Federal Court  Cour fédérale

Date: 20170316

Docket: IMM-4012-16

Citation: 2017 FC 286

Ottawa, Ontario, March 16, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

NATASHA GARRAWAY,
TASSIA GARRAWAY

Applicants

And

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

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

[2] For the reasons that follow, I have determined that this application for judicial review must be dismissed.

Background

[3] The Principal Applicant and her 10 year old daughter, Tassia, are citizens of St. Vincent (together, the "Applicants"). The Principal Applicant entered Canada on June 2, 2008, and her daughter followed on July 29, 2009, at which time she was 3 years old. The Principal Applicant has two other children, a 14 year old son, Taji, who is a citizen of St. Vincent and resides there with his maternal grandmother, and a 4 year old son, Kristian, who is a Canadian citizen. The Principal Applicant sought to include Taji as a dependent under her H&C application.

[4] The Applicants made a claim for refugee protection in August 2010. Their claim was refused in December 2010 and their application for leave and judicial review of that decision was denied in April 2011. An application to sponsor the Principal Applicant under the spouse in Canada class was made by Kristian's father, but his relationship with the Principal Applicant ended and he withdrew the application in October 2014. The Principal Applicant submitted a Pre-Removal Risk Assessment ("PRRA") application which was refused in November 2014. Judicial review of the PRRA decision was refused on October 10, 2015. On April 7, 2016, the Applicants submitted an H&C application which was refused on August 31, 2016. This is the judicial review of that decision.

Decision Under Review

[5] The Officer noted that the Applicants have continuously resided in Canada for approximately 8 and 7 years respectively. The Principal Applicant was unemployed and receiving social assistance until 2012; she remained employed at the time of the H&C application. The Officer gave this factor some positive consideration. The Officer noted the Principal Applicant's involvement with her local church and a letter of support in that regard, as well as a letter of support from the Principal Applicant's close friend and the god parent to her youngest child. These were also afforded positive consideration. However, the Principal Applicant had submitted little further evidence of significant integration into Canadian society in general, or her local community in particular and the Officer concluded that the degree of establishment was not greater than would be expected of individuals adjusting to a new country. Thus, overall, it could not be given significant positive consideration.

[6] The Officer also addressed the best interests of each of the three children concerned. With respect to Taji, the Officer noted counsel's submission that Taji has endured years of separation from his mother and it is in his best interests to reunite with her in Canada. The Officer noted, however, that Taji has spent his entire life in St. Vincent where he attends school, likely has friends and has resided with his grandmother who has raised him since the age of 6. Based on the limited evidence provided, the Officer could not conclude that Taji had been unable to access education or healthcare services in St. Vincent. The Officer agreed with the Applicants' counsel that it would be in Taji's best interests to be reunited with his mother and

siblings, but noted that if this reunification took place in St. Vincent, it would cause minimal disruption to Taji's routine and preserve his family and social support network.

[7] The Officer noted that Tassia came to Canada at the age of 3 and has spent 7 years in Canada. The Officer acknowledged that Tassia has spent the majority of her life in Canada and that she is doing well academically and socially. The Officer also acknowledged that there will likely be a period of readjustment for Tassia if she returned to St. Vincent but that she is only 10 years of age and at such a young age is likely to readapt well to her home country. Returning to St. Vincent would also reunite her with her grandmother and elder brother.

[8] The Officer noted that Kristian was born in Canada, is 4.5 years old and that counsel had submitted that Kristian suffers from a number of health issues for which he is receiving treatment which would likely not be available to him in St. Vincent. In that regard, the Officer noted that the documentary evidence showed that Kristian was diagnosed with a left hydrocele, which was repaired in April of 2016. And that while both the Principal Applicant and her counsel asserted that he was likely to require further treatment, there was no evidence in the record to demonstrate that Kristian's surgery was not successful or that he was likely to need any further treatment for this or any other condition. Further, the Principal Applicant had adduced no evidence to establish that similar treatment would not be available to Kristian in St. Vincent, if needed in the future. Kristian would also be entitled to St. Vincent citizenship through his mother and be entitled to the benefits available to other citizens.

[9] The Officer noted that documentary evidence showed that primary and secondary level medical care is available in St. Vincent, especially in urban areas such as Kingstown where the Principal Applicant is from and where her mother and eldest son reside. Further, there was little to no evidence that the Principal Applicant or her two eldest children have had difficulty accessing medical services in St. Vincent in the past or that the healthcare system in St. Vincent would not adequately address the children's needs in the future. Therefore, the Officer found that the Principal Applicant's three children would have access to health services in St. Vincent should the need arise.

