Federal Court  Cour fédérale

Date: 20211126

Docket: IMM-2800-20

Citation: 2021 FC 1311

Ottawa, Ontario, November 26, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

PRINCESS MMESOMA ONUOHA
ANGEL RHEMA ONUOHA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision by a visa officer [Visa Officer] cancelling their permanent resident visas. The Applicants filed separate applications for judicial review (Angel Rhema Onuoha in Court File IMM-2798-20 and Princess Mmesoma Onuoha in Court File IMM-2800-20) but subsequently requested that the matters be consolidated and heard together. By Order dated October 26, 2021, the matters were consolidated into this single

application, IMM-2800-20, and the style of cause in IMM-2800-20 was amended to reflect both Applicants.

Background

[2] The Applicants, Angel Rhema Onuoha and Princess Mmesoma Onuoha, are minor sisters, aged 8 and 12 respectively, and are citizens of Nigeria.

[3] Their mother, Irene Onuoha, applied for Canadian permanent residence as a member of the Federal Skilled Worker class. In her application, Ms. Onuoha included her daughters as accompanying dependants. In that regard, she submitted a form entitled “Declaration from Non-accompanying Parent/Guardian for Minors Immigrating to Canada” for each daughter, purportedly signed by her former husband, the children’s father, Chamberlin Onuoha.

[4] Ms. Onuoha became a permanent resident of Canada on July 13, 2019. On October 19, 2019, she entered Canada with her two daughters, who had been issued permanent resident visas and were seeking confirmation of permanent residence status upon landing. Upon arrival, a Canada Border Services Officer [CBSA Officer] advised Ms. Onuoha that an alert in CBSA’s files indicated that by a letter received by Abuja on October 25, 2018, her former husband had indicated that she might be attempting to remove the children from Nigeria and that she would be doing so without his consent. Ms. Onuoha claimed that she was unaware of her former husband’s change of heart, purported to phone him while being interviewed by the CBSA Officer and then advised the CBSA Officer that her former husband would attend at the Canadian Embassy to correct the situation and to allow the children to be landed.

[5] The CBSA Officer scheduled the examination to be continued on November 7, 2019 “or sooner should an answer be received from Visa post”. The CBSA Officer also sent an email to the visa post seeking instructions.

[6] On or about November 4, 2019, the Visa Officer sent an email to the CBSA Officer advising that given the conflicting information concerning the consent to the immigration of the children by their father the permanent resident visas for the children had been cancelled “to allow CBSA to proceed with appropriate action”.

[7] Although not referenced in the Global Case Management [GCMS] notes, it is not disputed that on November 7, 2019 Ms. Onuoha attended with the children for the scheduled continuation of the examination. At that time, she was advised that the children’s permanent resident visas had already been cancelled and that she was to return on November 25, 2019.

[8] On their attendance on November 25, 2019, the CBSA Officer advised Ms. Onuoha that inadmissibility reports [s 44(1) reports] concerning each of the children had been prepared, pursuant to s 44(1) of the *Immigration and Refugee Protection Act* [IRPA]. On the same date, pursuant to s 44(2) of the IRPA, the Minister’s Delegate referred the s 44(1) reports for an admissibility hearing.

[9] On December 20, 2019 CBSA provided disclosure with respect to the admissibility hearings which included the CBSA Officer’s notes referencing a November 4, 2019 email from the Visa Officer advising that the children’s permanent resident visas had been cancelled.

[10] On June 23, 2020, the Applicants filed their application for leave and judicial review of the Visa's Officer's decision cancelling their visas. That is the decision under review.

[11] There is, however, other post-decision related procedural history that is of note.

[12] First, following four postponements the admissibility hearing proceeded on July 14, 2020. On the same date exclusion orders were issued against each of the Applicants, pursuant to s 45(d) of the IRPA, on the basis that they are persons described in s 41(a) of the IRPA and s 20(1)(a). That is, they were found to be inadmissible because they did not hold valid visas. An application for leave and judicial review challenging the exclusion orders was filed on November 19, 2020 (Court File No. IMM-6006-20). However, it was not perfected and the application was therefore dismissed by this Court on July 14, 2021.

[13] In early 2020, the children's father commenced legal proceedings in the Ontario Superior Court of Justice, including the bringing a motion seeking return of the children to Nigeria. In its decision (*Onuoha v Onuoha*, 2020 ONSC 6849) that Court found that the children had been abducted within the meaning of s 22(3) of the *Children's Law Reform Act,* RSO 1990, c. C.12 [CLRA] and that their father had not consented to their removal to Canada. Further, that there had been no acquiescence or undue delay by the father in commencing the legal process seeking the return of the children. The Ontario Superior Court also did not accept the authenticity of a travel consent document purportedly signed by the father on February 14, 2019. On November 10, 2020, the Ontario Superior Court ordered that the children were to be returned by their mother to Nigeria within 30 days.

[14] Ms. Onuoha appealed that order. Her appeal was dismissed on March 2, 2021 by the Ontario Superior Court of Justice Divisional Court (2021 ONSC 1592), its reasons followed on March 19, 2021 (2021 ONSC 2228). By Order dated May 6, 2021 the Divisional Court issued a further order permitting police enforcement of the order for the children's return, including all steps reasonably necessary for the children to depart from Pearson Airport for Nigeria (2021 ONSC 3391). The Respondent advises the children were returned to Nigeria in May 2021.

Decision under review

[15] The admissibility hearing disclosure package includes a document dated November 25, 2019 generated by a CBSA immigration officer. This states:

> ON OR ABOUT 04NOV2019 THE FOLLOWING EMAIL WAS RECEIVED:
>
> Greetings from CPCO,
>
> As previously noted, the PA's ex-husband, and the father of two dependants listed on file, has sent correspondence whose declarations are in direct conflict with previous documents supplied by the PA.
>
> **In light of the conflicting information present, the PRVs for applicants ONUOHA, PRINCESS MMESOMA (1118661286) and ONUOHA, ANGEL RHEMA (1118661288) have been cancelled to allow CBSA to proceed with appropriate action.**

[16] Although the actual email does not appear in the certified tribunal record [CTR], its content is also reproduced and entered in the GCMS.

Issues and standard of review

[17] In my view, the issues in this matter can be framed as follows:

i. Did the Visa Officer breach the duty of procedural fairness owed to the Applicants?

ii. Was the Visa Officer's decision reasonable?

iii. If there was a breach of procedural fairness or the decision was unreasonable, what is the appropriate remedy?

[18] Questions of procedural fairness are reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 [*Khela*] at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 43). The Court, owing no deference to the decision-maker, must ask "whether the procedure that was followed was fair having regard to all the circumstances" (*Lipskaia v Canada (AG)*, 2019 FCA 267 at para 14; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para 56). If the Court is satisfied that the procedure was not fair, the application should be allowed.

[19] With respect to the second issue, when a court reviews the merits of an administrative decision, the presumptive stand of review is reasonableness. In this matter, no exceptions to that presumption have been raised nor apply (*Canada (MCI) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25). On judicial review, the Court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of

reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Did the Visa Officer breach the duty of procedural fairness owed to the Applicants?

Applicant's position

[20] The Applicants submit that the Visa Officer breached the duty of fairness owed to them by not permitting them an opportunity to respond to a "poison pen letter". The Visa Officer's cancellation of their permanent resident visas was based on a letter sent by their father, the content of which conflicted with Ms. Onuoha's documentation. The Applicants submit that they have not been provided with this conflicting information but that the CBSA Officer's notes disclosed with respect to the inadmissibility hearings refer to an information alert stating that a "PPL", or poison pen letter, was received by Abuja on October 25, 2018 from the alleged father of the Applicants informing of his concern that his ex-wife would travel out of Nigeria with the children without his consent. The Applicants submit that it was a breach of procedural fairness not to disclose this extrinsic evidence and allow them to respond to it. There was no reason why the October 25, 2018 letter could not have been put to them for response before their visas were cancelled, particularly given the lengthy delay between the receipt of the letter and the cancellation.

Respondent's position

[21] The Respondent concedes that Ms. Onuoha was not provided with the correspondence received by the Canadian authorities from her former husband. However, it submits that she was advised on October 18, 2019, at the port of entry, that a letter had been received stating that the children's father did not consent to the children immigrating to Canada. The Respondent submits that third party information need not be disclosed if the substance of the allegations are made known to the person concerned. Further, that between October 19 and November 4, 2019, when the visa were cancelled, Ms. Onuoha did not provide any new documentation to confirm that their father had consented to the children immigrating to Canada.

Analysis

[22] The Applicants refer to *Sapojnikov v Canada (Citizenship and Immigrations)*, 2017 FC 964 [*Sapojnikov*] where Justice McTavish held:

> [20] It is a breach of procedural fairness not to disclose extrinsic evidence, such as a poison pen letter, that is subsequently relied upon in making a decision: *Qureshi v. Canada (Citizenship and Immigration)*, 2009 FC 1081 at para. 28, [2010] 4 F.C.R. 256.

[23] In this case, the CTR does not contain any correspondence from the Applicant's father. A GCMS notes entry made on October 24, 2018 by "CPC-Ottawa" indicates that "CPC-O RAU" received (when is not stated) a "Poison Pen" and that an email was sent to "CIO-Sydney" regarding the information received (when is not stated). The content of that letter appears to then be entered into the GCMS notes. Given that this is the only documentation from the Applicants'

father referred to in the record (the CTR does include a letter dated October 23, 2018 from the solicitors for the children's father to the Canadian High Commission in Nigeria to the same effect, but it is unclear when or how this was received), it seems apparent that it was solely in reliance on the father's letter (and possibly the solicitor's letter) – presumably sent on or about October 24, 2018 letter [October Letter] - that the Visa Officer cancelled the Applicants' permanent resident visas. However, unlike *Sapojnikov*, this is not a circumstance where the existence of the letter(s) was never disclosed prior to the visa officer making a decision.

[24] Further, even when there is reliance on the extrinsic evidence in making a decision, this does not necessarily mean that the evidence had to be provided to the Applicants. In some instances, putting the allegations to the applicant may be sufficient if, having been given notice of the allegation, there was an adequate opportunity to respond (*Qureshi v Canada (Citizenship and Immigration)*, 2009 FC 1081 at 29-31).

[25] In this regard, the Respondent refers to *Wang v Canada (Citizenship and Immigration)*, 2011 FC 812 [*Wang*]. There, during an interview the visa officer disclosed that an anonymous letter had been received alleging that the applicant's marriage was not genuine. Justice Mosley found that there was nothing in the IAD's reasons to suggest that it relied on the poison pen letter in reaching its conclusion as to the *bona fides* of the marriage:

> [13] Moreover, the applicant's contention that there was a breach of procedural fairness because the letter or its particulars were not disclosed to the applicant or her husband is without merit. It has been held that a "poison pen letter" does not necessarily have to be disclosed to an applicant so long as the applicant is made aware of the allegations contained therein: *D'Souza v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 57, 321 F.T.R. 315 at para. 14. This is what occurred here. During the applicant's

> husband's interview, the visa officer explicitly indicated that they had received an anonymous letter and gave him the opportunity to respond to the visa officer's concerns: Visa Officer's Decision, Applicant's Record, pgs. 50-52. No breaches of natural justice can said to have been committed.

[26] In this case, the CBSA Officer's notes refer to the "info alert" found in CBSA's files indicting that Ms. Onuoha's former husband did not consent to immigrating to Canada. The notes indicate that the info alert states that "PPL received by Abuja on 25 October 2018 from alleged father of subject informing of his concern that his ex-wife would travel out of Nigeria with their 2 children (including this subject) without his consent. PPL uploaded to Correspondence Incoming".

[27] The notes then record:

> MOTHER STATED THAT THE EX SPOUSE WAS DEMANDING INTERCOURSE FROM SUBJECT AND WHEN SHE EVENTUALLY DECLEINED HE STATED THAT HE 'WOULD DEAL WITHHER'. MOTHER WAS UNAWARE OF THE LETTER SENT OR THE SUDDEN CHANGE OF HEART OF EX HUSBAND FOR THE CHILDREN TO IMMIGRATE TO CANADA.
>
> THE MOTHER CALLED THE EX SPOUSE WHILE SPEAKING WITH ME AND STATED THAT HE WILL ATTEND THE EMBASSY TOCORRECT THE SITUATION. SHE STATED TO ME THATHE IS WILLING TO RETRACT THE STATEMENTS AND ALLOW THE CHILDREN TO LAND AND TRAVEL WITH HER FREELY. (CANNOT VERIFY IF SHE WAS INDEED TALKING TOHER EX-SPEOUSE).
>
> I ASKED THE MOTHER FOR THE PHONE NUMBER AND NAME OF THE EX SPOUSE AND SHE STATED THE FOLLOWING: CHAMBERLAIN ONUOHA….

> EXAMINATION FURTHERED TO 07NOV2019 AT 1000AM
> AT LBPIA T1 IMMIGRATION OR SOONER SHOULD AN
> ANSWER BE RECEIVED FROM VISA POST
>
> ….

[28] There can be little doubt from Ms. Onuoha's reaction during the CBSA interview, purporting to call her former spouse and stating that he had agreed to correct the situation and permit the immigration of the children, that she knew the substance of the allegation – being that her former husband had not consented to the children immigrating to Canada. Further, in her affidavit filed in support of this application for judicial review, she states that the CBSA Officer informed her that her former spouse had sent a letter indicating that she did not have his consent for the children to move to Canada. She attests that she told the CBSA Officer that her former spouse had provided his genuine consent on the form and had not informed her he had changed his mind. She also attests that she then called her former spouse who verbally confirmed to her that he would inform the High Commission of Canada that he was consenting to the children to moving to Canada and that she communicated this to the CBSA Officer.

[29] Therefore, as Ms. Onuoha clearly knew the substance of the allegation, the question in this matter is whether she had an opportunity to respond. What constitutes a meaningful opportunity to respond will vary, depending upon the factual context. The Visa Officer cancelled the Applicants' visas on or about November 4, 2019, three days prior to the scheduled continuation of their examination, and 16 days after their arrival in Canada. While the Respondent submits that during these intervening 16 days, Ms. Onuoha did not submit new documentation to establish that the children's father did consent to their immigration, the Respondent points to no evidence indicating that Ms. Onuoha was advised that a decision to

cancel the children's visas could be made without notice before the scheduled reconvening of the interview. She was not provided with a procedural fairness letter or given any indication that there was a timeframe within which she must respond. In my view, in these circumstances, Ms. Onuoha could have reasonably expected the resumed interview was an opportunity to address the lack of consent allegation.

[30] The Respondent points to Ms. Onuoha's affidavit in which she states, among other things, that had she been given an opportunity to respond that she could have satisfied the concerns, including asking for more time to resolve the custody issue. The Respondent states that the custody issue has reached a final resolution, referencing the decision of the Ontario Superior Court. This is true, but that decision was reached over a year after the Visa Officer cancelled the visas and was not before the Visa Officer. Accordingly, when the Visa Officer made their decision they had only conflicting information and the information received from the CBSA Officer that Ms. Onuoha was following up with her former spouse.

[31] In my view, in these particular circumstances, there was a breach of the duty of procedural fairness as Ms. Onuoha, acting on behalf of the minor Applicants, was not afforded a meaningful or fair opportunity to respond.

[32] This is not to say that the subsequent custody decision of the Ontario Supreme Court is not significant or can be ignored. It is very significant and will be addressed with respect to the Applicants' remedy.

Was the Visa Officer's decision reasonable?

Applicants' position

[33] The Applicants submit that the Visa Officer's decision lacks transparency and fails to reveal a rational chain of analysis (*Vavilov* at para 103). While the visa cancellations were made in order "to allow CBSA to proceed with the appropriate action", there is no indication of what the appropriate action would be or why the cancellations were required to proceed with the appropriate action. If the appropriate action would be the investigation of the conflicting information to determine whether Ms. Onuoha's former spouse had indeed provided his consent, then the CBSA Officer could have continued postponing the landing interview until the conflicting information was resolved. There was no need to cancel the visas in order to continue the investigation.

Respondent's position

[34] The Respondent submits that visa officers have implicit authority to revoke or cancel a visa which later turns out to have been misused and that visa officers retain residual jurisdiction to reopen visa applications to do justice in unusual circumstances. The Respondent submits that the cancellation of the visas in these circumstances was reasonable, fair and necessary given the serious allegations of child abduction.

Analysis

[35] In *Sanif v Canada*, 2020 FC 115 [*Sanif*] Justice Mosley discussed the jurisprudence concerning the power of visa officers to revoke a visa and stated that while there is a presumption that once a visa is issued it remains valid for the duration of the term for which it is granted, there is an exception to this general principle where the visa is revoked or cancelled by a visa officer (*Sanif* at para 27 citing *Canada (Minister of Citizenship and Immigration) v. Hundal*, [1995] 3 F.C. 32, [1995] F.C.J. No. 918, *(T.D.)*, at para. 19). Further:

> [31] In *Hundal*, Mr. Justice Rothstein considered that the authority to revoke arose by necessary implication, in part because the statute in effect at the time required that the person seeking admission be in possession of a "valid immigrant visa". He concluded, at paragraph 19, that when a visa officer cancels a visa it is no longer "valid" citing *Minister of Employment and Immigration v. Rogelio Astudillo Gudino*, [1982] 2 F.C. 40 (F.C.A.). While the current legislation does not refer to validity, I think it is implicit in the obligation in paragraph 20(1) (a) of the IRPA that any foreign national who seeks to enter Canada to become a permanent resident must establish that they hold the visa required under the regulations. I also think that the reference to validity is implicit in the obligation at section 6 of the regulations that a foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa. Revocation or cancellation of the visa requires some decision by the visa officer. As long as a decision to revoke or cancel has been made, the visa is no longer valid.
>
> [32] In *Hundal* it was found that the visa was initially valid, as in this case, and the High Commission had only the intention to investigate (*Hundal*, at paragraph 21). Wanting to investigate the suspect job offer, the High Commission convoked Ms. Sanif to an interview. Only after the failure of Ms. Sanif to attend the interview for that purpose did the High Commission proceed to cancel the visas in light of the circumstances which included the difficulties encountered in attempting to communicate with Ms. Sanif by telephone on December 1, 2008.
>
> [33] In this instance, the officer was acting reasonably on the basis of the information that he had before him. Questions had

> been raised about the validity of the job offer and the principal applicant had failed to attend an interview scheduled to address those questions. The officer had the authority to cancel or revoke the visas on December 1, 2008 if he was not satisfied that the applicants were not inadmissible. Once Officer Chong had cancelled the visas, they were no longer valid and could not be used to enter Canada.
>
> [34] There was no denial of procedural fairness in the manner in which the officer proceeded. Ms. Sanif was informed that there was a problem with the visas and she was given an opportunity to discuss the matter in an interview with the immigration officer. The officer, through his assistant, had accommodated her schedule by deferring the interview until the following Monday.
>
> [35] Ms. Sanif can't now complain that she was denied an opportunity to be heard before the decision was made: *Mugu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 384, [2009] F.C.J. No. 457, at para. 64; *Wayzhushk Onigum Nation v. Kakeway*, 2001 FCT 819, [2001] F.C.J. No. 1167; *Begum v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 164, [2006] F.C.J. No. 196, at para. 32.

[36] In *Ali v Canada (Citizenship and Immigration)*, 2012 FC 710 [*Ali*], Justice McTavish held that the determination that the applicants met the requirements of the country of asylum class was but one step in the process that could lead to the issuance of a permanent resident visa. In that regard, she held that such intermediate decisions made in the course of the assessment process are not "final decisions" for the purposes of the *functus officio* doctrine and that a visa officer may reverse an initial or preliminary finding made in the context of an application for a permanent resident visa. Further:

> [31] Moreover, even if I were satisfied that Officer Sauvé had made a final decision (which I am not), I would nevertheless conclude that visa officers retain the discretion to reopen a visa application to do justice in unusual circumstances: see, for example, *Kheiri v. Canada (Minister of Citizenship and Immigration)* (2000), 193 F.T.R. 112, 8 Imm. L.R. (3d) 265 at para. 8; *Moumivand v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 157, [2011] F.C.J. No. 354 (QL) at para.

> 17; *Grigaliunas v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 87, [2012] F.C.J. No. 87 (QL).
>
> [32] Visa officers must retain the discretion to look at previous decisions in order to ensure that immigrants are not inappropriately let into Canada: *Lo v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1155, 229 F.T.R. 145 at para. 33. This policy concern applies equally in the refugee context where the identity of one of the applicants is at issue.
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> …..
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> [36] Indeed, in *Chan v. Canada (Minister of Citizenship and Immigration)*, [1996] 3 F.C. 349, 114 F.T.R. 247 at para. 28, this Court recognized that new evidence demonstrating an applicant's inadmissibility may legitimately require the reconsideration of a visa application, *even after the visa has issued*.
>
> [37] As a consequence, I am satisfied that Officer Mjanes did not err in law in reconsidering whether the applicants met the country of asylum class definition.

[37] I agree with the Respondent that these were unusual circumstances. The Applicants' permanent resident visas appear to have been issued on the strength of the Declarations, that is, the documentation submitted by Ms. Onuoha indicating that the children's father consented to the children immigrating to Canada. It is entirely unclear to me why – when the Canadian immigration officials had received the father's letter by October 24, 2018, advising of his concern that his former wife would attempt to travel out of Nigeria with the children and advising that he did not consent to this and alerting them that any documentation that she might provide to the contrary would be fraudulent – that the Applicant's permanent resident visas were issued by the visa post without any further inquiry. Based on the record before me, the visa post clearly dropped the ball. This had a very serious consequence: the issuance of the Applicants' permanent resident visas.

[38] However, when the Applicants arrived in Canada the CBSA Officer was alive to the "info alert". The GCMS notes indicate that on October 19, 2019, the CBSA Officer sought instructions from the visa post as to how the Officer should proceed with the landings, noting that the mother apparently spoke with the father while in the office of the CBSA Officer and that she had stated that the father would contact the embassy to retract the derogatory information he provided. The GCMS notes indicate that on November 5, 2019 the Visa Officer responded, advising that the father had sent correspondence (presumably the October Letter as it is the only correspondence referenced in the GCMS notes) the content of which was in direct conflict with the documents previously (based on the record this would be the Declarations which Ms. Onuoha actually subsequently provided) and, in light of the conflicting information, the visas were cancelled.

[39] Viewing the record in whole, it is apparent that the visas were cancelled because they should never have been issued by the visa post while it had the unresolved conflicting information as to the father's consent in its possession. Therefore, the visa post's email indicating that the visas had been cancelled "to allow CBSA to proceed with the appropriate action" is, at best, ingenuous. Nor is it transparent. It is also not clear to me why, given that the children were already in Canada but had not been landed – that is, their permanent resident status had not been confirmed – it was necessary to immediately cancel the visas before providing Ms. Onuoha with an opportunity to respond to the concerns at the interview which was scheduled to reconvene on November 7, 2019. While I agree that the Visa Officer had the authority to cancel the visas, in the circumstances that existed at the time, the cancellation of the visas was both unreasonable and procedurally unfair.

[40] The Respondent points out that the Ontario Superior Court found that the children had been abducted without their father's consent and that Ms. Onuoha had utilized a fraudulent travel document in effecting their abduction.

[41] I emphasise that parental child abduction is heinous and is to be condemned in all circumstances.

[42] Again, however, the Ontario Superior Court's decision was issued on November 10, 2020. That is, nearly a year after the November 4, 2019 decision of the Visa Officer to cancel the Applicants' visas. Thus, while that decision clearly resolves the question of parental consent and custody, it did so after a hearing and consideration of the evidence. My point is that the outcome of that proceeding cannot serve as justification for the Visa Officer's earlier decision or the breach of procedural fairness.

[43] However, the determination of the Ontario Superior Court does, in my view, very much play a role in the remedy available to the Applicants in this case.

If there was a breach of procedural fairness or the decision was unreasonable, what is the appropriate remedy?

Applicant's position

[44] The Applicants seek an order that the judicial review be granted and that the Visa Officer's decision be set aside and the matter referred back to another officer for reconsideration.

Respondent's position

[45] The Respondent submits that even if there was a breach of procedural fairness, the Applicants have not demonstrated that a remedy should issue. The remedies available under s 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7 are discretionary and not every breach of procedural fairness will give rise to a remedy. Here the Ontario Superior Court determined that the Applicants were abducted and, accordingly, the judicial review should be dismissed. The Respondent references *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [2004] 1 SCR 202 [*Mobil Oil*]; *Stevens v Conservative Party of Canada*, 2005 FCA 383 [*Stevens*]; and, *Maple Lodge Farms Ltd v Canada (Food Inspections Agency)*, 2017 FCA 45 in support of its position.

Analysis

[46] Section 18.1(3) states

> **(3)** On an application for judicial review, the Federal Court may
>
> > **(a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
> >
> > **(b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
>
> **(4)** The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> > **(a)** acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

> **(b)** failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> **(c)** erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> **(d)** based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> **(e)** acted, or failed to act, by reason of fraud or perjured evidence; or
>
> **(f)** acted in any other way that was contrary to law.

[47] The use of the term "may" in ss 18.1(3) and 18.1(4) preserves the traditional discretionary nature of judicial review. As stated by the Supreme Court in *Khosa*:

> [36] In my view, the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case": see *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 575. Further, "[i]n one sense, whenever the court exercises its discretion to deny relief, balance of convenience considerations are involved" (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 3-99). Of course, the discretion must be exercised judicially, but the general principles of judicial review dealt with in *Dunsmuir* provide elements of the appropriate judicial basis for its exercise.

[48] And, in *Strickland v Canada (Attorney General)*, 2015 SCC 27 the Supreme Court held:

> [37] Judicial review by way of the old prerogative writs has always been understood to be discretionary. **This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief**: see, e.g., D. J. Mullan, "The Discretionary Nature of Judicial Review", in R. J. Sharpe and K. Roach, eds., *Taking Remedies*

> *Seriously: 2009* (2010), 420, at p. 421; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 575; D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at pp. 686-87; Brown and Evans, at topic 3:1100. Declarations of right, whether sought in judicial review proceedings or in actions, are similarly a discretionary remedy: "... the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded" (Dickson C.J. in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 90, citing S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at p. 513).
>
> [38] The discretionary nature of judicial review and declaratory relief is continued by the judicial review provisions of the Act. This is underlined both by the reference in s. 18 to the traditional prerogative writs and other administrative law remedies which have always been considered discretionary and by the use of permissive rather than mandatory language in relation to when relief may be granted. Section 18.1(3) provides that "[o]n an application for judicial review, the Federal Court may" make certain orders in the nature of those traditional remedies. This statutory language "preserves the traditionally discretionary nature of judicial review. As a result, judges of the Federal Court ... have discretion in determining whether judicial review should be undertaken": *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 31; *TeleZone*, at para. 56.

(see also *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at paras 51-52).

[49] And, in *Mobil Oil* the Supreme Court of Canada held that in the ordinary case, Mobil Oil would be entitled to a remedy responsive to the breach of fairness. However, the remedies sought by Mobil Oil in the appeal were *per se* impractical since the result of the cross-appeal was that the administrative decision maker would be bound in law to reject that application:

> The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: *Cardinal, supra*. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., *Harelkin v. University*

> *of Regina*, [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, viz., one which has an inevitable answer.

[50] In this case, very significant to the question of remedy is the subsequent decision of the Ontario Superior Court. This found that there was a Nigerian Divorce Order which formalized an agreement between Ms. Onuoha and her former spouse that they would have joint/shared custody of the children; that this was an extra-provincial order that should be and was recognized and enforced; that the children were abducted by Ms. Onuoha and that the children's father did not consent to the children immigrating to Canada; that a travel consent document purportedly signed by the children's father was fraudulent; and, that recognition of the Divorce Order required the Ontario Superior Court to order the return of the children – which it did. The Ontario Divisional Court affirmed the decision.

[51] The Respondent advises and counsel for the Applicant confirmed when appearing before me that the children have been returned to Nigeria.

[52] In these circumstances, if the Visa Officer's decision to cancel the visas were quashed and the matter sent back for redetermination the outcome is inevitable. The custody decision of the Ontario courts simply cannot be ignored. It was issued subsequent to the Visa Officer's decision but the conflicting information as to the consent of children's father to them immigrating to Canada that was before the Visa Officer when the Applicants' permanent resident visas were issued now been definitively resolved – albeit in a different forum. Upon redetermination, the Applicants' permanent resident visas would again have to be cancelled in

light of these circumstances. Put otherwise, in these circumstances redetermination would be an exercise in futility.

[53] When appearing before me the Applicants submitted that if the matter were sent back for redetermination then they would have the opportunity to withdraw their applications for permanent residence. This would ensure that they would not be prejudiced by the cancelled visas which would have to be declared in the future should they wish to travel to Canada (referencing *Mandivenga v Canada (Citizenship and Immigration)* 2019 FC 1631 at paras 12-14 and *Khaniche v Canaa (Public Safety and Emergency Preparedness)* 2020 FC 559). In my view, this is of no merit.

[54] First, it is not at all apparent to me that the applications can be withdrawn. Based on the record before me, there was only one application for permanent residence which was made by Ms. Onuoha in which she listed her children as accompanying dependants. Her application was granted and, based on the likely fraudulent Declarations, the children were issued the visas that were later cancelled.

[55] Second, the Applicants have been found to be inadmissible and exclusion orders have issued. While the Applicants filed an application for judicial review of the decision to issue the exclusion orders, the application was not perfected and was therefore dismissed. Even if the Applicants were able to withdraw their applications for permanent residence, the exclusion orders remain on record. Any alleged future potential prejudice will not be avoided.

[56] Third, I am not persuaded that there is any potential of prejudice. The Applicants are children. They had no involvement in making the application for permanent residence and cannot be held accountable or faulted for Ms. Onuoha's actions. Indeed, they are victims of parental abduction. To suggest that if, at some later time their father consents for them to come to Canada or that they might want to do so when they are adults, that they would be prejudiced by the visa cancellations is speculation. Should they apply for new visas then the circumstances around the cancelled visas could be explained and well documented.

[57] Finally, I will add that it causes me concern that it is, in reality, Ms. Onuoha who is seeking this remedy allegedly for the benefit of the children. In my view, her motivation is suspect in attempting to avoid a record of a cancellation of the children's visas by being permitted to withdraw the application.

[58] Accordingly, although the Visa Officer's decision to cancel the visas was made in a procedurally unfair manner and was unreasonable, in these unusual and exceptional circumstances I am exercising my discretion and declining to grant the remedy sought. That is, I am declining to order that the decision cancelling the visas be set aside and referred back for redetermination.

JUDGMENT IN IMM-2800-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. However, given the very unusual and exceptional circumstances of this case, I am exercising my discretion under s 18.1(3) of the *Federal Courts Act* and declining to grant the Applicants the remedy that they seek. The Visa Officer's decision cancelling their visas for permanent residence will not be set aside and will not be remitted for redetermination. The outcome of such a redetermination is now inevitable given the custody proceeding determined by the Ontario Courts;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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