children and the burden of adducing proof of any claim on which their humanitarian and compassionate application was based. It was incumbent upon the applicants to raise, and support with evidence, any specific issue a family member would face that was said to give rise not just to hardship, but to hardship which is unusual and undeserved or disproportionate.

[44] The issue in *Baisie v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 953, 132 A.C.W.S. (3d) 350, was similar to the one raised in this case. The applicant faulted the officer for not having considered the potential impact on the children in the event that they stayed in Canada without their mother. The Court rejected this argument on the basis that the record did not suggest that factual scenario. At para 15, Justice Mosley wrote:

> **[15]** In my view, the officer adequately addressed the interests of the applicant's Canadian children in making the H&C assessment, pursuant to the standard set out in Baker, supra, based on the limited information that was provided to him by the applicant. Had the applicant advised the officer that the Canadian-born children would remain in Canada, as is their right, there would have been an obligation on the officer to inquire into the effects of separation from their mother on them and the arrangements for their care in this country to ensure that their best interests would be met. The record indicates, however, that the applicant told the officer that she would take the children with her to Ghana and, indeed, on that basis arrangements were made for the costs of the children's travel to be covered by the respondent. In those circumstances, it was reasonable for the officer to focus his attention on how relocation to Ghana with their mother would affect the children. . . .

[45] I concur with Justice Mosley's reasoning and consider that it should be applied to this case. The applicant faults the officer for not having considered the hardship that her removal would impose on the children, should they remain in Canada. However, the applicant never referred the officer to that eventuality in her H&C application or at any point during the determination process of her application, which started in 2006. On the contrary, the applicant's counsel concluded the H&C application by stating:

> It goes without saying that any removal of Brigitte . . . would automatically cause the removal of her two children who would

> have to accompany their mother causing untold emotional problems for not only Allen but also his younger sister Ines.

[46] An H&C application is not a mathematics formula that is applied in a vacuum. The officer does not have the responsibility to consider all possible scenarios that could possibly result from the applicant's removal, nor does she have to address issues that are purely speculative. The officer's role is to assess the special circumstances that the applicant raises and to determine whether they warrant the application of an exceptional exemption.

[47] Therefore, I conclude that in this case, the possibility that the applicant's children would remain in Canada was simply not raised by the applicant, and as such, the officer did not have to assess the impact upon the children of such a scenario.

[48] Next, I turn to consider the applicant's argument that the officer made a reviewable error in relying on the supposed similarity between the French and Canadian school systems in her assessment of the best interests of the applicant's children. It is true that the officer's conclusion in this regard does not appear to have been based on specific documentary evidence. However, I do not consider that it amounts to a reviewable error.

[49] This Court in *Gomes v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 98, 176 ACWS (3d) 206, considered a similar issue. The officer had concluded that the health care available in Portugal was sufficient to provide the applicant with the care he required. The applicant argued that this determination was speculative and not based on any evidence. Justice Phelan found the officer's determination to be reasonable. At para 12 he wrote:

> **[12]** The speculative elements of the decision arose as the result of the failure of the Applicant to adduce evidence to the contrary, as was his obligation. The Officer, in concluding that Portugal could provide medical care, undoubtedly took judicial notice of the fact that Portugal is a member of the EU and as such, has a reasonable medical system. The Applicant acknowledges that he provided no evidence that medical care sufficient for the Applicant was not available in Portugal. While it might have been preferable for the Officer to simply state that the Applicant had failed to discharge the onus of proof in respect of this matter, the conclusion that Portugal, on a balance of probabilities, could provide medical care was not unreasonable.

[50] Similarly, in this case, while it might have been preferable for the officer simply to have indicated that the applicant had failed to discharge the onus of proving that the French school system would not be sufficient to meet the children's needs, the ultimate conclusion that the officer made was not unreasonable. It also appears from the decision that the officer's finding regarding the similarity between the French school system and the Canadian school system was not determinative as to her assessment of the children's best interests.

[51] Finally, the applicant argues that the officer was not sensitive to Allen's best interests because she failed to adequately consider the reports regarding his learning difficulty and assumed that he would be able to adapt to life in France because he was able to cope with the transition from elementary to secondary school.

[52] With respect, I cannot conclude that the officer was not alert and sensitive to Allen's best interests. The officer did note Allen's learning disability and did refer to the various reports submitted. She specifically discussed the most recent letter of July 13, 2009, in some detail. Ultimately, she concluded that on the evidence submitted there was nothing to show that, with the

proper planning and supervision, Allen would be unable to adapt to living in France with his mother.

[53] To adopt the words of Justice Mainville in *Medina v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 504 (available on CanLII) at para 55, "Having found that the officer did address the issue of the child's best interest, it is not for this Court to substitute its opinion for that of the Officer unless the Officer's decision was such as to fall outside the framework of reasonability." The officer's decision in this case was not unreasonable.

Establishment

[54] The applicant takes issue with the fact that the officer, in her analysis of the applicant's establishment, gave significant weight to the fact that the applicant had lived in Canada for a long period with visitor status instead of obtaining permanent residence status. The applicant insists that, until 2006, she had legal status and that the officer failed to consider the possibility of a dual intent as describe in section 22 of the *IRPA*.

[55] I do not consider that the officer's assessment, in this regard, warrants the Court's intervention.

[56] In *Legault*, above at para 19, the FCA clearly indicated that the conduct of an applicant is relevant to the determination of an H&C application:

> **[19]** In short, the Immigration Act and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes

> to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorized to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

[57] In this case, it has not been alleged that the applicant remained "illegally" in Canada. However, the record does not explain why the applicant, who has clearly been living in Canada since 1996 with the intent of staying permanently, did not apply for permanent residency before 2006. The record indicates that in 2002, a customs officer at Trudeau International Airport in Montreal instructed the applicant to apply for permanent resident status within the following six months. The applicant explained that she retained the services of counsel in 2004 but never explained why she waited until 2004 and what kind of follow-up on her application was done between 2004 and 2006. Furthermore, an exclusion order was issued against the applicant in July 2006.

[58] In those circumstances, it was not unreasonable for the officer to consider the applicant's Immigration record as a relevant factor and conclude that she disregarded the legislation by living in Canada for over nine years as a visitor.

[59] With respect, I consider that subsection 22(2) of the *IRPA* cannot be of any help to the applicant in this case. First, subsection 22(2) is designed to permit a temporary visa to be provided to a foreign national despite the fact that the individual intends to become a permanent resident.

Second, it is to be applied by the immigration officer when "the officer is satisfied that [the person] will leave Canada by the end of the period authorized for [his or her] stay."

[60] The officer was not required to apply section 22 of the *IRPA* and, in any event, the applicant's "dual intent" would not have prevented the officer from considering the length of the period of time that had elapsed since the applicant first entered Canada as a visitor in 1996.

[61] Given the above, the officer's decision to consider the applicant's choice to stay in Canada for a long period of time, without applying for permanent resident status, as a factor in weighing the applicant's degree of establishment was not unreasonable.

Other Factors

[62] The applicant also claims that the officer erred by failing to consider as a "factor" that the applicant may not be *able* to return to Canada as an independent immigrant. I do not agree. It is true that Justice Evans of the Court of Appeal in *Hawthorne*, above at para 21, in concurring reasons, pointed out that:

> …in many cases, the outcome of [an H&C] application determines not only whether an applicant may apply for permanent residence from within Canada, but also whether she will be granted permanent residence status at all. Thus, if Ms. Hawthorne's H & C application is unsuccessful, she will almost certainly be removed from Canada. If she were then to apply from outside Canada for a visa to enter as a permanent resident in the independent category, a visa would likely be refused because she lacks the educational qualifications and job skills required to meet the selection criteria. However, if her H & C application succeeds, she will be granted permanent residence status in Canada on satisfying health and security requirements.

[63] However, Justice Evans' comments were made in the context of a particular factual case and cannot simply be transposed in this case. Further, Justice Evans did not base his decision to dismiss the appeal (and to uphold the decision setting aside the officer's determination) on the fact that the immigration officer had not considered the likelihood of Ms. Hawthorne being successful on a subsequent application for permanent residence.

[64] The applicant has not offered any authority to suggest that, in order for an immigration officer's decision on an H&C application to be reasonable, that officer must include an analysis of the applicant's ultimate likelihood of not being granted permanent resident status on a subsequent application for residence from abroad.

[65] The applicant also claims that the Officer erred by not considering either the applicant's common-law relationship with Mr. Chamas, a Canadian citizen, or the spousal sponsorship form submitted in support of the H&C application. However, the correspondence between the applicant and the Officer suggests that the applicant's relationship with Mr. Chamas was considered. In a letter addressed to the Officer, dated January 10, 2010, the applicant's lawyer indicated that the inquiries regarding Mr. Chamas were excessive. She said she did "not understand the emphasis on the "sponsor" and suggested to the Officer that her focus should be on the other aspects of the application; that the sponsorship form provided was merely facilitative.

[66] In any event, it is clear that the Officer did consider the applicant's common-law relationship with Mr. Chamas. It was mentioned at a number of points in the Officer's reasons. Specifically, the Officer made reference to Mr. Chamas' precarious tax situation, as well as the mobile nature of his work. The Officer further found that it was reasonable to believe that, given his

mobility, Mr. Chamas would be able to continue to support his family, even in the event of the applicant's departure.

Overall Balancing

[67] Finally, the applicant claims that if there are public policy considerations that outweigh the H&C factors, they must be specifically identified – otherwise the Minister is exercising an arbitrary power, not a discretionary one. This argument is without merit.

[68] The FCA in *Legault*, above at para 17, indicated that the discretion afforded to the Minister to grant an H&C application "must be exercised within the general context of Canadian laws and policies on immigration." Those laws and policies include the general rule that permanent residence must be applied for from outside of the country, as well as the fundamental notion that "[n]on-citizens do not have a right to enter or remain in Canada" (*Legault*, above at para 16). This is why an exemption under subsection 25(1) is an exceptional remedy. Although the Officer may not have cited these aspects of the *IRPA*'s public policy specifically as factors weighing against granting the H&C application, it is clear that she was alive to them. They are inherent in the Officer's application of the "unusual and undeserved, or disproportionate hardship" test. Since the application of this test recognizes the exceptional nature of the remedy sought, as well as its role within the overall scheme of the *IRPA*, there is no need for the Officer to invoke, as "negative factors", general public policy aspects of the *IRPA* in her reasons.

[69] For all of the above reasons, the application for judicial review is dismissed. The parties did not propose any important question for certification and I find that no such questions arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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