Federal Court Cour fédérale

Date: 20180809

Docket: IMM-3734-17

Citation: 2018 FC 821

Ottawa, Ontario, August 9, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

REGGINOLD MAGSANOC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

The applicant, Regginold Magsanoc, is a citizen of the Philippines. Sponsored for permanent residence in Canada by his mother under the live-in caregiver program, he landed in Canada in March 2006 at the age of 24. Unfortunately, not long after his arrival, the applicant developed a serious drug addiction. He also eventually acquired a lengthy record of criminal offences of the sort often associated with drug addiction. In July 2013, the applicant was found inadmissible to Canada due to serious criminality.

[1] In October 2016, the applicant submitted an application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. A senior immigration officer refused the application on August 14, 2017. On November 29, 2017, the officer confirmed the decision after a request for reconsideration.

[2] The applicant now applies for judicial review of these decisions under section 72(1) of the *IRPA.*

[3] For the reasons that follow, I am allowing the application for judicial review. In my view, the officer's decision is unreasonable because it lacks transparency and intelligibility. Specifically, the central feature of this case is the applicant's drug addiction. The officer failed to examine aspects of this addiction and its impact on the applicant's life which reasonably could give rise to a more empathetic and compassionate view of the circumstances of this case than the one she adopted. I also find that the officer committed reviewable errors in her assessment of the best interests of the children who would be affected by her decision. The application for permanent residence under section 25(1) of the *IRPA* must, therefore, be reconsidered.

II. BACKGROUND

[4] The applicant was born in the Philippines in June 1982. When he was about ten years of age, his mother secured a position as a caregiver in Hong Kong. The applicant and his two brothers were left in the care of his father and his maternal grandmother. The applicant's mother sent money home to the Philippines to support her family.

[5] In 1998, the applicant's mother moved to Canada to work as a live-in caregiver. Her hope was to sponsor her children to join her in Canada when she was able to.

[6] Meanwhile, the applicant completed high school in the Philippines. He attempted training programs in refrigeration and air conditioning and in nursing assistance but he did not complete either program.

[7] The applicant came to Canada as a permanent resident in March 2006 under his mother's sponsorship. He secured employment as a machine operator within less than a week of his arrival.

[8] The applicant had used soft drugs like marijuana recreationally in the Philippines. He had also used methamphetamine – specifically, the form of the drug colloquially known as crystal meth – occasionally. After arriving in Canada, he began using crystal meth more frequently. Eventually, he became addicted to the drug.

[9] The applicant also started to acquire a criminal record. While the complete record is not included in evidence before me, the applicant reportedly was convicted of some twenty-two offences, including theft under $5000, fraud under $5000, possession of controlled substances, assault, breach of recognizance, failure to attend court and failure to comply with probation. Apart from when he was in custody, the applicant's course of criminal conduct was essentially unbroken from 2007 until April 2015.

[10] The applicant met Rachel H.-H. in the latter part of 2006. Rachel had struggled for most of her life with addiction and depression. As she describes them, her teenage years "were a blur of drugs and the streets of Guelph." She became pregnant at 17 but the child was apprehended by child protection authorities. Her second child was also apprehended.

[11] The applicant and Rachel were friends for roughly nine months. A romantic relationship developed and they began living together in 2007. They also used drugs together.

[12] In February 2009, Rachel gave birth to their first son, V. Almost immediately, V. was apprehended by child protection authorities. The loss of V. devastated the applicant, who turned to drugs for solace. It was at this point that he went from being a casual user of crystal meth to an addict.

[13] In December 2011, the applicant and Rachel had a second child, a daughter C. C. was also apprehended by child protection authorities. Eventually, the applicant's mother was given custody of V. and C.

[14] In 2012, when Rachel was pregnant with their third child, she and the applicant made the mutual decision to sever contact with one another until they both had their addictions under control. As Rachel describes this decision, "[i]t was one of the hardest things either of us ever had to do, but we knew it was best for our future child." The child, a son H., was born in June 2013. By this time, Rachel had addressed her addiction and other issues effectively so she was permitted to retain custody of H. When the H&C application was submitted in 2016, Rachel had

been sober for three years and was continuing to receive treatment for addiction and mental health challenges.

[15] Sadly, the applicant continued to use drugs heavily. As a result, he was estranged not only from Rachel and H. but also at times from his other two children as his mother carefully controlled his access to them.