[10] The Officer noted a letter from a nurse practitioner dated March 18, 2016, indicating that Kristian is having difficulty in daycare likely connected to his father's separation from the Principal Applicant and recommending that Kristian obtain counselling services to address his behavioral and emotional difficulties. Further, that Kristian's behavioral issues were documented in a February 2016 report completed by YWCA [*sic*] Childcare Services ("YMCA"). However the Officer noted that there was a lack of evidence to demonstrate that Kristian is in receipt of any counselling services or that he continues to experience emotional and behavioral difficulties similar to those he experienced when he was transitioning to a new environment. In that regard, the Officer also noted that Kristian began attending the YMCA on January 11, 2016, and the letter adduced was dated February 8, 2016. As well, there was little evidence to demonstrate that the appropriate childcare and counselling services would not be available to Kristian on relocation to St. Vincent.

[11] The Officer also considered counsel's submission that the children would not have access to a Canadian education. The Officer appreciated that Canadian education may be preferable to the education available in St. Vincent, however, noted that there is little evidence to demonstrate that the children would be unable to obtain secondary and post-secondary education in St. Vincent. The Principal Applicant was able to obtain secondary and post-secondary education in St. Vincent and there was little evidence to suggest that her eldest son had any problems accessing the same. Further, that information obtained from independent sources indicated that secondary education is compulsory and available for children in both rural and urban areas of St. Vincent.

[12] The Officer found that, overall, the conditions in St. Vincent may not be 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. Further, there was insufficient evidence to establish that having to depart from Canada for the purpose of applying for permanent residence would have a significant negative impact on the best interests of the children concerned.

[13] The Officer considered the Principal Applicant's statement that she had been a victim of domestic violence but noted that she had not provided any additional documentary evidence to substantiate her allegations of past abuse by her former partner. Further, that 8 years had elapsed since she left St. Vincent and little evidence was adduced to demonstrate a continued interest by her former partner in locating and harming her today. Therefore, the Officer placed little weight on this factor. Moreover, that the documentary evidence established that redress was available in

St. Vincent through the courts, police, government agencies and non-governmental organizations if the Principal Applicant experienced any problems from her former partner. The Officer concluded that overall the evidence demonstrated that women in St. Vincent can face discrimination on the basis of gender, including gender based violence. However, given the availability of redress, these discriminatory factors in and of themselves did not warrant an exemption.

[14] The Officer concluded that, having weighed all of the factors, considered the circumstances of the Applicants and examined all of the submitted documentation, he or she was not satisfied that the H&C considerations before him or her justified an exemption under s 25(1) of the IRPA.

Issue and Standard of Review

[15] The Applicants raise only one issue, being whether the Officer erred in the analysis of the best interests of the children, thereby rendering the decision unreasonable.

[16] The parties submit, and I agree, that the Officer's decision is reviewable on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*"); *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59 ("*Khosa*"); *Basaki v Canada (Citizenship and Immigration)*, 2015 FC 166 at para 18; *Richard v Canada (Citizenship and Immigration)*, 2016 FC 1420 at para 14 ("*Richard*")). The same standard of review is applicable to the assessment of the best interests of the child (*Kanthasamy v Canada*

(Citizenship and Immigration), 2015 SCC 61 at paras 44-45 ("*Kanthasamy*"); *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18 ("*Kisana*"); *Richard* at para 14).

[17] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* para 47). There may be several reasonable outcomes but "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Khosa* at para 59).

Positions of the Parties

Applicants' Position

[18] The Applicants submit that H&C officers must be "alert, alive and sensitive" to the best interests of children affected by their decisions, these interests are to be given "primary consideration" and should be examined "with a great deal of attention" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*")). Further, consideration of the best interests of the child must be thorough and complete, not perfunctory (*Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 32 ("*Hawthorne*")). Thus, an officer cannot merely say that the interests of children were given significant weight but must demonstrate that this in fact was done.

[19] The Applicants refer to the three-part analysis articulated in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 ("*Williams*") for assessing whether an officer reasonably assessed the best interests of a child. The Applicants submit that this approach has been specifically endorsed in several recent decisions of this Court. However, even if the *Williams* analysis is not precisely followed, an officer's reasons must identify and include an assessment of the scenario that best protects the child's interests. All other scenarios such as the child remaining in Canada with or without his or her parent or accompanying him or her to the country of removal must then be measured against this. An officer should not ignore or fail to consider one of those scenarios (*Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 at para 53; *Joseph v Canada (Citizenship and Immigration)*, 2013 FC 993 at paragraphs 18-20). Further, the Supreme Court of Canada in *Kanthasamy*, quoted with approval a number of findings from earlier case law with respect to the best interests of the child analysis on an H&C application. The Applicants cite several passages from *Kanthasamy* as principles that should inform this analysis (at paras 35, 36, 41 and 58). The Applicants submit that the Officer failed to conduct the assessment of the best interests of Tassia and Kristian in accordance with these principles.

[20] The evidence established that Tassia has spent virtually her entire life in Canada, that her life here revolves around her school and church and that to require her to leave would impose significant hardship by way of disruption to her life here and by requiring her to adjust to a reduced standard of living in St. Vincent. She would no longer have access to Canadian healthcare and education and would have to adjust to life in a country with a vastly reduced status for women. The availability of state protection does not alleviate the hardship which

Tassia would face in having to live in a society that values girls and women less than boys and men. The Applicants also point to several pieces of supporting documentation affirming that it would be in Tassia's best interests to remain in Canada, including a letter of support from the principal at her school, a letter of support from Tassia's grade 4 teacher and the contents of Tassia's elementary provincial report cards.

[21] The Applicants submit that the Officer did not consider the hardships Tassia may suffer but merely concluded that her age would allow her to readjust to life in St. Vincent. While it may be trite law that some degree of hardship is inherent in the process of deportation and cannot be avoided, when a child is involved different criteria apply as circumstances which may not warrant H&C relief when applied to an adult may nonetheless entitle a child to relief (*Kanthasamy* at para 41). And, while one may expect an infant or a very young child, unaware of their surroundings to adapt easily to a new locale, the same cannot be said for a 10 year old girl who has only ever known life in Canada. In these circumstances, it was incumbent on the Officer to consider the trauma she would suffer from such a significant life event. The Officer was required to consider under which scenarios Tassia's best interests would be served and there is no suggestion that such an assessment was done in a meaningful way.

[22] As to Kristian, being a citizen of Canada, he is not subject to removal but his best interests are engaged by the removal of his mother. The benefits available to Kristian as a non-citizen of St. Vincent would not begin to approach what is available to him in terms of healthcare, education and employment opportunities and general well-being in Canada. His best interests are therefore met by remaining in Canada with his family.

[23] The Applicants submit that they provided evidence that Kristian suffers from a number of health issues for which he is receiving treatment and that he was scheduled for surgery in April 2016, shortly after the H&C application was made. Letters were provided from healthcare professionals and social workers detailing his health issues and suggested treatment. It was argued that Kristian's best interests would be served by remaining in Canada with his family to continue with whatever therapies were necessary. The Officer noted these health issues but stated that there was no evidence that Kristian had actually undergone the surgery in question or that he was in need of or receiving further treatment or therapies. Accordingly, the Officer determined that his best interests would not be adversely affected by him having to accompany his family to St. Vincent where he could presumably receive the treatments he requires.

[24] The Applicants submit that, while the onus was on them to provide evidence in support of their H&C application, in this case they filed their application in early April 2016 and the Officer rendered the decision just five months after the application was made when the expected processing time was around 36 months. Given that the Officer relied on the absence of updated information relating to Kristian's health and various forms of treatment and that the decision was rendered sooner than the Applicant expected, in these circumstances the Officer should have asked the Applicant for an update on these matters before making the decision. Not doing so lacks fairness and renders the decision unreasonable.

Respondent's Position

[25] The Respondent submits that there is no magic formula to assess the best interests of children (*Hawthorne* at para 7). The assessment is highly contextual and officers are not

required by the Court to follow any one specific test (*Kanthasamy* at para 35). A more precise test would "risk sacrificing the child's best interests to expediency and certainty" (*Gordon v Goertz*, [1996] 2 SCR 27 at para 20). The Officer was required to be "alert, alive and sensitive" to the children's best interests (*Kanthasamy* at paras 38 and 143; *Baker* at para 75). Here the Officer's reasons demonstrate that the interests of the children concerned were at the forefront of the Officer's consideration. That the Applicants would have wanted the Officer to weigh those interests differently does not render the decision unreasonable. Nor were the Applicants automatically entitled to a positive decision simply because the children's best interests may have favoured that result (*Hawthorne* at para 8; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at paras 11-12 ("*Legault*")). The best interests of children will, in most cases, be to live with their parents in Canada, but this is just one factor to be weighed against other factors (*Kisana* at para 24; *Legault* at paras 11-12; *Fathi v Canada (Citizenship and Immigration)*, 2015 FC 805 at paras 47-48). The Officer weighed those factors along with the best interests of the children and reasonably concluded that an exemption was not warranted.

[26] The Officer took into account each of the submissions made by the Applicants with respect to the impact on Tassia of leaving Canada. The Officer's consideration was appropriate to the submissions made as well as the context. Again, in most cases the best interests of a child will be to remain in Canada, but this does not automatically allow for a positive determination. As stated in *Kanthasamy*, "there will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (at para 23).

[27] The Officer also properly considered Kristian's health issues. He was diagnosed with a left hydrocele (accumulation of fluid in the testicle) which was repaired in April 2016. The Applicants' H&C request stated he was likely to require further treatment, but given that this was not a definitive statement, the Officer noted that there was no evidence to demonstrate that such further treatment was in fact needed. Further, that there was no evidence that treatment for the hydrocele would not be available in St. Vincent, if future treatment were required. If the Principal Applicant had proof that further treatment was required and that such treatment was not available in St. Vincent then she ought to have provided that evidence as an update to the H&C application as soon as she was aware of it. All that was before the Officer was counsel's suggestion that treatment would "likely" be required, there was nothing in the medical evidence submitted that suggested further treatment was likely. The onus was on the Applicants to adduce proof of any claim on which their H&C application relied, failure to do so is at an applicant's peril; as such the Officer did not err in not requesting further information (*Anaschenko v Canada (Citizenship and Immigration)*, 2004 FC 1328 at para 8; *Odafe v Canada (Citizenship and Immigration)*, 2011 FC 1429 at para 7; *Pannu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356 at para 29; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8 ("*Owusu*"); *D'Aguiar-Juman v Canada (Citizenship and Immigration)*, 2016 FC 6 at para 23 ("*D'Aguiar-Juman*"); *Kisana* at paras 43, 56, 61).

[28] The Respondent submits that, as noted by the Officer, the purpose of s 25 is not to make up for the difference in standards of living between two countries. Thus, although Kristian may have better healthcare, education and general well-being in Canada, the simple fact that living in Canada is more desirable for a child is not sufficient by itself to grant an H&C application

(*Sanchez v Canada (Citizenship and Immigration)*, 2015 FC 1295 at para 18 ("*Sanchez*"); *Vasquez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 91 at paras 41-44; *Dreta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1239).

[29] The Respondent also submits that, for the reasons described in the decision, it was reasonable for the Officer to have found that Taji's best interests would be served by the family reuniting in St. Vincent. And, while the Applicants argue that Tassia's best interests would be to remain in Canada given the hardships associated with readjusting to life in a new country at her age, at the same time they also argue that the Officer unreasonably found that the best interests of Taji, who is older than Tassia and has spent his entire life in St. Vincent, would be to reunite with his family in Canada, thereby separating him from his primary caregiver and life in St. Vincent.

Analysis

[30] Subsection 25(1) of the IRPA states that the Minister may grant a 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. An H&C exemption is an exceptional and discretionary remedy (*Legault* at para 15; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15 ("*Semana*")) and the onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana* at para 45; *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 29; *Semana* at para 16; *D'Aguiar-Juman* at para 9).

[31] The Supreme Court of Canada had occasion to re-visit the analysis an officer must engage in when considering the best interests of a child in the context of an H&C application in *Kanthasamy*. That decision is, therefore, the current starting point of any discussion of what that term encompasses. When discussing s 25 generally, the Supreme Court of Canada stated that there will inevitably be some hardship associated with being required to leave Canada but that this alone will generally not be sufficient to warrant relief on H&C grounds (at para 23). What will warrant relief will vary depending on the facts and context of the case, but officers making H&C determinations must substantively consider and weigh all of the relevant facts and factors before them (at para 25). As to the requirement under s 25(1) to take into account the best interests of a child directly affected, the Supreme Court of Canada stated as follows:

> 35 The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.
>
> …
>
> 38 Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:
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> > ... attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [a humanitarian and compassionate] decision to be made in a reasonable manner....
> >
> > ... for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker

> should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying [a humanitarian and compassionate] claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [paras. 74-75]

39 A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

40 Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective: *A.C.*, at paras. 80-81. The Minister's Guidelines set out relevant considerations for this inquiry:

> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account when raised…

41 It is difficult to see how a child can be more "directly affected" than where he or she is the applicant. In my view, the status of the applicant as a child triggers not only the requirement that the "best interests" be treated as a significant factor in the analysis, it should also influence the manner in which the child's other circumstances are evaluated. And since "[c]hildren will rarely, if ever, be deserving of any hardship", the concept of "unusual or undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9. Because children may experience greater

> hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief: see *Kim v. Canada (Minister of Citizenship & Immigration)*, [2011] 2 F.C.R. 448 (F.C.), at para. 58; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, December 22, 2009.
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> [Emphasis in original.]

[32] The Applicants submit that the Officer erred in his or her assessment of the best interests of the children by failing to follow the three part test in *Williams*, or at least by not identifying and comparing all of the possible scenarios that may engage the best interests of the child. I am not persuaded that this is the current state of the law. In *Semana*, Justice Gascon addressed the best interests principle, post-*Kanthasamy*, and whether or not this included a requirement to apply the *Williams* approach and concluded that it did not:

> 23 There was simply no obligation for the IAD to follow the approach developed in *Williams*, and the IAD decision cannot be unreasonable because it did not do so. The *Williams* decision has often been rejected as creating a formal test for BIOC assessments, and it has been found inconsistent with the jurisprudence from the Supreme Court and the Federal Court of Appeal (*Sanchez v Canada (Citizenship and Immigration*), 2015 FC 1295 at para 16; *Onowu v Canada (Citizenship and Immigration)*, 2015 FC 64 [*Onowu*] at para 44). At best, the *Williams* case can provide useful guidelines which can be followed by decision-makers, but the IAD was certainly not required to apply the precise analytical method elaborated in that precedent (*Webb v Canada (Citizenship and Immigration)*, 2012 FC 1060 [*Webb*] at para 13).
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> 24 The BIOC test to be followed by the IAD has been developed and enunciated by the Supreme Court in several cases, culminating in its recent decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy SCC*]. This test requires the IAD to be "alert, alive and sensitive" to the best interests of the children. Where a child's interests are minimized "in a manner inconsistent with Canada's humanitarian

and compassionate tradition and the Minister's guidelines, the decision will be unreasonable" (*Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 [*Baker*] at para 75). Under that test, "[t]hose interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence" (*Kanthasamy SCC* at para 39; *Legault* at paras 12 and 31; *Hawthorne v Canada (Minister of Citizenship and Immigration*), 2002 FCA 475 [*Hawthorne*] at para 32). Furthermore, the analysis needs to take into account the "child's level of development", as it is necessary to be "responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy SCC* at para 35).

25 However, no specific formula or rigid test is prescribed or required for a BIOC analysis, or to demonstrate that the IAD or an immigration officer has been "alert, alive and sensitive" to the BIOC, as required by *Baker* and its progeny (*Onowu* at paras 44-46; *Webb* at para 13). There is no "magic formula to be used by immigration officers in the exercise of their discretion" (*Hawthorne* at para 7). In other words, form should not be elevated over substance (*Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at para 12*Webb* [*sic*] at para 11).

26 I pause to underline that, in *Kanthasamy*, the Supreme Court did refer to certain passages of *Williams*, but refrained from adopting the three-step approach laid out in that decision (*Kanthasamy SCC* at paras 39 and 59). The Supreme Court did not even cite the specific paragraph of *Williams* (i.e., para 63) setting out the three-pronged method advocated in that decision.

27 Ultimately, the correct legal test is whether the IAD was "alert, alive and sensitive" to the best interests of the child in conducting a BIOC analysis (*Baker* at para 75; *Hawthorne* at para 10; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at para 8). In order to demonstrate that the IAD is alert, alive, and sensitive to the BIOC, it is of course necessary for its analysis to address the "unique and personal consequences" that removal from Canada would have for the children affected by the decision (*Tisson v Canada (Minister of Citizenship and Immigration)*, 2015 FC 944 at para 19; *Ali v Canada (Minister of Citizenship and Immigration)*, 2014 FC 469 at para 16).

(Also see: *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 25).

[33] Accordingly, based on the jurisprudence, the Officer was required to be alert, alive and sensitive to the best interests of the children, afford them significant weight, examine them with care and attention in light of all of the evidence, and to take into account the context of the children's personal circumstances. In my view, the Officer did not err in his or her assessment of the interests of either of the three children in this matter.

[34] I do not agree with the Applicant that the Officer dismissed the potential hardship that Tassia would face upon her return to St. Vincent on the basis that she is young and resilient and will therefore be able to readjust to life in St. Vincent. The Officer acknowledged that Tassia came to Canada when she was only 3 years old, has spent the majority of her life here and that she is doing well both academically and socially. The Officer also stated that there will likely be a period of readjustment for Tassia on return to St. Vincent but that she is only 10 years of age and therefore likely to readapt well to her home country. The Officer pointed to the fact that Tassia's grandparents and eldest brother are in St. Vincent and that she will be able to reunite with them.

[35] The record included letters from Tassia's school principal and her grade 4 teacher which confirm that Tassia is doing well socially and academically, that over the last year she has shown a marked improvement in maintaining social relationships with her classmates and is less shy and more outgoing. The principal noted that it would be regrettable if the gains she has made were jeopardized because she and her mother had to leave Canada. While the Officer did not explicitly reference these letters, the Officer is presumed to have done so (*Pusuma v Canada*

(Citizenship and Immigration), 2015 FC 658 at para 56), and it is apparent from the decision that he or she did consider them.

[36] While brief, all of the factors raised in the Applicants' H&C submissions were captured in the Officer's reasons, being Tassia's age, that she has spent most of her life in Canada and has a level of establishment here and that return to St. Vincent would be disruptive. As to the Applicants' suggestion that the Officer failed to consider the "trauma" Tassia would face as a result of the significant life event if removed to St. Vincent, I note that there was no evidence on the record before the Officer suggesting any such resultant trauma. Accordingly, the Officer was not required to address this, and as noted above, his or her reasons did acknowledge the disruption in her life and coincident readjustment that removal would cause.

[37] As to the Applicants' submission that Tassia would no longer have access to a Canadian education, this was addressed by the Officer. The Officer stated that he accepted that a Canadian education may be preferable to that available in St. Vincent but that there was little evidence before him or her to demonstrate that the children would be unable to obtain secondary and post-secondary education in St. Vincent. The Principal Applicant had been able to do so and there was little evidence that Taji has had any problem in accessing primary and secondary education there. Additionally, the information obtained from independent sources indicated that secondary education was compulsory and available. This finding is also supported by a review of the country conditions documentary evidence found in the record.

[38] Moreover, in *Sanchez* at paragraph 18, the Court stated that the simple fact that living in Canada is more desirable for children is not sufficient, in and of itself, to grant an H&C application, quoting *Serda v Canada (Minister of Citizenship and Immigration),* 2006 FC 356 as follows:

> 31 Finally, the Applicants have argued that conditions in Argentina are dismal and not good for raising children. They cited statistics from the documentation, which were also considered by the H & C Officer, to show that Canada is a more desirable place to live in general. But the fact that Canada is a more desirable place to live is not determinative on an H & C application (*Vasquez v. Canada (M.C.I.)*, 2005 FC 91; *Dreta v. Canada (M.C.I.)*, 2005 FC 1239); if it were otherwise, the huge majority of people living illegally in Canada would have to be granted permanent resident status for Humanitarian and Compassionate reasons. This is certainly not what Parliament intended in adopting section 25 of the *Immigration and Refugee Protection Act*. [My emphasis.]

[39] The Officer accepted that the conditions in St. Vincent may not be perfect and that different standards of living exist between countries. The Officer acknowledged that many countries are not as fortunate in having the same social supports, including financial and medical, as can be found in Canada. However, that Parliament did not intend the purpose of s 25 of the IRPA to be to make up for the difference in standard of living between Canada and other countries.

[40] As to access to healthcare, I have addressed this below in the context of the Officer's consideration of the best interests of Kristian.

[41] The Applicants' main submission when appearing before me was that the Officer had failed to address the gender discrimination and violence, and therefore hardship, that Tassia

would face as a child in St. Vincent. In the Applicants submission to the Officer, as here, was that girls and women face many more difficulties and dangers due to their gender in St. Vincent, as compared to Canada, and while there may be state protection available to those subject to gender based bias, discrimination and violence, this would not alleviate the potential harm that Tassia would face by having to live in such a society.

[42] It is true that in this matter the Officer did not include gender based discrimination and violence in the section of his or her reasons which addressed the best interests of Tassia. However, the issue was addressed. Under the heading, "gender-based discrimination and violence", the Officer noted that the Principal Applicant asserted that she had been a victim of domestic and gender based violence in St. Vincent at the hands of her former partner. The Officer found that there was an absence of evidence to substantiate this, or that her former partner, 8 years later, had any continuing interest in locating and harming the Principal Applicant. Further, that there was an option of redress available to her should she experience any problems with her former partner.

[43] The Officer then went on to discuss the documentary evidence which confirmed that gender based and domestic violence remains a serious and pervasive problem in St. Vincent. However, that the law provides protection for victims, including the government's Division of Gender Affairs which offers 19 different programs to assist women and children. The Officer concluded that, overall, the evidence before him or her demonstrated that women in St. Vincent can face discrimination on the basis of gender but that it also suggested that redress in the form of services from the government, as well as from NGOs, would be available to the Principal

Applicant, if she personally experienced gender based violence in the future. Due to the availability of redress, the Officer did not find the factors presented in relation to the Principal Applicant's gender in and of themselves, to be sufficient to warrant an exemption.

[44] In my view, while the Officer should have also directly addressed the gender based discrimination and violence assertions within his or her best interest of the child analysis, the outcome would be the same. The Principal Applicant put forward assertions of direct and personal concerns of gender based violence, however, the Officer was satisfied that there would be redress available to her for any future discrimination on the basis of gender, including domestic and gender based violence. As to Tassia, the Applicants submit that there is the potential of gender based discrimination. This is true. However, the record contains no evidence submitted by the Applicants addressing how gender based discrimination affects female children differently than women and the Applicants' submission to the Officer addressed this issue only generally. In any event, given the Officer's conclusion that redress is available, I am not convinced that the failure to address this separately, in the context of Tassia, amounts to a reviewable error rendering the decision in whole unreasonable.

[45] As to Kristian, I would first note that the Principal Applicant's submission to the Officer was that if she were removed, Kristian would accompany her to St. Vincent, thus, this was part of the context in which the Officer's decision was made. The Applicants also submitted that the benefits available to Kristian as a non-citizen of St. Vincent would not begin to approach those that are available to him as a citizen of Canada in terms of healthcare, education and in general. The Officer found that Kristian is entitled to St. Vincent citizenship through his mother and

would be entitled to all of the benefits available to other citizens of St. Vincent. As set out above, the Applicants' submission that the Officer erred by depriving Kristian of the better standard of living in Canada and the rights he is entitled to as a Canadian citizen is alone not a basis for granting an H&C exemption.

[46] And while the Officer did not explicitly state that it would be in Kristian's best interests to remain in Canada with his mother, the Federal Court of Appeal in *Hawthorne* held that it is necessarily implied that a child's best interests will be to remain in Canada with his or her parent and is a premise which need not be stated in an officer's reasons:

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

[47] As stated by Justice Kane in *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258:

> 64 Moreover, the officer is presumed to know that living in Canada would offer the child opportunities that they would not otherwise have (*Hawthorne*, above, at para 5) and that to compare a better life in Canada to life in the home country cannot be determinative of a child's best interests as the outcome would almost always favour Canada: (*Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292, [2006] FCJ No 1613 at para 28).

[48] Accordingly, no error in the Officer's best interests of the child analysis arises in this regard.

[49] The Applicants primarily take issue with the manner in which the Officer assessed the medical evidence concerning Kristian. In their written argument, they submit that the Officer "stated that there was no evidence that Kristian had actually undergone the surgery in question, or that he was in need of or receiving further treatment or therapies. Accordingly, the Officer found that his best interests would not be adversely affected by accompanying his family to St. Vincent, where he could presumably receive whatever treatments he required".

[50] In my view, this mischaracterizes the Officer's reasons. The Officer did not say that there is no evidence that Kristian had undergone the surgery in question, rather the Officer's reasons show that the Officer accepted that Kristian had surgery for a left hydrocele in April 2016. The Officer stated that "a careful review of the documentary evidence on file suggests that Kristian was diagnosed with left hydrocele, which was repaired in April of 2016".

[51] The Officer's real concern was with the lack of evidence to show that Kristian's surgery was not successful, that he likely needed any further treatment for this or any other condition or that similar treatment would not be available in St. Vincent, should the need arise. The evidence presented by the Applicants concerning Kristian's present and ongoing health needs was limited: documents concerning a scheduled surgery in April 2016 for left hydrocele repair; the submission of counsel and the Principal Applicant in her affidavit in support of the H&C application that Kristian is likely to require further treatment and that he suffers from a number of unspecified health issues for which he is receiving treatment; a March 18, 2016 letter from a primary care nurse practitioner indicating that Kristian was having an extremely difficult time in daycare, displaying signs of aggressive behavior towards other children and that the Principal Applicant was in the process of arranging an appointment for Kristian with a counsellor at an agency that provides mental health services to children; and, a February 8, 2016 report from the YMCA daycare indicating that attention needed to be paid to Kristian's physical aggression towards others, working on displaying signs of empathy, verbally communicating his feelings and social skills need to be further developed. The Officer specifically addressed all of this evidence. However, it did not establish the existence of any ongoing or foreseeable future medical problems or that the described behavioral problems were ongoing or that counselling for them was being pursued.

[52] Nor was any objective evidence submitted to establish a lack of availability of medical services for Kristian in St. Vincent in connection with any present or ongoing medical or behavioral issues. While the nurse practitioner stated in her letter that it was her belief that the counselling Kristian required would not be available in St. Vincent, she did not indicate the basis

for that belief. Similarly, while the Principal Applicant and her counsel submitted that there was no guarantee that Kristian would receive a similar level of treatment in St. Vincent, this was not supported by any objective evidence.

[53] Conversely, the Officer found that, based on the limited evidence provided, he or she could not conclude that Taji had been unable to access education or healthcare services in St. Vincent. Further, that documentary evidence showed that primary and secondary level medical care is available in St. Vincent, especially in urban areas such as Kingstown where the Principal Applicant is from and where her mother and eldest son reside. Additionally, there was little to no evidence that the Principal Applicant or her two eldest children have had difficulty accessing medical services in St. Vincent in the past or that the healthcare system in St. Vincent would not adequately address the children's needs in the future. Therefore, the Officer found that the Principal Applicant's three children would have access to health services in St. Vincent should the need arise.

[54] In my view, in these circumstances, the Officer did not err in finding that there was insufficient evidence to show that Kristian would not have access to any healthcare that he may require in the future nor that all three of the children would not have access to necessary healthcare services. The onus was on the Applicants to show that an H&C exemption should be granted and if an applicant fails to adduce sufficient relevant information to support an H&C application, he or she does so at his or her own peril (*Ordonez v Canada (Citizenship and Immigration)*, 2017 FC 135 at para 9; *Owusu* at paras 5-8; also see *Villanueva v Canada (Citizenship and Immigration)*, 2015 FC 311 at para 19 and *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at para 17).

[55] Similarly, as to the Applicants' assertion that the Officer should have requested further or updated medical information and that it was procedurally unfair and unreasonable for the Officer not to have done so, this argument cannot succeed. The decision was rendered almost five months after the hearing leaving sufficient time for the Applicants to submit any updated or additional information concerning Kristian's medical or behavioral care. Moreover, as noted above, the onus is on the Applicants to provide all of the information that is relevant to support their H&C application. Officers are not obligated to make any further inquiries or to request any additional information (*Nzeza Nsongi v Canada (Citizenship and Immigration)*, 2010 FC 1291 at paras 9-10; *Melchor v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327 at para 13; *Guxholli v Canada (Citizenship and Immigration)*, 2013 FC 1267 at para 25; *Kisana* at para 61).

[56] In sum, in my view the Officer was alert, alive and sensitive to the best interests of the children concerned. The Officer devoted a significant portion of the decision to this factor; considered the interests of each of the three children separately and with a view to the submissions that were made by the Applicants and in the context of the children's particular circumstances; referenced most if not all of the documentary evidence; and, consulted country condition documentation where none were provided. The Officer's reasons demonstrated that the best interests of the children were an important factor in his or her decision.

[57] It should also be recalled that while the Applicants contested only the Officer's assessment of the best interests of Tassia and Kristian on this application, the decision not to grant an H&C exemption was made not just on that basis but also by weighing this together with

the Applicants' establishment as well as adverse country conditions, specifically, gender based discrimination and violence. As noted in *Legault*:

> 11 In *Suresh*, the Supreme Court clearly indicates that *Baker* did not depart from the traditional view that the weighing of relevant factors is the responsibility of the Minister or his delegate. It is certain, with *Baker*, that the interests of the children are one factor that an immigration officer must examine with a great deal of attention. It is equally certain, with *Suresh*, that it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to reexamine [*sic*] the weight given to the different factors by the officers.
>
> 12 In short, the immigration officer must be "alert, alive and sensitive" (*Baker*, para. 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Minister of Employment and Immigration* (1995), 184 N.R. 230 (F.C.A.), leave to appeal refused [[1995] 3 S.C.R. vii (S.C.C.)], SCC 24740, August 17, 1995).

(Also see *Semana* at para 28 and *Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068 at para 58).

[58] The Federal Court of Appeal in *Kisana*, in reference to paras 11 and 12 above of *Legault* stated:

> 24 Thus, an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests

> of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors. It is not for the courts to reweigh the factors considered by an H&C officer. On the other hand, an officer is required to examine the best interests of the child "with care" and weigh them against other factors. Mere mention that the best interests of the child has been considered will not be sufficient (*Legault*, *supra*, at paragraphs 11 and 13).

[59] As I have found above, the Officer's best interests of the child analysis was not unreasonable. It is not the role of the Court to reweigh the relevant H&C factors. And, viewed in whole, the Officer's conclusion, having considered the circumstances of the Applicants and having examined all of the submitted documents, that he or she was not satisfied that the H&C consideration before him or her justified an exemption under s 25(1) of the IRPA, in light of the findings as to the Applicants' establishment in Canada, the availability of state protection in St. Vincent and the best interests of the children was reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

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

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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