Federal Court  Cour fédérale

Date: 20170629

Docket: IMM-3620-16

Citation: 2017 FC 636

Ottawa, Ontario, June 29, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

PUI YEE LEUNG
KA KIN TAM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Pui Yee Leung and her 22 year old son, Ka Kin Tam (Brion), are citizens of Hong Kong. Ms. Leung's eldest son, Brion, was born in Hong Kong and her younger son, Oscar, now 18 years old, was born in Canada. After the breakdown of Ms. Leung's marriage in 2012, she and her two sons spent most of their time in Canada and they have remained in Canada continuously since August 2013.

[2] In June 2014, the Applicants applied for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds, but their application was refused. At the time of their H&C application, Brion was 19 years old and Oscar was 14 years old. Their application for judicial review of the negative H&C decision resulted in the Minister of Citizenship and Immigration consenting to the H&C application being re-determined in light of the Supreme Court of Canada's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. In a letter dated July 30, 2016, a Senior Immigration Officer informed the Applicants that their H&C application was not granted. The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision denying their request for permanent residence.

I. The Officer's Decision

[3] The Officer noted at the outset of the reasons for the decision that the onus was upon the Applicants to show that sufficient H&C considerations exist to grant an exemption under section 25(1) of the *IRPA*. After noting the Applicants' travel history to Canada and their submissions as to their establishment in Canada, the Officer stated:

> I have carefully assessed all information and evidence with respect to the applicants' establishment in Canada. I note that though the applicants have stayed in Canada for short periods of time in 2011, 2012 and 2013, they last re-entered Canada in August of 2013 and therefore have lived here continuously for approximately three years. The principal applicant is unemployed, but is in receipt of alimony from her former husband in the amount of approximately $100,000 per annum. The principal applicant has accumulated a significant amount of savings and has purchased a home in Ontario. I give some positive consideration to the principal applicant's self-sufficiency.

Despite this positive factor, the Officer remarked that the Applicants' return to Hong Kong would not disrupt Ms. Leung's income as she would continue to receive her support payments and she could choose to sell her Canadian property.

[4] The Officer then discussed Brion's enrollment in a diploma program in a post-secondary institution, noting that Brion struggles academically and continues to study at the ESL level. The Officer found there was no evidence that Brion could not continue his education upon return to Hong Kong where, in the Officer's view, he "would likely be able to achieve greater success studying in his native tongue." The Officer then reviewed the evidence about the Applicants' community involvement and integration, referencing the letters which outlined their volunteer work and involvement in their local church. The Officer gave "some positive consideration to the applicants' volunteer activities and their involvement with the Wismer Baptist Church" but noted that "the evidence before me speaks little of the impact of the applicants' departure from Canada on their church or Christian Communications Canada."

[5] As for the Applicants' ties to Canada, the letters submitted by the Applicants' friends were such that the Officer concluded that "the applicants have made some friendships in the community and I give some positive consideration to this factor." The Officer accepted that the Applicants have strong connections to their family members in Canada and it would be emotionally difficult to leave their family members behind. The Officer placed weight on this factor. The Officer found, however, that:

> … the impact of physical separation from the family in Canada can be offset, to a degree, by maintaining the relationship via alternate modes of communication. The applicants adduce very little evidence to demonstrate that they would be unable to continue

> their relationship with family in Canada via the Internet, Skype, telephone and regular mail. While clearly not ideal, this type of contact can prevent a disruption in communication and offer the applicants and their family in Canada continuous connection, while the applicants submit an application for permanent residence from outside of Canada in the normal fashion. Furthermore … the applicants can travel to Canada to visit their family here; as well, the applicants' family in Canada can travel to Hong Kong SAR to visit them. There is little evidence before me to suggest otherwise.

The Officer recognized that, while the Applicants live close to Ms. Leung's parents and assist them with housework and provide care when they are sick, Ms. Leung's siblings and extended family also live in close proximity to her parents and they would be able to provide assistance if needed in the future.

[6] With respect to the best interests of Brion and Oscar, the Officer said Brion's age precluded him from consideration in the best interests of the child [BIOC] analysis. The Officer cited the *Convention on the Rights of the Child*, Can TS 1992 No 3 [*Convention*], which defines a child as an individual below the age of 18, as well as the Humanitarian and Compassionate Assessment Manual [the Manual] which states:

> BIOC must be considered when a child is less than 18 years of age at the time the application is received. There may be cases in which the situation of older children is relevant and should be taken into consideration in an H&C assessment but if they are not under 18 years of age it is not a best interests of the child case.

[7] The Officer's BIOC analysis focused on Oscar, who was 14 years old at the time the H&C application had been submitted. The Officer recognized that Oscar is a Canadian citizen by birth, but spent the first 13 years of his life in China and would likely follow his mother and older brother if the H&C application was refused. The Officer reviewed the submissions and evidence, including how Oscar has "been doing great both academically and socially and has

integrated well into his community" since coming to Canada. The Officer addressed the Applicants' submissions that Oscar's asthma would be exacerbated if he returned to China or Hong Kong. The Officer reviewed the medical evidence which indicated that Oscar had been prescribed an inhaler and medications for his asthma. The Officer noted that the medical evidence did not indicate what exacerbates Oscar's medical condition, and that the Applicants had not provided any evidence to demonstrate that Oscar's asthma was not adequately managed while he lived in China. The Officer further noted that the Applicants had not provided hospital records to show that Oscar's hospitalization was related to his asthma. The Officer stated: "I am unable to conclude that Oscar's medical condition would deteriorate on return to Hong Kong or that the condition would not be adequately treated in Hong Kong."

[8] The Officer discussed the Applicants' submissions that Oscar would have difficulty completing his education in Hong Kong because he has been completing school in English in Canada. The Officer noted that Oscar has lived and studied in Hong Kong and China for most of his life and that his school records from Canada indicate he still struggles with English. The Officer also noted that Oscar could enroll in an English school in Hong Kong since 28% of the schools in Hong Kong offer English language instruction. With respect to Oscar's connection to his family and friends in Canada, the Officer acknowledged that Oscar had developed a close bond with his grandparents and other family members and separation from them may be emotionally difficult. The Officer also accepted that Oscar had developed friendships and integrated into his local community. The Officer placed weight on these factors. But at the same time, the Officer found that:

> … Oscar will be in the loving care of his mother and eldest brother. Moreover, I find that Oscar can maintain his relationship

> with his relatives and friends in Canada via the telephone or other modes of communication currently available (e. g. Skype, email etc). Oscar can also visit his family and friends in Canada any time, for as a Canadian citizen he has the right to return to this country at any time…

[9] The Officer stated that Oscar's best interests constituted the most compelling aspect of the H&C application. However, the Officer determined that: "this factor alone, or when considered, globally, in conjunction with establishment and other factors cited, is not sufficient to warrant an exemption." The Officer concluded his reasons for refusing the application by stating:

> Overall, I acknowledge that the applicants have continuously resided in Canada for approximately three years and that they have a large family in Canada. I have weighed these factors against the fact that the applicants have a history of travelling back and forth between China and Canada. I took into consideration the fact that the family would likely be able to re-establish themselves on return to Hong Kong, as they have sufficient financial means, familiarity with the local culture and adequate language skills. Finally, having carefully assessed the best interests of the principal applicant's Canadian-born minor son, I find that it is in the best interests of Oscar to maintain a connection with his relatives and friends in Canada. However, having carefully assessed all evidence presented by the applicants, I am unable to conclude that departure from Canada would directly compromise the best interests of Oscar. Having considered the circumstances of the applicants and having examined all of the submitted documentation, I am not satisfied that the humanitarian and compassionate considerations before me justify an exemption under section 25(1) of the Act.

II. Issues

[10] The Applicants raise two issues:

1. Did the Officer err by not assessing Brion's best interests because he was 19 years old?

2. Was the Officer's assessment of Oscar's best interests unreasonable?

III. Analysis

A. *Standard of Review*

[11] An officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy* at paras 44-45). An immigration officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FCR 358).

[12] Under the reasonableness standard, the Court is tasked with reviewing a decision for "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": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "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"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339 [*Khosa*].

[13] The parties disagree as to whether the reasonableness standard also applies to the Officer's interpretation of "child" for purposes of subsection 25(1) of the *IRPA*. The Applicants contend that the correctness standard applies because this is a question of whether the Officer has applied the correct legal test, while the Respondent maintains that the reasonableness standard is presumed to apply because the Officer is applying the Officer's home statute. This issue remains unsettled in the jurisprudence.

[14] Since the Supreme Court of Canada's decision in *Kanthasamy*, this Court continues to be conflicted over the applicable standard of review to be applied to the selection of a legal test by an H&C officer. While some decisions continue to apply a correctness standard (see: e.g., *Shrestha v Canada (Citizenship and Immigration)*, 2016 FC 1370 at para 6, [2016] FCJ No 1412; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 27, [2017] FCJ No 52; *Gomez Valenzuela v Canada (Citizenship and Immigration)*, 2016 FC 603 at para 19, [2016] FCJ No 571; *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 at paras 23-35, [2015] 4 FCR 535), other decisions have determined that *Kanthasamy* requires a reasonableness standard of review. For example, in *Roshan v Canada (Citizenship and Immigration)*, 2016 FC 1308 at para 6, [2016] FCJ No 1313, Justice Bell noted that: "The Court in *Kanthasamy* never departed from its opinion in *Dunsmuir* that the reasonableness standard of review applies to questions of law related to the interpretation of a tribunal's home statute." Similarly, in *Tang v*

Canada (Citizenship and Immigration), 2017 FC 107 at para 11, [2017] FCJ No 76, Justice McDonald remarked that: "jurisprudence from this Court supports the application of a reasonableness standard of review when the issue is whether the correct legal test has been applied to the H&C considerations."

[15] One pre-*Kanthasamy* decision which directly addresses the issue at hand is *Ramsawak v Canada (Citizenship and Immigration)*, 2009 FC 636, 182 ACWS (3d) 167 [*Ramsawak*], where the Court applied the reasonableness standard to review an officer's interpretation of "child" under subsection 25(1) of the *IRPA*:

> [13] The first two issues raised by the applicants are clearly of a legal nature. The first one relates to the proper interpretation to be given to the concept of a "child" in the analysis required by the Supreme Court of Canada in assessing the "best interests of the child". The second one bears upon the proper test to apply in an application under s. 25(1) of *IRPA*. These legal issues, however, are clearly intertwined with the factual matrix in which they arise; moreover, they pertain to the interpretation of the very statute empowering the officers to make their determinations, and it is to be assumed that the officers will have acquired a particular familiarity with the *IRPA* as a result of applying it in the normal course of their duties. For those reasons, I am of the view that the applicable standard of review in examining the first two questions ought to be the "reasonableness" standard.

[16] Contrary to the Applicants' submissions, interpretation of the word "child" is simply an exercise of statutory interpretation by the Officer and not an issue of whether the Officer applied the correct legal test. Moreover, I find the reasoning in *Ramsawak* persuasive, as did the Court in *Saporsantos Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587 at paras 28-29, [2011] 4 FCR 290 [*Saporsantos Leobrera*].

[17] As to the Applicants' argument that the Officer fettered his or her discretion, the jurisprudence in this regard is also unsettled. In *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, 341 DLR (4th) 710 [*Stemijon*], Justice Stratas explained how fettering of discretion was traditionally an automatic ground for setting aside a decision, but now it should be subsumed into the reasonableness analysis:

> [21] The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.
>
> [22] On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decision-making: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.
>
> [23] This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19. But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.
>
> [24] *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an

> informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable

[18] For the purposes of this case, it is sufficient to conclude that, regardless of the standard of review to be applied to the fettering of discretion issue raised by the Applicants, if the Officer fettered his or her discretion that would constitute a reviewable error under either standard of review and would require that the decision be set aside.

[19] The standard to review issues of procedural fairness is correctness (*Khosa* at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502). Under the correctness standard, a reviewing court shows no deference to the decision maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision maker's determination (see: *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 471 FTR 71).

B. *Did the Officer err by not assessing Brion's best interests because he was 19 years old?*

(1) Applicants' Submissions

[20] The Applicants maintain that the Officer's failure to conduct a BIOC analysis for Brion amounted to both an error of law and a breach of procedural fairness. They note that the definition of "dependent child" under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] at the time of the H&C application in 2014 included a child who is less than 22 years of age. The Applicants say Brion, whatever his age, is a "child" who could reasonably be expected to be dramatically affected by his mother's removal from Canada. According to the Applicants, the Officer simply concluded that Brion was precluded from a BIOC assessment because of the Manual and the Officer's belief that he or she lacked jurisdiction to consider Brion's best interests.

[21] The Applicants argue that the Officer cannot rely on the Manual to fetter his or her discretion, and the Officer should have provided them with notice so they could make additional arguments in support of their position. The Applicants further argue that the Officer erred by treating the guidelines in the Manual as mandatory requirements, pointing to *Kanthasamy* where the Supreme Court of Canada stated:

> [32] There is no doubt, as this Court has recognized, that the Guidelines are useful in indicating what constitutes a reasonable interpretation of a given provision of the *Immigration and Refugee Protection Act*…. But as the Guidelines themselves acknowledge, they are "not legally binding" and are "not intended to be either exhaustive or restrictive"… Officers can, in other words, consider the Guidelines in the exercise of their s. 25(1) discretion, but should turn "[their] mind[s] to the specific circumstances of the case"... They should not fetter their discretion by treating these

> informal Guidelines as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion granted by s. 25(1). [Citations omitted.]

[22] In the Applicants' view, the status of a child does not automatically cease upon the child turning 18 years of age. The Applicants reference *Kanthasamy* where the Supreme Court stated that the "'best interests' principle is 'highly contextual' because of the 'multitude of factors that may impinge on the child's best interest'" and it "must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity" (at para 35). The Applicants submit that whether a BIOC assessment is required is based on the particular context and not the age of the child.

(2) Respondent's Submissions

[23] According to the Respondent, the Officer did not breach any duty of procedural fairness by relying on the Manual without providing notice to the Applicants. The Respondent says it would be an absurdity if an officer had a duty to inform an applicant every time that officer relied on an immigration manual, and this is especially so when the manual directly pertains to the scheme under which the applicant has applied. The Officer's reliance on the Manual to determine that a BIOC analysis does not apply to children older than 18 is, the Respondent further says, consistent with the jurisprudence, most notably *Saporsantos Leobrera*. Additionally, the Respondent says the Officer was not required to review the accuracy of the Manual, since it accords with recent case law from this Court. In the Respondent's view, the Officer properly determined that a BIOC did not apply to Brion.

[24] The Respondent maintains that the context surrounding the inclusion of the "best interests of a child directly affected" language in subsection 25(1) indicates that it was meant to be read with regard to the *Convention*. The Respondent says Parliament added this language in response to the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 [*Baker*], which focused on the best interests of the child in view of the *Convention*. Although the *Convention* is not enacted into Canadian law, the Respondent points to *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 67, [2006] 3 FCR 655, where the Federal Court of Appeal observed that *Baker* "endorsed the use of international law to interpret a statutory provision as requiring immigration officers to give great weight to the best interests of any affected children when exercising a discretion to grant an in-country application for landing on humanitarian and compassionate grounds."

[25] The Respondent rejects the Applicants' proposition that the definition of "dependent child" in the *Regulations* should be used to define "child" under subsection 25(1) of the *IRPA*, citing *Saporsantos Leobrera* where the Court stated:

> [54] Although the Court is sympathetic to situations of dependency, it is also cognizant, in keeping with the presumption of consistent expression, that Parliament is presumed to have chosen to use "child" and "dependent child" for two distinct purposes and it would be questionable, in the absence of firm evidence to the contrary, to import, in whole or in part, the definition of one into the other.

(3) Analysis

[26] The Applicants' arguments that the Officer should have conducted a BIOC assessment of Brion's best interests fly in the face of established jurisprudence in this Court. For example, in *Saporsantos Leobrera*, Justice Shore thoroughly reviewed the applicable legislation, including arguments about the applicability of the definition of "dependent child" under the *Regulations*, and concluded that: "the best interests of the child analysis is intimately tied to the *Convention on the Rights of the Child* and, because of that link, the best interests of the child analysis cannot be performed after a person reaches the age of 18 because that is the limit placed by that instrument" (at para 63). More recently, in *Norbert v Canada (Citizenship and Immigration)*, 2014 FC 409, 453 FTR 303 [*Norbert*], Justice Russell adopted the reasoning from *Saporsantos Leobrera*, stating that:

> [37] The Officer was not required to undertake a best interests of the child analysis in this case. The Applicants are correct to point out that there is some jurisprudence that suggests that children over the age of 18 may, in certain circumstances, still be considered children for the purposes of an H&C application. However, there is also jurisprudence that says a best interests analysis is simply not available under the IRPA for older children and, in this regard, it is my view that the reasoning and conclusions in such cases as *Leobrera*, above, and *Massey*, above, is to be preferred. In *Massey*, at para 48, the Court held that:
>
> > [48] In addition, recent jurisprudence of this Court has held that there is no need to consider the best interests of a person over the age of 18 as a "child directly affected" in an application brought under s 25 of IRPA. In *Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587, Justice Michel Shore relied on domestic legislation, international instruments and the jurisprudence of the Federal Court of Appeal and Supreme Court to reach the conclusion that "childhood is a temporary state which is delineated

> by the age of the person, not by personal characteristics" (at para 72).

[27] The Applicants correctly note that the applicants in *Norbert* did not request that a BIOC analysis be completed in respect of their 21 year old financially dependent son, while the Applicants here specifically requested that a BIOC assessment be conducted for Brion. This distinction, however, is one without a difference and it does not change my view that the Officer in this case reasonably interpreted the meaning of a "child" for purposes of subsection 25(1) of the *IRPA*. Indeed, the Supreme Court of Canada in *Kanthasamy* referenced the Manual when stating that: "As the Guidelines note, the 'best interests' principle applies to all children under 18 years of age" and added a footnote indicating that "No province in Canada sets the age of majority below 18 years of age" (at para 34).

[28] The Officer's determination in this case not to conduct a BIOC assessment of Brion's best interests is justifiable, intelligible, and transparent, and falls within the range of acceptable and possible outcomes defensible in respect of the facts and law. The Officer's reasoning clearly demonstrates that the Officer relied upon the Manual and the *Convention* to conclude that a "child" for purposes of subsection 25(1) of the *IRPA* only applies to a child under the age of 18. The Officer's decision on this point is reasonable and, moreover, it is consistent with this Court's jurisprudence in *Saporsantos Leobrera* and *Norbert*; and also in *Moya v Canada (Citizenship and Immigration)*, 2012 FC 971 at paras 17-18, 416 FTR 247 [*Moya*]; *Ovcak v Canada (Citizenship and Immigration)*, 2012 FC 1178 at para 18, [2012] FCJ No 261 [*Ovcak*]; and *Massey v Canada (Citizenship and Immigration)*, 2011 FC 1382 at para 48, [2011] FCJ No 1684 [*Massey*].

[29] The Applicants' procedural fairness and fettering of discretion arguments are without merit. The Officer was not required to inform the Applicants the Manual would be relied upon in the Officer's assessment of their H&C application. The Manual is publically available and widely known by immigration practitioners. In my view, the Officer did not fetter his or her discretion by relying upon the Manual and the *Convention* to conclude that no BIOC assessment was required of Brion. The Officer's reliance on the *Convention* indicates that the Officer exercised his or her discretion in considering whether Brion was a "child" under subsection 25(1) of the *IRPA*.

C. *Was the Officer's assessment of Oscar's best interests unreasonable?*

(1) Applicants' Submissions

[30] The Applicants contend that the Officer's assessment of Oscar's best interests was unreasonable. According to the Applicants, the Officer was required to be "alert, alive and sensitive" to Oscar's best interest by: (1) identifying his interests; (2) determining the degree to which they would be compromised by one decision over another; and (3) balancing this against the other factors in the application. In the Applicants' view, a best interests analysis makes Oscar's present life in Canada the relevant point of comparison, not his previous residence in China and Hong Kong. The Applicants note that the Officer found Oscar's best interests were to maintain a connection with his relatives and friends in Canada, yet the Officer concluded contradictorily that departure from Canada would not "directly compromise" his best interests.

[31] The Applicants maintain that the Officer failed not only to recognize the importance and benefits of having emotional, physical and social support in Canada through his family and friends, but also to acknowledge the near complete lack of similar support in Hong Kong. In the Applicants' view, the evidence submitted to the Officer highlights Oscar's strong family ties in Canada, including how his grandfather and uncles are his only father figures. The Applicants say the Officer's assessment of the disruption to Oscar's education is terse, and that the Officer unreasonably focused on Oscar's ability to adapt and adjust to life in Hong Kong rather than on whether it would be in his best interests to leave Canada. The Applicants cite *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008 at para 20, 246 ACWS (3d) 167, where this Court stated that: "it is the child that must, first and foremost, be considered when analyzing BIOC, rather than whether the child could adapt to life in another country, accompany parents, or otherwise fit what might be in someone else's fate. It would be exceptional for relocation to be the better solution."

(2) Respondent's Submissions

[32] The Respondent maintains that the Officer did not err in the assessment of Oscar's best interests. The Respondent says the Applicants' submissions fail to account for the impact of *Kanthasamy* and blatantly request this Court to reweigh the evidence. According to the Respondent, the test for a BIOC analysis advocated by the Applicants emanates from *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at para 63, 212 ACWS (3d) 207 [*Williams*], a case which has been rejected by subsequent jurisprudence. In this regard, the Respondent refers to *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 23, 271 ACWS (3d) 389 [*Semana*], where the Court remarked that 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)."

[33] The Respondent says this Court should reject the Applicants' open and blatant attempt to have the Court step into the Officer's shoes and conduct the H&C assessment. The Respondent further says it was not unreasonable for the Officer to suggest that Oscar could maintain relationships with family and friends overseas. In the Respondent's view, the Officer reasonably determined that Oscar could continue his education in Hong Kong. The Respondent notes that the Applicants did not provide any evidence of how Oscar would receive a substandard education in Hong Kong or how his Canadian education would be detrimental to him continuing his education in Hong Kong.

(3) Analysis

[34] I agree with the Respondent that the Applicants are attempting to reargue the merits of their request for H&C relief and are asking the Court to reweigh the evidence. The Officer's decision in this case was highly discretionary and it is to be afforded considerable deference. The Applicants have not pointed to a reviewable error made by the Officer. The Officer thoroughly assessed Oscar's best interests. The Officer was clearly alert, alive, and sensitive to Oscar's best interests and the BIOC analysis addressed the unique and personal consequences that removal from Canada would have on Oscar.

[35] The Officer accepted that Oscar's best interests are "to maintain a connection with his relatives and friends in Canada." However, his best interests could not be determinative of the outcome because those interests must be weighed against the other relevant factors in order to justify an exemption on H&C grounds (see: *Jogiat v Canada (Citizenship and Immigration)*, 2015 FC 501 at para 16, 478 FTR 315; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 38, [2010] 1 FCR 360; *Semana* at para 28). In my view, it was reasonable for the Officer in this case to conclude that Oscar's best interests alone, or when considered globally in conjunction with the Applicants' establishment and other factors, were not sufficient to warrant H&C relief.

[36] Moreover, the Officer's statement that "I am unable to conclude that departure from Canada would directly compromise the best interests of Oscar" does not, as the Applicants suggest, contradict the Officer's characterization of Oscar's best interests. The Officer said it was "in the best interests of Oscar to maintain a connection with his relatives and friends in Canada" and that this can be achieved through telephone or internet communications and, as a Canadian citizen, Oscar can visit Canada at any time. In effect, the Officer is saying that Oscar's ability to maintain a connection with his family and friends in Canada would not be "directly compromised" by returning to Hong Kong because he can still communicate with and visit them. The Officer's decision in this regard is neither contradictory nor unreasonable.

IV. Conclusion

[37] Overall, the Officer's decision to deny the Applicants' application for permanent residence from within Canada is justifiable, transparent, and intelligible, and it falls within a

range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicants' application for judicial review is dismissed.

[38] At the hearing of this matter, the Applicants proposed the following question of general importance to be certified:

> Is an officer assessing an H&C application under subsection 25(1) of the *IRPA* precluded from considering the bests of a child who is more than 18 years old?

[39] The Federal Court of Appeal recently reiterated the test for certification in *Lewis v. Canada (Public Safety and Emergency Preparedness*), 2017 FCA 130, when it stated that:

> 36 The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case): *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9, 446 N.R. 382; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras. 28-29, [2010] 1 F.C.R. 129; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paras. 11-12, 318 N.R. 365 [*Zazai*]; and *Liyanagamage v. Canada (Secretary of State)*, 176 N.R. 4 at para. 4, [1994] F.C.J. No. 1637 (F.C.A.)

[40] In my view, the question proposed by the Applicants does not transcend the interests of the parties and does not raise an issue of broad significance or general importance. The answer to this question has already been answered in cases such as *Norbert* and *Saporsantos Leobrera*, and

also in *Moya* at paras 17-18; *Ovcak* at para 18; and *Massey* at para 48. I decline, therefore, to certify the Applicants' proposed question for certification.

JUDGMENT in IMM-3620-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3620-16
STYLE OF CAUSE:	PUI YEE LEUNG, KA KIN TAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 24, 2017
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JUNE 29, 2017

APPEARANCES:

Christopher Collette	FOR THE APPLICANTS
David Knapp	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT