Federal Court  Cour fédérale

Date: 20180618

Dockets: IMM-4173-17
IMM-4174-17

Citation: 2018 FC 632

Ottawa, Ontario, June 18, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MICHAEL MOSIAH BRADSHAW
NICOLE ANN MARIE BROWN-BRADSHAW
AND BRIHANNA MICKAYLA BRADSHAW,
BY HER LIGITATION GUARDIAN
MICHAEL MOSIAH BRADSHAW

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of the decision of a Senior Immigration Officer [the Officer] which refused their application for an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] on humanitarian and compassionate [H&C] grounds, pursuant to section 25 of the Act.

[2] For the reasons that follow, the Application for Judicial Review is dismissed. First, the Applicants do not come to the Court with "clean hands", having failed to report for their removal from Canada as directed. The Court could decline to determine the Application or dismiss it on this basis alone. Although Canada benefits in many ways from immigration and provides several options for lawful immigration, persons seeking to immigrate to Canada are expected to follow the law and the established process. While the Applicants wish to make a life in Canada and their letters of support, as acknowledged by the Officer, show them to be well-liked in their community, to permit their Application for Judicial Review in the face of their conduct would bring the integrity of the immigration regime and the administration of justice into disrepute. Second, even if the Application for Judicial Review is considered on its merits, it cannot succeed. The Officer's decision is both procedurally fair and reasonable.

I. Background

[3] The male Applicant, Michael, his wife, Nicole, and their daughter, Brihanna, are citizens of Jamaica (the Applicants). The family also has a two year old son, Jayden, who is a Canadian citizen.

[4] The Applicants came to Canada as visitors in 2013. They did not seek to extend their visitor status and instead have remained in Canada without status. The Applicants applied for Permanent Residence on H&C grounds in 2014, and again in 2015, but were refused both times. The Applicants were reported as being inadmissible to Canada in August 2016, for their failure to comply with the Act and an exclusion order was issued in December 2016.

[5] In November 2016, the Applicants again applied for Permanent Residence on H&C grounds, re-submitting the same material that they had submitted in their previous applications. In February 2017, after retaining new counsel, they updated their application and made additional submissions.

[6] This H&C application was refused by the Officer on August 30, 2017.

[7] The Applicants provided brief additional submissions on September 11, 2017. The Applicants submit that they had not received the August 30, 2017 decision at that time. Given that the decision had already been rendered, the Officer regarded the submissions as a request to reconsider the H&C decision. The Officer reviewed the updated submissions and found that they did not justify changing the initial decision. Both the August 30, 2017 decision and the reconsideration decision are the subject of this Application for Judicial Review.

[8] The Applicants were directed to report for removal from Canada on December 30, 2017. They brought a motion seeking a stay of their removal pending the determination of the within Application and pending the determination of their Application for Leave and Judicial Review of their Pre-Removal Risk Assessment [PRRA]. By Order dated December 20, 2017, Justice Gleeson dismissed the motion. The Applicants did not report for removal from Canada as directed on December 30, 2017.

II. The Decision Under Review

[9] The Applicants raised 3 grounds in their H&C application: establishment, adverse country conditions, and the best interests of their children [BIOC].

[10] With respect to establishment, the Officer noted that the Applicants had been in Canada for approximately 4 years. The adult Applicants were employed for most of this period, although they had worked without work permits. The Officer gave low weight to their employment in Canada for this reason. The adult Applicants also claimed that they had recently launched a catering business, but the only evidence submitted was a photocopy of a business card. The Officer found that there was no evidence of the business' viability, nor was there evidence that the business was licensed.

[11] The Officer acknowledged that the Applicants had developed close personal ties with members of their community and were well-liked, but was not persuaded that the relationships were such that separation would have a serious negative impact on the Applicants. The Officer also found that they could become similarly involved in the Jamaican community, particularly given that they had lived all but the last 4 years in Jamaica.

[12] The Officer acknowledged that the Applicants sent money to family members in Jamaica, including for HIV treatment for Michael's brother. The Officer acknowledged that this improved conditions for the Applicants' family in Jamaica, but noted that there was no evidence about how

the family coped in the past. The Officer also found that the Jamaican government and non-governmental organizations offer treatment and support to people with HIV.

[13] With respect to adverse country conditions, the Applicants argued that they would be exposed to a high risk of crime and violence in Jamaica. They argued that this risk was particularly high because Michael was a former police officer who was part of an elite unit dealing with gangs and gun violence [the Street Crimes Task Force]. The Applicants alleged that unit members and their families are targeted by organized crime associates, even while off duty.

[14] The Officer accepted that Michael was a former police officer, but found there was insufficient evidence to suggest that he was a member of the Street Crimes Task Force. Instead, the evidence suggested that he was a member of the Police Construction Unit. The Officer noted:

> - The Applicants' Schedule A form, submitted with the previous H&C Applications, which indicated that the Principal Applicant worked in the Police Construction Unit from 2007 to 2013;
> - A Letter dated January 2017, from the Jamaica Constabulary Force ("JCF"), which indicated that the Principal Applicant served in the JCF from 2007 to 2013, "and last served in the Property Management Unit"; and
> - Documents submitted by the Principal Applicant showing that he participated in training courses relating to general construction matters.

[15] The Officer found this evidence to be more persuasive than the Applicants' claim – supported by Michael's affidavit – that he belonged to an elite unit. The Officer also found that Michael's inconsistent reporting of the unit of the JCF in which he worked detracted from the

weight of his evidence. The Officer concluded that there was insufficient evidence to suggest that the family will be targeted by virtue of Michael's previous employment in the JCF.

[16] The Officer acknowledged that crime and violence is prevalent in Jamaica, but found that the objective evidence indicated that most violence occurs between gang members. In addition, there was evidence that the Jamaican government was willing and able to protect its citizens from crime.

[17] With respect to the Applicants' argument that the conditions in Jamaica were not favorable to women, the Officer noted Nicole's claim that her cousin had exposed himself to her when she was eight years old, and that she witnessed her cousin being raped when she was 11 years old. However, the Officer noted that Nicole had lived in Jamaica for 30 years, finished high school and entered the work force and did not indicate any other instances of gender-based violence or discrimination. The Officer also acknowledged that domestic violence was an issue in Jamaica, but noted that the Applicants did not point to any specific threat of domestic violence. The Officer found that their claimed risk of gender-based violence was speculative.