[16] In April 2015, the applicant was arrested and charged with possession of methamphetamine for the purpose of trafficking and several other offences. He remained in custody pending the resolution of the charges. In September 2016, he pled guilty to possession of methamphetamine for the purpose of trafficking and other charges. He was sentenced to 19 months in jail in addition to his pre-sentence custody. This was the longest custodial sentence the applicant had received. The applicant was serving this sentence when he submitted his H&C application.

[17] Previously, the applicant had made several attempts to address his drug addiction but he failed every time. He states, however, that while in custody after the April 2015 arrest, he resolved to finally address his addiction. He participated in substance abuse and addiction programs and appears to have benefited from them. The applicant began these programs at Maplehurst Correctional Centre, where he was held following his arrest, and continued them at the Central East Correctional Centre, where he was transferred after being sentenced. The record before the officer included positive reports from the Central East Correctional Centre about the

applicant's participation in substance abuse programs, his conduct while incarcerated, and his employment in the institution.

[18] As a result of the steps the applicant was taking to address his drug addiction, Rachel re-established contact with him.

[19] Rachel wrote a lengthy letter in support of the H&C application. In the letter, she describes, among other things, the challenges both she and the applicant have faced and their efforts to overcome their drug addictions. She writes: "I believe that Reggie saved my life. Him [sic] and his family, possibly without knowing it, helped piece together what was left of me. To lose him now, when I could show him the way, would be very cruel, and unfair. I know he's made mistakes, so does he. But his mistakes are not who he is. And I believe he can overcome this."

[20] Attempts were made to find an in-patient drug treatment program in Toronto for the applicant to enter when he was released from custody. However, the applicant's request for a stay of his removal was denied. I am advised that he was removed to the Philippines in November 2017.

III. DECISION UNDER REVIEW

[21] The request for H&C relief was based on four main factors: the applicant's family ties in Canada; the applicant's establishment in Canada; the best interests of the applicant's three children; and the hardship the applicant would suffer in the Philippines as a result of poor

economic conditions there, the lack of accessible drug rehabilitation programs, and violence against drug users. The application was refused by a senior immigration officer on August 14, 2017.

[22] With respect to the applicant's family ties and establishment in Canada, the officer considered that the applicant had lived in Canada for ten years, had family members here, and had had periods of employment, all of which gave his establishment some weight. However, the officer found that the absence of evidence of stable employment and residence, a pattern of financial management and savings, and a level of interdependency between the applicant and his family "detracts from the weight given to [the applicant's] degree of establishment."

[23] The officer acknowledged the importance of the best interest of the child factor and the significant weight it warrants in H&C applications, but also noted that it is not necessarily determinative. She considered the evidence demonstrating the applicant's relationship with his children. She also noted that the applicant's mother allowed the applicant to visit V. and C. while he was seeking treatment for his addiction issues. The officer also noted that between August 2013 and March 2014, the Applicant had moved in with his mother and had become more involved with V. and C. The officer acknowledged that the applicant wanted to care for and be involved in the lives of his children and that the children missed their father and wanted him home permanently.

[24] While accepting that separating a parent from a child is difficult, the officer was not satisfied that "the best interest of the child will be affected by the outcome of the application"

given that V. and C. had been placed in custody by child protection authorities, "whom [*sic*] reasonably has taken into account their best interest." The officer noted that the applicant's mother, brother and aunts were "all involved in the custody proceedings with CAS, which reasonably indicates they are able to meet the best interest of the children." The officer gave minimal weight to the applicant's claims about his ongoing relationship with his mother and children because of the absence of objective evidence. Specifically, the officer noted that a letter provided by the applicant's aunts was not a sworn document; the applicant had provided no evidence of correspondence with his children during his most recent incarceration; and the applicant's mother had provided insufficient evidence about the impact the applicant's removal would have on his children.

[25] With respect to H., the officer expressed doubts that he was actually the applicant's child. In any event, irrespective of their biological relationship, the officer found that H. is currently under the care of his mother, who is "reasonably ensuring his best interests are met." The officer also noted that there had been almost no contact between Rachel and the applicant between 2012 and 2015. This included the first two years of H.'s life.

[26] The officer gave "some weight" to the applicant's common law relationship with Rachel but was not satisfied that their level of interdependency warranted an exemption. While acknowledging that Rachel had written letters to the applicant and provided assistance to him since his incarceration, the officer found the applicant had intentionally stayed out of her life during her rehabilitation. The officer also found that the applicant had provided insufficient

evidence of their intention to reunite or that they had cohabited when the applicant was not incarcerated.

[27] With respect to the applicant's criminal history, the officer noted the applicant's statement that the offences he committed were "related to his drug addiction and the need to find money to feed his addiction." The officer acknowledged the applicant's struggle with drug addiction and his efforts at rehabilitation, which had resulted in his abstaining from drugs since 2015. While the officer noted that the applicant had accepted responsibility for the consequences of his actions and appeared to have made some progress toward a life of abstinence, "his ten year criminal history does not weigh in favor of his request for an exemption. His list of charges and convictions is extensive, the offenses are serious in nature and he is currently incarcerated."

[28] Finally, the officer considered the country conditions in the Philippines. The officer noted the submissions of counsel that the "new president has employed brutal and inhumane practices to deal with the drug and crime problem" and that police "have carte blanche to perform extrajudicial killings with impunity," especially of drug dealers and addicts. The officer also noted counsel's submission that "should the applicant avoid the death squads roaming the streets, he will likely be arrested and place[d] inside some of the worst prison conditions in Asia."

[29] The officer acknowledged the "less than ideal country conditions" and "the government's stance on the drug and crime problems in the Philippines." However, the officer found the applicant's argument that he would likely relapse on return to the Philippines and, as a result,

would face the above-noted risks to be "speculative." The officer found that the applicant had led insufficient evidence that he would be perceived by the authorities as a drug addict, the applicant claims to have abstained from drugs since 2015, and he "now has more insight into his drug addiction struggles." The officer also found that there was insufficient evidence that the applicant could not find support by re-connecting with his brother, grandmother, and father, who all live in the Philippines. While acknowledging that the applicant may face challenges finding employment, the officer noted that the applicant's high school diploma, post-secondary education, knowledge of English, work experience in Canada, and family in the Philippines all weighed in favour of his reintegration in the Philippines.

[30] Based on all of these considerations, the officer refused the H&C application.

[31] On November 7, 2017, counsel for the applicant asked for the decision to be reconsidered because a letter from the applicant's mother inadvertently had been omitted from the original application. Among other things, this letter described the applicant's life in Canada, the effects of his drug addiction, his mother's role in caring for V. and C., and the potential consequences of the applicant's deportation for his children.

[32] On November 29, 2017, the officer issued a decision stating that she had considered the letter from the applicant's mother but the result of the application was unchanged. The officer reiterated that the best interest of the child is a significant factor but it is not determinative. In a global assessment, it is "weighed and considered against other factors presented." The officer observed that the applicant's "predicament is very unfortunate where his drug addiction lead

[*sic*] to a criminal record that commenced in 2007, one year after his arrival in Canada and continued up until his current incarceration." The officer accepted that it would be in the best interest of any child to be in the physical presence of their father, but this was mitigated by applicant's current circumstances as well as those of the children. The children had been placed in the custody of the applicant's mother and there was no evidence that this will change. The officer was not persuaded that the children's distress as described by the applicant's mother was sufficient to overcome the other factors grounding the refusal of the application.

IV. ISSUES

[33] This application raises the following issues:

1. What is the applicable standard of review?
2. Did the officer commit a reviewable error in her assessment of the applicant's drug addiction?
3. Did the officer commit a reviewable error in her assessment of the risk to the applicant should he be returned to the Philippines?
4. Did the officer commit a reviewable error in her assessment of the best interests of children who would be directly affected by the decision to remove the applicant?

V. LEGAL FRAMEWORK

[34] Section 36(1) of the *IRPA* provides that a permanent resident or foreign national is inadmissible for "serious criminality" if he or she commits an offence meeting the criteria set out there. As has been noted many times, this provision reflects a form of social contract. In exchange for the opportunity to reside in Canada, permanent residents (and foreign nationals) are expected not to commit serious criminal offences (as defined). The *IRPA* recognizes that immigration brings many benefits to Canada and that the "successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian society," including the obligation of the former to avoid serious criminality (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paras 1-2 [*Tran*]; see also s. 3(1) of the *IRPA*). The *IRPA* "aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents" (*Tran* at para 40). When a permanent resident commits a serious criminal offence, this breach of the social contract can lead not only to the consequences imposed by the criminal courts but also to the loss of his or her immigration status and removal from Canada.

[35] The obligation to avoid serious criminality lest adverse immigration consequences follow applies equally to all permanent residents (and foreign nationals). That being said, the uniform application of this principle to all cases can lead to injustice or unfairness in some. Section 25(1) of the *IRPA* exists to protect against this result.

[36] This provision authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from

any applicable criteria or obligations under the Act. Relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." These considerations include matters such as children's rights, needs and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 41).

[37] The relevant statutory provisions may be found in Annex I to these reasons.

[38] An H&C application is a weighing exercise in which an immigration officer, on behalf of the Minister, must consider different and sometimes competing factors. When, as in the present case, an H&C exemption from criminal inadmissibility is sought, the officer must weigh the public policy reflected in section 36(1) of the *IRPA* against the individual circumstances of the case and determine whether the latter outweigh the former so as to warrant making an exception to the usual rule that serious criminality by a permanent resident leads to loss of status and removal from Canada.

[39] In *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61[*Kanthasamy*]*),* the Supreme Court of Canada endorsed an approach to section 25(1) that is grounded in its underlying equitable purpose. Justice Abella, writing for the majority, approved of the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, where it was held that humanitarian and compassionate considerations refer to "those facts, established

by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13). This discretion provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19).

[40] Ministerial Guidelines for processing requests for H&C relief had directed immigration officers to consider whether an applicant had demonstrated either "unusual and undeserved" or "disproportionate" hardship. In *Kanthasamy*, the majority held that while these words could be helpful in assessing when relief should be granted in a given case, they were not the only possible formulation of the grounds justifying the exercise of discretion. Rather, the majority held that the three adjectives "should be seen as instructive but not determinative, allowing s. 25(1) to respond flexibly to the equitable goals of the provision" (at para 33).

[41] As Justice Abella also observed, "[t]here 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)" (*Kanthasamy* at para 23). What does warrant relief will vary depending on the facts and context of the case (*Kanthasamy* at para 25).

[42] Section 25(1) expressly requires a decision-maker to take into account the best interests of a child directly affected by a decision made under that provision. The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy* at para 35, quoting *Canadian Foundation for Children, Youth and the*

Law v Canada (Attorney General), 2004 SCC 4 at para. 11 and *Gordon v Goertz*, [1996] 2 SCR 27, at para 20). As a result, it must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). Protecting children through the application of this principle means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (*Kanthasamy* at para 36, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA), at p 489).

VI. ANALYSIS

1. What is the applicable standard of review?

[43] It is well-established in the jurisprudence that generally a denial of H&C relief under section 25(1) of the *IRPA* is reviewed on the reasonableness standard (*Kanthasamy* at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at para 16). This deferential standard of review reflects the fact that the provision creates a mechanism to deal with exceptional circumstances and decisions under it are highly discretionary (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15).

[44] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). Such review "reinforces in the context of

adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 63 [*Khosa*]). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "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). These 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). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Khosa* at paras 59 and 61).

[45] The applicant submits that some aspects of the officer's decision should be reviewed on a correctness standard. I do not agree. None of the circumstances that engage this higher degree of scrutiny (e.g. an alleged breach of principles of procedural fairness) are present here. As well, I am satisfied that the officer applied the correct test under section 25(1) of the *IRPA*. While I agree with the applicant that the officer's decision is deficient in key respects, those deficiencies are evident under the reasonableness standard of review.

2. *Did the officer commit a reviewable error in her assessment of the applicant's drug addiction?*

[46] The applicant contends that the officer did not engage in a meaningful analysis of the consequences of his drug addiction. The respondent submits that the applicant's objection is really a complaint about the weight the officer gave to this factor and this is something with which I ought not to interfere. If I were satisfied that the officer had appreciated fully the potential ramifications of this factor and then determined what weight to give to it, I might agree with the respondent. However, I am not so satisfied.

[47] The officer accepted that the applicant "clearly has a serious drug addiction." While the officer notes the applicant's submission that his criminal record was "related to his addiction and the need to find the financial means to fuel his addiction," she does not actually make any finding about this. Instead, in the original decision, the officer simply asserts that the applicant's "list of charges and convictions is extensive, the offenses are serious in nature and he is currently incarcerated." The officer concludes, rather obliquely, that the applicant's "ten year criminal history does not weigh in favor of his request for an exemption." She never addresses to what extent, if any, the applicant's criminal record was a result of his drug addiction.

[48] If accepted, the applicant's explanation for his criminal history – that it was largely due to his drug addiction – could mitigate the blameworthiness of his conduct. Together with evidence of the steps the applicant had taken to address his addiction, it could also point to his capacity for rehabilitation. Both factors, in turn, are relevant to the necessary balancing under section 25(1) of the *IRPA* (cf. *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84,

2002 SCC 3, at para 40, discussing the so-called *Ribic* factors). The only reason the applicant is inadmissible to Canada is his criminal history. On its face, the applicant's explanation for his criminal conduct is plausible. The officer may not have been required to accept that explanation but she was required to make a finding on this critical issue, one way or the other.

[49] On the request for reconsideration, the officer does appear to accept that the applicant's drug addiction led to his criminal conduct. While this rectifies one deficiency in the original decision, the officer was still required to examine the implications of this finding for the factors to be weighed in assessing the claim for H&C relief. She did not do so.

[50] The same lack of analysis affects other parts of the decision. For example, in weighing the evidence of establishment in Canada, the officer did not consider whether the applicant's failure to maintain stable employment, a pattern of financial management and savings, a stable residence, and abiding connections with family could be the result of the applicant's drug addiction. If these circumstances were additional consequences of the addiction, this could affect whether they fairly reflect a lack of establishment in Canada and, as a result, the degree to which they weigh against granting an exemption on equitable grounds. The officer never addresses this important question. Instead, she simply deems these circumstances to detract from the weight given to the applicant's degree of establishment in Canada.

[51] More generally, despite accepting that the applicant had a "serious drug addiction," the officer never examines the hardship this has caused in the applicant's life. That hardship arguably manifested itself in many factors relevant to whether the applicant ought to be

permitted to remain in Canada despite his criminal history. It bears directly on whether the underlying equitable purpose of section 25(1) of the *IRPA* warrants an exception being made in the applicant's case. In the absence of such an examination, the officer's reasons lack transparency and intelligibility on a central issue.

3. Did the officer commit a reviewable error in her assessment of the risk to the applicant should he be returned to the Philippines?

[52] On any reading of the applicant's submissions in support of his H&C application, there is a fundamental tension in his position. On the one hand, the applicant contended that he had taken significant steps to overcome his drug addiction and, as a result, he had the potential to become a law-abiding and contributing member of Canadian society. On the other hand, the applicant contended that, as a drug user, he faced the risk of serious human rights abuses if returned to the Philippines. These two arguments are in tension with one another but they are not mutually inconsistent. In my view, however, while the officer reasonably gave weight to the first line of argument, she unreasonably used it to undercut the second.

[53] The officer described conditions in the Philippines for drug users as "less than ideal" – a remarkable understatement – but she appears to have accepted that country conditions were a serious problem. Indeed, on the evidence before her, she could not reasonably have concluded otherwise. The officer found, however, that the applicant's claim that he would be at risk if returned to the Philippines to be "speculative." She wrote: "There is insufficient evidence the applicant will be perceived by authorities as a drug addict, the applicant stated that he has abstained from drug use since 2015 and now has more insight into his drug addiction struggles."

[54] The respondent submits that this conclusion was reasonably open to the officer on the evidence before her. I disagree.

[55] There was evidence that the applicant was making good progress in addressing his drug addiction. No doubt everyone concerned hopes this will continue. The problem with the officer's assessment is that she infers from this evidence that the applicant will not face hardship in the Philippines without undertaking any meaningful analysis of the applicant's risk of relapse in the particular circumstances of this case. While a risk of relapse exists for every recovering drug addict, for the applicant it could well be exacerbated by the dislocation that is entailed by removal from Canada and all of the supports he has here. As well, the officer does not appear to have considered that the applicant's abstention from drugs, while commendable under any circumstance, has been while he has been incarcerated. The applicant's current capacity to abstain from drugs once out of jail again had not been tested. The risk of relapse in the Philippines is also exacerbated by the inaccessibility of drug treatment programs there, something with respect to which a substantial body of evidence was provided to the officer.

[56] Having regard to the record before the officer, the risk of relapse cannot reasonably be dismissed as "speculative." And if the applicant were to relapse and begin using drugs again in the Philippines, the evidence suggests he would be at risk of gross human rights violations. In short, the officer never comes to grips with or evaluates the hardship the applicant would face if removed to the Philippines (cf. *Mings-Edwards v Canada (Citizenship and Immigration)*, 2011 FC 90 at para 14; *Apura v. Canada (Citizenship and Immigration)***,** 2018 FC 762 at para 29). Her failure to do so results in a decision that is unreasonable.

4. Did the officer commit a reviewable error in her assessment of the best interests of children who would be directly affected by the decision to remove the applicant?

[57] When deciding an H&C request that engages the best interests of a child, an immigration officer must do more than simply state that the interests of the child have been taken into account. A child's best interests must be "'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39, quoting *Legault* at paras 12 and 31 and referencing *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paras 9-12). A decision under s. 25(1) of the *IRPA* will be found to be unreasonable if the interests of children affected by it are not sufficiently considered (*Baker* at para 75). However, what constitutes sufficient consideration of the best interests of an affected child will depend on the evidence presented on the application.

[58] In his application for H&C relief, the applicant submitted that the best interests of his three children favoured permitting him to remain in Canada. This was potentially a difficult case to make. The applicant was not the primary caregiver for any of these children; he did not appear to have provided much, if any, financial support for them; and he had been at best an intermittent presence in their lives. Nevertheless, he advanced comprehensive submissions in support of his position and supported those submissions with evidence.

[59] While accepting that "it would be in the best interest of any child to be in the physical presence of their father," the officer concluded that the weight to be assigned to the best interests of the children who would be directly affected in this case "is mitigated by [the applicant's]

current circumstances as well as that of his children." In the result, this factor was insufficient to "overcome all the other factors within this assessment."

[60] In my view, this conclusion is tainted by several errors.

[61] First, the officer states with respect to V. and C. that she was "not satisfied the best interest of the child will be affected by the outcome of this application." She appears to have thought this because the custodial arrangements for the children (their "current circumstances") would presumably remain the same if the applicant were removed from Canada. Assuming for the sake of argument that this is the case, it does not follow that the best interests of the children will be unaffected by the applicant's removal. If nothing else, the children lose the opportunity to develop a closer relationship with their father here in Canada (cf. *A.B. v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1170 at paras 28-29).

[62] Second, the officer's reference to the applicant's "current circumstances" must be a reference to the fact that he was serving a prison sentence when the application was submitted. While this fact may explain why the applicant was not playing a larger role in his children's lives at that moment, the officer does not consider how this could change once the applicant was released from prison.

[63] Third, the officer unreasonably concluded that the applicant had failed to provide "sufficient evidence that the best interest of [H.] will be affected by the outcome of this application." The officer expressed doubts about whether H. was even the applicant's child,

even though no one else had done so (apart from the applicant's mother once, in what may well have been a flippant remark in a very different context). In any event, the officer was satisfied that Rachel alone was reasonably ensuring that H.'s best interests were being met. However, the officer did not consider why that arrangement came about in the first place (i.e. the exigencies of Rachel's efforts to overcome her own drug addiction). Even apart from the rather thin basis upon the officer expressed doubts about whether H. was the applicant's child, the circumstances of H.'s early years and the applicant's relationship with him required a great deal more attention than they received to determine where H.'s best interests lay.

[64] The evidence suggested that the applicant's children are important to him. He sincerely regrets the decisions he has made that have, to a large degree, separated him from his children. He hopes for a closer relationship with his children in the future, a hope shared by the children's current primary caregivers. Of course, the mere fact of close ties with a child "does not render a positive outcome a foregone conclusion," particularly when one is not the child's primary caregiver or financial provider (*Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 30). Nevertheless, this was a significant part of the applicant's request for H&C relief. Given the errors I have identified in the officer's approach, I am not satisfied that her conclusions about the best interests of the children who would be affected by the decision fall with the range of reasonable, acceptable outcomes.

VII. CONCLUSION

[65] For these reasons, the applicant's application under section 25(1) of the *IRPA* must be reconsidered.

[66] The parties did not suggest any questions for certification. I agree that none arise.

JUDGMENT IN IMM-3734-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Senior Immigration Officer dated August 14, 2017 (confirmed November 29, 2017) is set aside and the matter is remitted for reconsideration by a different immigration officer.

3. No question of general importance is stated.

"John Norris"
Judge

ANNEX I

RELEVANT STATUTORY PROVISIONS

Immigration and Refugee Protection Act, SC 2001, c 27

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[…]

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[…]

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3734-17
STYLE OF CAUSE:	REGGINOLD MAGSANOC v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 13, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	AUGUST 9, 2018

APPEARANCES:

Clifford McCarten	FOR THE APPLICANT
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarten Wallace Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Toronto, Ontario	FOR THE RESPONDENT