[18] With respect to the Applicants' submission that they would be unable to re-establish themselves in Jamaica because of its stagnant economy, the Officer was not persuaded that conditions were significantly worse than in 2013 when the Applicants left Jamaica, noting that they were employed and adequately supported themselves.

[19] The Officer addressed Nicole's claim that her mental health condition would be exacerbated if returned to Jamaica. The Applicants submitted a letter from her family doctor in Jamaica indicating that Nicole had been treated for gastritis and anxiety in the past. They also provided a letter from Dr. Agarwal, a psychologist, dated January 12, 2017, who diagnosed Nicole with Post-Traumatic Stress Disorder [PTSD]. The Officer found that the tone of the letter was not objective. It stated that "Nicole cannot obtain remission…unless she stops feeling fearful of returning to [Jamaica]". The Officer noted that the psychologist simply recommended that Nicole not be removed to Jamaica. The Officer also noted that the letter was based, at least in part, on Nicole's account of the stress arising from Michael's membership in an elite police unit – a claim which the Officer did not accept. The Officer also noted that Nicole only visited the psychologist once and had not obtained any follow-up treatment. The Officer concluded that Nicole may face anxiety in Jamaica, but that she could obtain medical support there. Further, the fact that Nicole was not receiving any ongoing treatment in Canada meant that there would be no disruption to her "medical support network" if removed.

[20] With respect to the BIOC, the Officer accepted that the children are happily established in Canada. However, the Officer found that the school and church-related activities that the children currently attend were also available in Jamaica. The Officer acknowledged that Brihanna was doing very well in school, including studying French. Although studying French in school would likely not be an option if removed to Jamaica, the Officer noted that Brihanna could use other extracurricular resources if she wanted to learn French.

[21] The Applicants also argued that proper English was not used in Jamaican schools. They submitted a 2011 article from the "Jamaica Gleaner" in support of this claim. The Officer consulted the Jamaican Ministry of Education's website, which indicated that Standard Jamaican English was the common language of instruction in Jamaican schools.

[22] The Applicants also claimed that the children would not have access to post-secondary education, pointing to a 2013 article from the Humanium, an NGO. The Officer attributed low weight to the article, noting that she did not consider the source reliable. The Officer preferred current information on the Ministry of Education's website which stated that the Government is committed to providing "opportunities for continuous learning, and access to affordable tertiary education". The Officer also noted that the adult Applicants had been able to access vocational and post-secondary education while living in Jamaica. The Officer found there was insufficient evidence that the children would not have the same access.

[23] With respect to the Applicants' claim that there was inadequate child health care in Jamaica, the Officer consulted up-to-date Government websites, noting that there was free access to health care for children.

[24] The Officer considered the adverse country conditions claimed by the Applicants through the "lens of BIOC". The Officer acknowledged that conditions in Jamaica are not as favorable as in Canada and that the high crime rate was not ideal for raising children.

[25] The Officer also considered the psychologist's report regarding Brihanna, which indicated that she was happy and well-adjusted, but warned that "disruptions" in the environment could adversely affect the children's development and "make them vulnerable to mental health conditions".

[26] The Officer noted that it would be rare for her to find that it was *not* in a child's best interests to remain in Canada. However, she found that the primary concern for the children is a difference in the standard of living. The Officer concluded that the degree to which the children's best interests would be compromised if returned to Jamaica was modest.

[27] The Officer found that the weight attached to the BIOC, although positive, was not sufficient to "tilt this application" and concluded, based on all the evidence, that the circumstances did not warrant an exemption under section 25 of the Act.

[28] As explained above, the Applicants provided further submissions on September 11, 2017, which the Officer treated as a Request for Reconsideration of the August 30, 2017 decision. These submissions included: proof that the adult Applicants secured work authorizations in June, 2017; Brihanna's Grade 2 Report Card demonstrating her success at school; and, a letter noting that Nicole applied for a program at Seneca College, but was rejected.

[29] The Officer found that the recent work authorizations did not affect the establishment analysis, because the adult Applicants' employment history in Canada was unauthorized except for the last few months. The Officer noted she had already acknowledged Brihanna's

accomplishments at school in the original decision and the new information did not change this finding. Lastly, the Officer found that Nicole's rejected application to Seneca College did nothing to demonstrate the Applicants' current establishment in Canada, noting that future intentions were not factors for establishment.

III. The Applicants' Overall Position

[30] The Applicants argue that the Officer breached procedural fairness by relying on extrinsic evidence regarding the Jamaican education system and regarding the availability of HIV treatment in Jamaica. The Applicants submit that they should have had an opportunity to respond to this information. The Applicants also submit that the Officer's finding that Michael was not a member of the Street Crimes Task Force was a credibility finding, which he should have had an opportunity to address.

[31] The Applicants also argue that the decision is not reasonable. They submit that the Officer erred: in finding that Michael was not a member of the Street Crimes Task Force; in discounting the psychological evidence regarding Nicole; in assessing the BIOC; and, in not accepting their updated submissions.

[32] The Applicants now acknowledge that they do not come to the Court with "clean hands", given that they failed to report for removal from Canada on December 30, 2017 as directed and following the Court's Order dated December 20, 2017, which refused to stay their removal. The Applicants submit that they have a strong case and, therefore, the Court should determine the Application for Judicial Review on its merits despite their conduct.

IV. The Respondent's Overall Position

[33] The Respondent submits that the Application for Judicial Review should not be considered and/or should be dismissed because the Applicants failed to report for removal. The Respondent submits that it is an affront to the integrity of our immigration system and to the administration of justice to determine the Application for Judicial Review on its merits in these circumstances.

[34] The Respondent submits that if the Application is determined on its merits, it should not be granted. The Officer's decision was both reasonable and procedurally fair.

V. The Issues

[35] The preliminary issue is whether this Application should be dismissed on the basis of the "clean hands" doctrine.

[36] In the event that the Application is determined on its merits, the issues are:

- Whether the Officer breached procedural fairness by: relying on extrinsic evidence; and, by making negative credibility findings without providing the Applicants with an opportunity to respond;
- Whether the Officer's decision is reasonable, which entails consideration of:
    - Whether the Officer erred in her assessment of the evidence and findings regarding Michael's employment in the Street Crimes Task Force;

- Whether the Officer erred in her assessment of the psychological evidence;
- Whether the Officer erred in her analysis of the BIOC; and,
- Whether the Officer erred in ignoring the Applicants' updated evidence.

VI. The Standard of Review

[37] The standard of review of a discretionary decision, such as an H&C application, is reasonableness (*Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835 at para 6, [2006] FCJ No 1061 (QL); *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57-62, 174 DLR (4th) 193 [*Baker*]; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909 [*Kanthasamy*]).

[38] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "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). Deference is owed to the decision-maker and the Court will not re-weigh the evidence.

[39] Issues of procedural fairness are reviewed on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

VII. The Preliminary Issue: Should this Application for Judicial Review be dismissed on the basis of the "clean hands" doctrine?

A. *The Respondent's Submissions*

[40] The Respondent notes that the Applicants' motion to stay their removal from Canada was dismissed by Order of Justice Gleeson dated December 20, 2017, which found, among other things, that the evidence did not demonstrate a clear and non-speculative likelihood of harm to the Applicants. The Applicants failed to report for their removal on December 30, 2017. A warrant was issued for their arrest on January 2, 2018. They remain at large in Canada.

[41] The Respondent notes that the Applicants failed to disclose or explain their unlawful conduct to the Court. The Respondent submits that the Applicants should not be rewarded with equitable discretionary relief from the Court.

[42] The Respondent submits that the Applicants' conduct meets the test established to deny relief on the basis of unclean hands, as set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14, 263 DLR (4th) 51 [*Thanabalasingham*].

B. *The Applicants' Submissions*

[43] The Applicants' Counsel acknowledges that the Applicants failed to report for removal and that their misconduct is serious, but submits that the Court should proceed to determine the Application on its merits because of the strength of the case and the interests at stake.

C. *Principles from the Jurisprudence*

[44] Recently, in *Debnath v Canada (Minister of Immigration, Refugees and Citizenship)*, 2018 FC 332, [2018] FCJ No 330 (QL) [*Debnath*], Justice Strickland considered the application of *Thanabalasingham* and the clean hands doctrine in similar circumstances. In that case, the applicants did not report for their scheduled removal following the rejection of their refugee claim.

[45] Justice Strickland noted, at para 20, that remedies on judicial review are discretionary, and that the Court has the discretion to decline to decide or to dismiss an application based on the conduct of the applicant. Justice Strickland explained the key principles and factors to consider at paras 21-22;

> 21 The leading decision on the application of the unclean hands doctrine is *Thanabalasingham*. There the Federal Court of Appeal considered a certified question being, when an applicant comes to the Court without clean hands on an application for judicial review, should the Court in determining whether to consider the merits of the application, consider the consequences that might befall the applicant if the application is not considered on its merits. The Federal Court of Appeal did not agree with the assertion by the respondent in that case that, if it was established that an applicant had not come to court with clean hands, then the Court must refuse to hear or grant the application on its merits. Rather, the Federal Court of Appeal found that the case law suggested, if satisfied that an applicant had lied or was otherwise guilty of misconduct, then the reviewing court may dismiss the motion without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief. Further:
>
> > [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of

> fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.
>
> 22 The factors are not exhaustive and are not all necessarily relevant in every case.

[46] Justice Strickland noted, at para 24, several examples in the jurisprudence where the Court found an applicant's conduct to be sufficient to dismiss the application, but nonetheless proceeded to assess the application on its merits.

[47] Justice Strickland concluded, at para 28, that upon balancing the *Thanabalasingham* factors, including the serious misconduct, and the apparent low strength of the case, there was justification to exercise the discretion to dismiss the application for lack of clean hands. However, as in the examples she identified, Justice Strickland went on to examine the merits of the application in the event that she was wrong in deciding it could be dismissed on the basis of the clean hands doctrine alone.

D. *The Application for Judicial Review could be dismissed; the Applicants do not come to the Court with "clean hands"*

[48] In the present case, the Court could dismiss this Application without considering its merits.

[49] As in *Debnath*, the Applicants' misconduct is serious. In addition to their failure to report for their scheduled removal, the Applicants made two previous H&C applications which they subsequently acknowledged included misinformation about their employment status. Further, the Applicants have not offered any explanation to justify their misconduct.

[50] Deterrence of such misconduct by others is an important consideration. While there are many options to pursue immigration to Canada, the strength of our immigration system depends on adherence to the law. Condoning this misconduct sends the wrong message to those who respect and observe the law and "play by the rules".

[51] Contrary to the Applicants' view that they have a strong case, I do not agree, as explained below. An H&C application provides an exemption from the requirements of the Act and is a discretionary relief. Deference is owed to the Officer's decision. In the present case, the Officer did not err in her determination. In my view, the factors noted above justify dismissing the Application for Judicial Review on the basis of the Applicants' lack of clean hands. However, I have followed the same approach as Justice Strickland in *Debnath*, and have also considered the Application on its merits.

VIII. Did the Officer Breach the Duty of Procedural Fairness?

A. *The Applicants' Submissions*

[52] The Applicants argue that the Officer erred by relying on "extrinsic evidence", without giving them an opportunity to address it. They point to the Officer's reference to the website of

the Jamaican Ministry of Health, regarding the availability of HIV treatment in Jamaica, and to the Officer's reliance on evidence from the Ministry of Education's website, regarding the use of English in Jamaican schools and the availability of post-secondary education.

[53] The Applicants submit that this was "novel and significant" information which they could not have anticipated would be relied upon (citing *Lopez Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778, 436 FTR 281).

[54] The Applicants also submit that they could not have reasonably expected the Officer to rely on information from the Ministry of Education's website that was published in the Ministry's monthly newsletter *after* the Applicants submitted their application in November 2016. The Applicants argue that it would have been easy for the Officer to provide this information to them and give them additional time to respond to the Officer's concerns about their evidence.

[55] The Applicants also argue that the Officer's reliance on evidence from the website is contrary to the Immigration, Refugees and Citizenship Canada [IRCC] policy as set out in their manual.

[56] The Applicants add that if they had been presented with this evidence, they would have provided other evidence to undermine the official Government's claims about the strength of its health care and education systems, noting that the Government's own site would not be objective.

[57] The Applicants also argue that the Officer made a negative credibility finding about the Michael's involvement in the Street Crimes Task Force, contrary to his sworn affidavit attesting to the fact that he was a member. They argue that if the Officer had doubts, she should have put them to the Applicants for a response (citing *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at para 22, 247 FTR 147) and her failure to do so is a breach of procedural fairness.

B. *The Respondent's Submissions*

[58] The Respondent submits that the Applicants failed to submit sufficient evidence, which necessitated the Officer's independent research, and that this did not amount to a breach of procedural fairness.

[59] The Respondent argues that the evidence submitted by the Applicants about education and health care in Jamaica was insufficient and out of date. It was reasonable for the Officer to refer to publicly available information from the Jamaican government. This evidence was not extrinsic and did not need to be disclosed because the Applicants should have reasonably anticipated that the Officer might refer to reputable, official, up-to-date and publicly available sources (*De Vazquez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 530 at para 28, 456 FTR 124 [*De Vazquez*]).

[60] The Respondent also notes that the Applicants submitted voluminous documentary evidence and updated their evidence with further submissions, yet did not provide sufficient and up-to-date evidence regarding their claims about the education system or HIV treatment.

[61] The Respondent disputes that the Officer made a negative credibility finding regarding Michael's claim about his employment with the Street Crimes Task Force. Rather, the Officer reasonably found that Michael had not provided sufficient evidence. The Respondent submits that the Applicants did not provide clear, objective evidence to establish Michael's role in the Task Force at any time, and even his updated submissions only contained vague and unsupported statements alluding to his role. The Respondent notes that it is not the Officer's responsibility to advise the Applicants of weaknesses in their claims and provide a "running score".

C. *There is no breach of procedural fairness due to reliance on "extrinsic evidence"*

[62] The Officer did not err by relying on up-to-date information from official government websites. The information supplied by the Applicants to support their claims regarding Jamaica's education system was outdated and insufficient. It also appears that the Applicants submitted no information about the availability of subsidized HIV treatment in Jamaica. The Officer cannot be faulted for seeking up-to-date public information from a government website, which the Applicants could have also consulted. The Applicants cannot claim, without any evidence, that they need to remain in Canada so that they can send money to their brother for HIV treatment in Jamaica, and then argue a breach of procedural fairness because the Officer tried to validate their claim.

[63] The Officer's reference to and reliance on information from the Jamaican Government website does not automatically fall into the category of extrinsic evidence which triggers a duty to disclose the information and to provide an opportunity for the Applicants to respond. The

jurisprudence has evolved to establish that a more contextual approach to the treatment of such evidence is required.

[64] In *Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294, 472 FTR 285 [*Majdalani*], Justice Bédard analyzed the prevailing jurisprudence regarding reliance on websites and publicly available documentation in the context of an H&C application. Justice Bédard noted that the pre-*Baker* jurisprudence generally took the approach that the applicant should be informed of novel and significant information which shows a change in country conditions that would affect the disposition. Justice Bédard noted that in the post-*Baker* jurisprudence, the courts have generally taken a more contextual approach, which considers, *inter alia*, the nature of the decision and the possible impact of the evidence on the decision.

[65] Justice Bédard acknowledged, however, that the "novel and significant" approach also continues to be applied, elaborating at paras 33-34;

> [33] In some cases, the Court has held that information publicly available, for example documents available on the internet originating from credible, reliable and well-known sources, is not considered "extrinsic evidence" or "novel and significant" information (*Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at paras 39-40, [2008] FCJ No 77; *Pizarro Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 623 at para 46, [2013] FCJ No 692).
>
> [34] In other cases, the Court applied the "novel and significant" test, and it found the duty to disclose is triggered when the information contained in the document relied upon by the officer was not available and would not have been easily accessible to the applicant, or when the evidence could not have been anticipated (*Jiminez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1078 at paras 17-19, [2010] FCJ No 1382; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 at paras 35, 39, [2011] FCJ No 1156; *Adetunji v Canada (Minister of*

Citizenship and Immigration), 2012 FC 708 at para 38, [2012] FCJ No 698).

[66] Justice Bédard also cited *De Vazquez*, where Justice de Montigny explained, at para 28, that "it is not the document itself which dictates whether it is "extrinsic" evidence which must be disclosed to an applicant in advance, but whether the information itself contained in that document is information that would be known by an applicant, in light of the nature of the submissions made".

[67] In *De Vazquez*, Justice de Montigny found that the website referred to by the officer provided general information that the applicants could have found elsewhere and that could not be characterized as "novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case" (para 27, citing *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, 161 DLR (4th) 488 (CA)).

[68] In *Majdalani*, Justice Bédard adopted the contextual approach and noted that the duty of procedural fairness should be assessed in light of the applicant's allegations and the evidentiary burden. In that case, she noted that the officer's research regarding home care options pertained to the applicant's allegation regarding her need to remain in Canada to care for her elderly mother, and that it was only after concluding that the applicant's evidence was insufficient with respect to the allegations that the officer turned to the websites, which provided information about other options for her mother's care.

[69] The onus remained at all times on the Applicants to support their H&C application with sufficient evidence, including with respect to the BIOC. The evidence they provided in support of their view that their children could not be properly educated in Jamaica was insufficient and outdated. The Officer noted that the 2011 Humanium article was not from a reliable source. The only other article submitted was the 2013 article in "The Gleaner" which, contrary to the Applicants' submissions, did not establish that English was not the language of instruction in Jamaican schools. Rather, it merely indicated that some teachers were not making sufficient efforts to ensure the use of English and some slipped into Jamaican Creole.

[70] Whether the Court applies the jurisprudence that establishes that extrinsic evidence should be disclosed if it contains "novel and significant" information that an applicant could not reasonably anticipate, or the jurisprudence that supports a broader contextual approach, which includes consideration of the nature of the Applicants' allegations and the nature of the evidence, the result in the present case is the same. There was no duty on the Officer to disclose the information found on the Ministry of Education website or the Ministry of Health website. The Applicants could have anticipated that such information would be considered, given the nature of their claims, and they could have easily accessed this same information.

[71] Although the websites were consulted after the Applicants filed their submissions, the information about the language of education, post-secondary education and treatment for HIV was general in nature and did not show a change in the country conditions arising only after the Applicants' submissions were filed.

[72] The information about Jamaica's education system may have been posted on the website after the Applicants' submissions, however, it does not contain any information which could not have been found elsewhere and earlier. The evidence describes the state of Jamaica's education system in general terms. The information describes literacy initiatives launched in 2009, as well as current primary and secondary enrolment rates, among other things.

[73] Further, the information about the availability of HIV treatment in Jamaica was posted on July 15, 2015, long before the Applicants had filed their submissions. Given that the Applicants stated that they sent money for Michael's brother's HIV treatments, they should have reasonably anticipated that the Officer would consider general information about subsidized HIV treatments in Jamaica, as documented on official government websites.

[74] Finally, I do not share the Applicants' interpretation of the IRCC's Policy Manual, "Humanitarian and Compassionate: Conducting Research, July 2014" regarding when external documents should be disclosed. The Applicants' submission – that the Manual lists the type of documents that do not need to be disclosed, and that all other documents should be disclosed – is not a reasonable interpretation of the Manual.

[75] The Manual, which is only a guide, and which does not usurp the jurisprudence, provides that external documents that the officer intends to rely on should be disclosed if the "applicant could not reasonably be expected to have seen or know about the information, even if the document is publicly accessible". This is a general principle. The Manual then also provides a list of documents that do not need to be disclosed, i.e. without having regard to the general

provision. The list refers to specific documents from Canada, the UK, USA, United Nations and some NGOs. To suggest that the list is exhaustive would make the general principle redundant.

D. *There is no breach of procedural fairness arising from the Officer's failure to provide the Applicants with an opportunity to respond to concerns regarding the evidence*

[76] The Officer did not make a negative credibility finding about Michael's role in the JCF's Street Crimes Task Force. Rather, the Officer found that there was insufficient evidence to support this claim. As such, the only issue is whether this finding is reasonable – i.e. justified based on the evidence (as will be addressed below).

[77] As a general matter, where concerns arise about the "credibility, accuracy, or genuineness of the information submitted", an officer should notify an applicant and provide an opportunity to respond to those concerns (*Cesar Nguesso v Canada (Minister of Citizenship and Immigration)*, 2015 FC 880 at para 63, [2015] FCJ No 916 (QL) [*Cesar Nguesso*], citing *Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665 at para 12, [2010] FCJ No 930 (QL) [*Baybazarov*]), where an officer makes factual findings which are the opposite to an applicant's submissions, Courts have treated this as a credibility finding (*Scarlett v Canada (Minister of Citizenship of Immigration)*, 2008 FC 1051 at para 13, [2008] FCJ No 1328 (QL) [*Scarlett*]).

[78] On the other hand, applicants are expected to submit sufficient evidence to establish their claims, and officers are not required to advise applicants that their evidence is insufficient, or that it contains contradictions. In other words, officers are not required to provide applicants with

a “running score” of weaknesses in their applications in order that they may respond to them (*Cesar Nguesso* at para 63, citing *Baybazarov* at para 12).

[79] As noted in *Delille v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 508, 52 Imm LR (4th) 133 [*Delille*] regarding contradictions in the evidence submitted, at para 48:

> Procedural fairness does not require that an interview take place when evaluating an H&C application. What is required is meaningful participation in the process (*Baker*). The sufficiency of the evidence is not to be supplemented with an interview. It is the duty of an applicant to put her best foot forward. Contradictions in the evidence submitted are not credibility issues; they go to the sufficiency of the evidence.

[80] At para 50 of *Delille*, the Court added that there is no duty on the H&C officer to highlight weaknesses in an application, noting that “Insufficiency and credibility are two different notions” (citing *Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068, [2015] FCJ No 1160 (QL)).

[81] Contrary to the Applicants’ submissions, the facts are not analogous to the facts in *Scarlett* where the officer relied on old submissions and made a finding that was opposite to the current submissions. In the present case, the Applicants knew the content of their previous submissions and had re-submitted them twice. Unlike *Scarlett*, the Applicants had the opportunity to point out any misinformation in their previous applications. The Applicants acknowledged that the 2016-17 forms were largely the same as their 2014 and 2016 forms, and the record confirms this. The Applicants provided lengthy submissions (58 pages) in addition to the forms, along with a lengthy affidavit (23 pages), which noted that there were inaccuracies in

the previous forms. However, nowhere in these submissions and affidavit do the Applicants state that Michael's job in the JCF was mis-described in the previous submissions nor do they clarify when he was part of the Street Crimes Task Force or when he was part of the Construction Unit (or Property Management Unit, PMU, as he also describes his employment). Further, the record indicates that Michael, his former colleague and the Deputy Superintendent of the JCF, all describe the role of the Task Force or Unit differently.

[82] The Officer considered the contradictions in the Applicants' evidence, as well as the lack of any objective evidence supporting the Applicants' claims. The Officer's reasons reveal that her finding is about the insufficiency of the evidence to support the Applicants' claim, rather than an implicit or explicit credibility finding. In her conclusion on this section, the Officer explicitly notes:

> I find his inconsistent reporting of the unit he worked in during his employment with the JCF detracts from the weight I accord his evidence. I find he has provided insufficient evidence to persuade me on a balance of probabilities that this family has or will reasonably be targeted by members of organized crime groups or other criminals on account of the male applicant's previous employment with the JCF.

[83] The Applicants claim that, had they known of the Officer's concerns, they would have provided further objective evidence. However, it was the Applicants' responsibility to "put their best foot forward" in their submissions to the Officer, rather than the Officer's responsibility to point out the contradictions in their application and ask for supplementary evidence.

IX. Is the Decision Reasonable?

A. *The Applicants' Submissions*

(1) Role in the JCF Street Crimes Task Force

[84] The Applicants argue that the Officer erred in doubting Michael's membership in the Street Crimes Task Force *even if* this was not a credibility finding. They note that the Officer relied on the Applicants' Schedule A form, which had been originally submitted as part of the previous H&C Applications, and was re-submitted in the present application. The Applicants explain that they subsequently retained new counsel, provided new forms, and made further submissions which explicitly stated that their earlier submissions contained mistakes and inaccuracies. They point to the updated H&C Application Form (Schedule A) which describes Michael's personal history and Government positions held. They argue that the Officer ignored the evidence that Michael worked for the Street Crimes Task Force before 2012, and then worked for the Construction Unit thereafter. They add that the January 2017 letter from the JCF Commissioner of Police stating that Michael "last served in the construction unit" is consistent with their submission.

(2) The Psychological Evidence

[85] The Applicants argue that the Officer erred in discounting the psychological evidence regarding Nicole. First, they submit that the Officer discounted the severity of Nicole's condition by noting that she was not receiving treatment for her condition in Canada. They argue that this approach is contrary to *Kanthasamy* at para 47. Second, the Applicants submit that the Officer

ignored the letter from Nicole's doctor in Jamaica, which indicated that she was not responding to treatment and that this was one of the reasons she left Jamaica. Third, the Applicants submit that the Officer erred in discounting Dr. Agarwal's letter because it was based in part on hearsay – specifically, Nicole's recounting of her husband' membership in the Street Crimes Task Force as the source or her anxiety. The Applicants argue that this is also contrary to *Kanthasamy* at para 49.

(3) The BIOC

[86] The Applicants submit that the Officer committed several errors in her BIOC analysis. First, they submit that the Officer never specifically assessed the best interests of Jayden. Instead, the Officer assessed only the interests of Brihanna specifically, and "the children" generally. They argue that this was contrary to *Kanthasamy*, which directs that BIOC analyses are conducted in "a manner responsive to each child's particular age, capacity, needs and maturity" (para 60).

[87] Second, the Applicants submit that the Officer focused only on whether the children's basic needs would be met in Jamaica rather than the hardships they would suffer if removed to Jamaica and the benefits to the children of remaining in Canada. They submit that the Officer did not address their evidence, including the psychologist's report for Brihanna and a letter from her teacher, which shows that she has established "deep roots" in Canada.

[88] The Applicants also point to their further submissions, submitted on September 11, 2017, specifically Brihanna's Grade 2 Report Card, which indicates that she "has established very

important friendships this year" and was excelling in school. They argue that the Officer unreasonably minimized this evidence which demonstrates that the Officer was not alert, alive and sensitive to Brihanna's best interests.

[89] Third, the Applicants argue that the Officer ignored relevant country condition documents which contradict the Officer's findings regarding the state of Jamaica's education and health care systems and the rate of crime.

B. *The Respondent's Submissions*

[90] The Respondent submits that the Officer reasonably found that the evidence was insufficient to establish that Michael was a member of an elite Street Crimes Task Force. The Respondent notes that the Applicants resubmitted the same forms on three occasions and did not point out errors regarding his employment. The other evidence is inconsistent and does not confirm if or when Michael was part of such a unit.

[91] With respect to the psychological evidence, the Respondent submits that the Officer did not err by observing that Nicole was not receiving mental health treatment in Canada and that her removal from Canada would not disrupt any treatment. The Respondent also submits that it was reasonable for the Officer to give little weight to Dr. Agarwal's letter as it was premised on Nicole's stress being caused, to some extent, from her husband's employment with the Street Crimes Task Force, which the Officer reasonably concluded had not been established.

[92] The Respondent submits that the Officer's BIOC was thorough. It was reasonable for the Officer to conduct a relatively more thorough analysis with respect to Brihanna than with respect to 2 year old Jayden, given that the Applicants' submissions focused almost exclusively on Brihanna's best interests.

[93] The Respondent further submits that the Officer clearly considered the benefits that remaining in Canada would have on the children's interests, and acknowledged that it was in their best interests to remain.

[94] The Respondent's position is that the Officer considered all the relevant evidence before her, and reasonably concluded that the weight of the evidence regarding best interests did not warrant the exceptional relief sought.

[95] The Respondent adds that the Officer acknowledged the new evidence submitted by the Applicants in September 2017, but reasonably concluded that it did not change the decision.

C. *The Decision is Reasonable*

(1) The Purpose of an H&C Determination

[96] The Applicants allege several specific errors by the Officer. However, the starting point in determining whether the Officer's decision is reasonable is to recall the purpose of an H&C determination.

[97] Section 25 provides that an *exemption* from some findings of inadmissibility and from other criteria or obligations of the Act may be granted on the basis of H&C considerations, "taking into account the best interests of a child directly affected". This relief, which provides an exemption from the otherwise applicable legal requirements, is discretionary and is often characterized as "exceptional".

[98] The onus is at all times on an applicant to establish with sufficient evidence that the exemption should be granted. Officers who conduct H&C assessments must consider all the evidence presented and the applicable jurisprudence which guides the assessment, and be satisfied that the relief is justified in the particular circumstances.

[99] In *Liang v Canada (Minister of Citizenship and Immigration)*, 2017 FC 287 at para 23, [2017] FCJ No 286 (QL), Justice Strickland captured the essence of an H&C determination as follows:

> [23] 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, taking into account the best interests of a child directly affected. This relieves an applicant, on the basis of hardship, from having to leave Canada to apply for permanent residence through the normal channels (*Shrestha v Canada (Citizenship and Immigration)*, 2016 FC 1370 at para 11; *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at para 16; *Basaki* at para 20). An H&C exemption is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 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 v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 29; *Semana*

> at para 16; *D'Aguiar-Juman v Canada (Citizenship and Immigration)*, 2016 FC 6 at para 9). [Emphasis added]

[100] The Applicants rely extensively on *Kanthasamy*. In *Kanthasamy*, the Supreme Court of Canada explained how section 25 should be more flexibly interpreted and applied. However, the Court did not go so far as to find that every H&C application must be granted, where it includes children or evidence of the impact of removal on a mental health condition, which appears to be the Applicants' position.

[101] In *Kanthasamy*, the Supreme Court of Canada explained that what will warrant relief under section 25 will vary depending on the facts and context of each case. Officers making such decisions must substantively consider and weigh all of the relevant facts and factors before them (at para 25). A significant aspect of *Kanthasamy* is the Court's clear direction to avoid imposing a threshold of *unusual, undeserved or disproportionate* hardship and to "give weight to *all* relevant humanitarian and compassionate considerations in a particular case" (at para 33) [emphasis in original].

[102] While the Court noted the need to consider all relevant H&C factors, it also acknowledged, at para 23, that the H&C process is not an alternative immigration scheme and that some hardship is inevitable:

> [23] 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): see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para. 13 (CanLII); *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206 (F.C.T.D), at para. 12. Nor was s. 25(1) intended to be an alternative immigration scheme: House of

> Commons, Standing Committee on Citizenship and Immigration, Evidence, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40 (Peter MacDougall); see also Evidence, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 9:55 to 10:00 (Joan Atkinson).[emphasis added]

(2) Michael's Role in the JCF Street Crimes Task Force

[103] The Officer's finding that there was insufficient evidence to establish that Michael was a member of the JCF Street Crimes Task Force is reasonable. Although the Applicants have strenuously argued that the Officer erred because Michael's affidavit and the new forms say that he worked in this elite unit for a period of time and then worked more recently in the Construction Unit, the earlier submissions do not say this at all and in fact, the Applicants' evidence is generally very inconsistent in describing Michael's employment.

[104] The Applicants submit that they pointed out mistakes and inaccuracies in their updated February 2017 submissions. However, the submissions to the Officer do not point out any errors regarding the description of Michael's employment. Moreover, the updated H&C Schedule A form which sets out personal history and Government employment states that Michael was in the "JCF-PMU" (which is the Property Management Unit) until 2012 and then was in the "Construction Task Force". This is a yet another description that differs from Michael's, but it does not state that he was in the Street Crimes Task Force. The January, 2017 letter from the Commissioner of the JCF does not refer to the Street Crimes Task Force at all. The letter from the Deputy Superintendent of the JCF, dated October, 2017, which was not on the record before the Officer, states that Michael "was assigned to the Operational Support Team and Street Crime Unit. These Units are responsible to give operational support to other areas within that particular

police division and are also mandated to attend to crime situation (sic) involving hard line criminals and to deal with other street crime". It also states that he last served in the Property Management Unit. While the October, 2017 letter refers to a "Street Crime Unit", it also describes it differently than Michael.

[105] With respect to the Applicants' argument that corroborative evidence should not be discounted simply because it comes from individuals who have a stake in the proceedings (*Cruz Ugalde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 458 at paras 24-28, [2011] FCJ No 647 (QL)), the Officer did not do so. The Officer noted that this evidence was inconsistent with the Applicants' own earlier submissions and reasonably gave the evidence low weight.

[106] The issue of whether Michael was part of the Street Crimes Task Force, as he now argues, is, in my view, blown out of proportion in the context of the Officer's assessment of whether an H&C exemption was justified. As noted, the Officer did not err in concluding that there was insufficient objective evidence to support this claim. However, the Officer accepted that Michael worked for the JCF. The Applicants' H &C submissions were based not only on the risk or hardship they would face because Michael would be returning as a former member of this unit, but as a former police officer. The Officer's finding was that "he has provided insufficient evidence to persuade me on a balance of probabilities that this family has or will reasonably be targeted by members of organized crime groups or other criminals on account of the male applicant's *previous employment with the JCF*" [emphasis added].

(3) The Psychological Evidence

[107] The weight to attach to a psychological or similar report is for the Officer to determine. An officer does not err in discounting psychological evidence when it merely reiterates what the patient says are the reasons for their stress or anxiety and then reaches a medical conclusion that the patient suffers stress because of those reasons. In the present case, Dr. Agarwal, the psychologist, diagnosed Nicole with PTSD based on her recounting her childhood in Jamaica and her concerns regarding her husband's job as a police officer. Dr. Agarwal's recommendation that she remain in Canada to alleviate her anxiety is based, to some extent, on the reason she provided for her anxiety.

[108] The Applicants rely on para 49 of *Kanthasamy* to argue that the Officer erred by discounting Dr. Agarwal's letter because it was based on hearsay. That passage provides:

> 49 And while the Officer did not "dispute the psychological report presented", she found that the medical opinion "rest[ed] mainly on hearsay" because the psychologist was "not a witness of the events that led to the anxiety experienced by the applicant". This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on "hearsay". Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence. In any event, a psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada.

[109] The Officer did not suggest that expert reports could only be filed by those who witnessed the underlying facts. Nor did the Officer discount Dr. Agarwal's letter simply because part of it was based on hearsay. However, the Officer was justified in finding that there was insufficient evidence that Michael was a member of the Street Crimes Task Force. Therefore, the Officer's related finding that Dr. Agarwal's opinion was less persuasive because it was based, at least in part, on the problems caused by her husband's stressful job in the elite unit was also justified. The Officer also noted several other reasons to give Dr. Agarwal's letter and recommendation low weight.

[110] The jurisprudence has cautioned that the recounting of events to a psychologist or a psychiatrist does not make these events more credible and that an expert report cannot confirm the allegations of harm or risk (*Rokni v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 182 (QL) at para 16, 53 ACWS (3d) 371 (FCTD); *Danailov v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1019 (QL) at para 2, 44 ACWS (3d) 766 (FCTD); *Saha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 304 at para 16, 176 ACWS (3d) 499).

[111] In *Czesak v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1149 at paras 37-40, [2013] FCJ No 1251 (QL), the Court noted concerns about psychological reports that advocate in the guise of an opinion and "propose to settle important issues to be decided by the tribunal". The Court found that in such cases, without some way to probe the opinion, little weight should be attached to it.

[112] Similarly, in *Egbesola v Canada (Minister of Citizenship and Immigration)*, 2016 FC 204, [2016] FCJ No 204 (QL) [*Egbesola*], the Court noted at para 12:

> 12. As submitted by the respondent, the "facts" on which the report is based are those told to Dr. Devins by the principal applicant, and thus are not facts until found to be so by the tribunal. What can be reasonably taken from the report is that the principal applicant suffers from PTSD, and that she requires medical treatment for it.

[113] As in *Egbesola*, all that can be taken from Dr. Agarwal is that Nicole suffers from PTSD.

[114] The Applicants also argue that the Officer erred by discounting Nicole's mental health condition because no treatment was proposed or was being followed, contrary to the principles set out in *Kanthasamy*. I do not agree. The Applicants' reliance on para 47 of *Kanthasamy* downplays the relevant context and the preceding and subsequent paragraphs, which note that the related and key concern of the Court was the application of the undeserved, unusual and disproportionate hardship test. Again, the passage relied on in *Kanthasamy* relates to the facts in that case.

[115] The Supreme Court of Canada stated at para 47:

> Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.
>
> [Emphasis in original]

[116] In the present case, the Officer did not dispute the diagnosis of PTSD. The Officer's concern was about Dr. Agarwal's opinion, which did not recommend any treatment, but only that Nicole not be removed from Canada to Jamaica where her "index traumatic experiences happened". This crossed over into the determination that the Officer is tasked with making. The Officer did not err in finding that the tone of the letter was not objective.

[117] As highlighted by the Supreme Court of Canada in *Kanthasamy*, "what will warrant relief under section 25 will vary depending on the facts and context of each case". The facts in *Kanthasamy* differ from the present facts.

[118] The Officer did not ignore the letter from Nicole's doctor in Jamaica, which noted that she had been treated in the past for anxiety and gastritis. Similarly, the Officer did not err in noting that there would be no disruption in her treatment if returned to Jamaica, because she was not undergoing any treatment or follow up in Canada and she had accessed treatment in Jamaica.

(4) The BIOC Analysis

[119] The Officer conducted a thorough BIOC analysis with respect to both children. To the extent that the Officer put more emphasis on Brihanna, this is due to the emphasis the Applicants placed on her interests in their submissions to the Officer, which were reiterated before the Court.

[120] The Supreme Court of Canada's decision in *Baker* sets out the basic principles regarding an officer's obligation to consider the best interests of the children when making H&C decisions:

> 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 an H & C claim even when children's interests are given this consideration. (at para 75)

[121] In *Kanthasamy,* the Supreme Court of Canada reiterated that officers must be alert, alive and sensitive to the best interests of a child; simply stating that the interests have been considered is not enough.

[122] The Court also reiterated that children are rarely deserving of any hardship. However, "any hardship" is not sufficient on its own to justify the H&C exemption. The language of "any hardship" originated in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9, [2003] 2 FC 555 [*Hawthorne*], which also provided guidance for the assessment of the best interests of a child in an H&C application. The principle that a child is rarely *deserving* of any hardship is not disputed, but "any hardship" does not provide a new threshold for determining the BIOC within the H&C application.

[123] As noted above, the Officer accepted that the children are happily established in Canada, but found that the school and church-related activities were also available in Jamaica. The Officer acknowledged that Brihanna was doing well in school and that other means could be used for her to continue to study French, if desired. The Officer addressed the concern about Jamaican English and post-secondary education and reasonably relied on current information from the Ministry of Education website. The Officer also considered that there was free access to

health care for children in Jamaica. The Officer did not ignore the impact of adverse country conditions, including the high crime rate, on the children and specifically noted that these issues had been considered also "through the lens of BIOC". The Officer considered the impact on the children of being returned and all the relevant circumstances including their age and ability to adapt, their close family and dependence on their parents, the adverse country conditions and the education system.

[124] The Officer did not ignore the psychologist's report regarding Brihanna indicating that she was happy and well-adjusted. Rather, the Officer noted, with respect to all the evidence of BIOC, that it would be rare for her to find that it was *not* in a child's best interests to remain in Canada. The Officer reasonably found that the children's best interests would be compromised only modestly if returned to Jamaica. The Officer reasonably concluded that the positive weight attached to the BIOC was not sufficient to "tilt this application".

[125] The Officer's finding is consistent with the jurisprudence which has established that the Officer is presumed to know that living in Canada would offer the child opportunities that they would not otherwise have (*Hawthorne* at para 5), and that a comparison between life in Canada and life in the country of origin cannot be determinative to a BIOC analysis, as the outcome would almost always favour Canada (*Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292 at paras 29-30, [2006] FCJ No 1613 (QL); see also *Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479 at para 44, 423 FTR 218).

[126] Contrary to the Applicants' allegation that the Officer focused only on meeting the children's basic needs in Jamaica, the Officer considered the children's best interests overall, and considered how they would be met in Jamaica and in Canada.

[127] I disagree with the Applicants' submission that the Officer ignored the new submissions with respect to Brihanna. The new evidence relied on is a Report Card which provided information consistent with the previous evidence that Brihanna was succeeding in school. To suggest that the Report Card and supportive letter from a teacher, should have significantly affected the decision is not persuasive. The Officer quite reasonably found that it did not change her earlier findings, which gave positive weight to the BIOC, but did not result in a finding that an H&C exemption was justified overall.

[128] The Officer's finding that a positive BIOC analysis was not sufficient to "tilt the application" to justify an exemption reflects the jurisprudence which establishes that BIOC is but one consideration in an H&C assessment, albeit an important one.

[129] Contrary to the Applicants' submissions, the Officer specifically addressed their new submissions and reasonably found that the additional information regarding Brihanna, their recently acquired work permits, and Nicole's application to Seneca College did not change the decision.

X. Conclusion

[130] The Applicants noted in their 2017 H&C submissions that their previous H&C applications, which were refused, were premature, because at the time they had little establishment. The establishment that they have worked to achieve has been due, to a significant extent, on their failure to abide by Canada's immigration laws. The Applicants overstayed their visitor visa, did not seek to extend their visas, worked in Canada without work permits, were aware that they were inadmissible to Canada and were aware of the 2016 exclusion order. As noted, the Applicants failed to report following this Court's dismissal of their application for a stay of their removal pending the determination of this Application. Their lack of "clean hands" would permit the Court to dismiss their Application without considering its merits. Regardless, the Application has been fully considered and the Court finds that the Officer's decision is both procedurally fair and reasonable.

JUDGMENT IN IMM-4173-17 and IMM-4174-17

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-4173-17 IMM-4174-17
STYLE OF CAUSE:	MICHAEL MOSIAH BRADSHAW, NICOLE ANN MARIE BROWN-BRADSHAW AND BRIHANNA MICKAYLA BRADSHAW, BY HER LIGITATION GUARDIAN MICHAEL MOSIAH BRADSHAW v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 10, 2018
JUDGMENT AND REASONS:	KANE J.
DATED:	JUNE 18, 2018

APPEARANCES:

Daniel Kingwell	FOR THE APPLICANTS
Manuel Mendelzon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT