Date: 20081217

Docket: IMM-207-08

Citation: 2008 FC 1391

Ottawa, Ontario, December 17, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

EUGENIA ANTONIETA ROJAS GUTIERREZ,
CAROLINA GENESIS SOLIS ROJAS,
AND RUTH ESTER SOLIS ROJAS

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an immigration officer (Officer), dated December 11, 2007 (Decision) refusing the Applicants' Humanitarian and Compassionate (H&C) grounds application under section 25 of the Act.

BACKGROUND

[2] Eugenia Gutierrez (Principal Applicant) was born on March 15, 1965 in San Felipe, Chile. She is a citizen of Chile and no other country. The Principal Applicant's daughter, Carolina, was born April 11, 1988 in Chile, and her daughter, Ruth, was born September 8, 1985 in Chile. Both daughters are citizens of Chile and of no other country.

[3] The Principal Applicant and her daughters arrived in Toronto, Canada in January 1996. They were found not to be Convention refugees on September 26, 1997. The Applicants did not challenge this decision.

[4] On July 23, 1999, a warrant for the arrest of the Principal Applicant was issued when she failed to appear for removal on July 20, 1999. The Principal Applicant was detained until her removal on October 21, 1999. Her daughters were not removed as the Principal Applicant refused to indicate where they were located.

[5] The Principal Applicant came back to Canada in April 2000 by hiding in a van and crossing the border at Niagara Falls. On March 8, 2000 she was arrested again and, on March 18, 2002, a departure order was made against her. She was released on a cash bond on April 16, 2002.

[6] The Principal Applicant received a negative Pre-Removal Risk Assessment decision on November 24, 2004. The Applicants made an application to remain in Canada on H&C grounds on September 14, 2005.

[7] The father of the girls, Manuel Solis, arrived in Canada in 1995 and lived with the Principal Applicant until February of 2002, when he abandoned the family. None of the family members have heard from Manuel, except for a phone call in 2006. They are not certain whether he is in Canada or not. The Officer confirmed that Manuel is a permanent resident. Manuel and the Principal Applicant have a son named Jacob, who was born on September 12, 2001. Jacob is a Canadian Citizen.

[8] The Principal Applicant has worked for Rose Cleaning in Toronto since September 2002 to the present. She works Monday to Friday at Rose Cleaning and on Saturdays she cleans houses on private contracts.

[9] Jacob is in grade one and has memory and language problems. Ruth graduated from high school in 2005 and has been working since graduation. Caroline is still attending high school.

[10] The Officer who handled the Applicants' file called the Principal Applicant's home on two occasions prior to the Decision. The first call, in early December 2007, was about 10 minutes long. The Officer asked who Jacob's father was, as the application stated that the Principal Applicant had been abandoned by her husband 12 years earlier. The Principal Applicant believes that the consultant who filed her application made an error regarding this issue. The Officer asked the

Principal Applicant why she did not notice this mistake when she signed the application. The Principal Applicant says she did not get to address this issue because she was cut off by the Officer.

[11] The Principal Applicant says that she was asked by her consultant, Clarence White, to sign her application form before any information was placed on the form. He assured her that he would complete the forms with the information the Principal Applicant provided. The documents were submitted the following day, but the Principal Applicant says she did not receive a copy of the documents.

[12] The Officer told the Principal Applicant that she was with her ex-husband in 2001. The Principal Applicant confirmed that was correct and explained that she had lived in Canada for 12 years and that she had been separated from Manuel since February 2002. The Principal Applicant alleges that the Officer became aggressive and told her in Spanish that she was a liar.

[13] The Officer also informed the Principal Applicant that her ex-husband had included or named their daughters in an immigration application in 2005. The Principal Applicant responded that she did not know about that, but the Officer seemed unconvinced. The Principal Applicant felt that the Officer was trying to suggest that she and her husband were still together.

[14] The Officer asked the Principal Applicant what her daughter Ruth was doing. The Principal Applicant informed the Officer that she was working in a factory. The Officer allegedly told the Principal Applicant that she and her daughter were working illegally and that they should stop.

[15] The Officer also asked what language Jacob spoke at home. The Principal Applicant told her that he speaks English at home mostly, and a little bit of Spanish, but not much. The Principal Applicant alleges that the Officer got mad and said that on the application it said that Jacob speaks no Spanish. The Principal Applicant says that the Officer spoke very aggressively to her about her son's language abilities, particularly since there is a report card that says he has trouble understanding English. The Principal Applicant says she tried to explain that Jacob has language difficulties in Spanish and English and that he spent a year enrolled in a special program for children with language problems. The Principal Applicant says that the Officer did not afford her the time or opportunity to explain everything in detail and that the Officer was angry at her and continued to call her a liar.

[16] The Officer called back one week after the initial phone call and asked who Mario Skouteris was. The Principal Applicant informed her that he was her boyfriend. The Officer asked why the application said they had been together for three years, when Mario's letter said one year. The Principal Applicant explained that the consultant must have made an error because she had known Mario for three years as a friend, but her relationship with him had started just over a year ago (at the time of the application).

[17] The Officer asked the Principal Applicant again where Ruth was working and where she had worked previously. The Principal Applicant informed the Officer that Ruth was working in a factory and had previously been a superintendent. The Officer asked again what language was

spoken at home and what language her son spoke. The Principal Applicant informed the Officer that she and her daughters spoke to her son mostly in English.

[18] The Principle Applicant alleges that the Officer reminded the Principal Applicant that the Officer had come to Canada at age 12 and had learned both English and her mother tongue. She asked why, if she could do this, Jacob could not. The Principal Applicant responded that Jacob had problems, but she alleges that the Officer cut the Principal Applicant off and again called her a liar.

[19] The Principal Applicant's daughter, Carolina, cannot read or write in Spanish, but she can understand it.

[20] The Officer denies that she ever called the Principal Applicant a liar, or that she cut her off, interrupted or refused to let the Principal Applicant speak, or made any suggestion that the Principal Applicant and her husband were still together. She also says that she did not tell the Principal Applicant and her daughter to stop working, or compared her child's abilities to learn a language to her own, or got angry at the Principal Applicant.

DECISION UNDER REVIEW

[21] The Officer held that the Applicants would not face unusual and undeserved or disproportionate hardship if they were to apply for permanent residency from outside of Canada.

[22] The Officer states that the Principal Applicant has been working without authorization for the majority of the years she has been residing in Canada. She was only issued one work permit, which was valid from April to November 1997. The Principal Applicant's employer, Rose Cleaning, did not provide sufficient evidence to establish the difficulties that would occur from replacing the Principal Applicant at the same pay scale. The letter from the Principal Applicant's second employer, a private residence where she cleans, also did not mention or provide sufficient evidence that it would be difficult to replace the Principal Applicant. The Officer notes that both employers could also turn to other existing immigration programs or initiatives to hire employees.

[23] The Officer notes that no financial documents were submitted to substantiate the Principal Applicant's claim to her monthly salary. The Principal Applicant also did not disclose any bank statements with her current savings. Although the Officer accepted that the Principal Applicant was working in Canada, the Officer did not find that there was sufficient evidence to assess the Principal Applicant's economic establishment or earnings in Canada.

[24] While the Officer noted that the wages the Principal Applicant received in Chile are lower then those in Canada, the Officer was not satisfied that the Principal Applicant's situation is exceptional or constitutes unusual and undeserved or disproportionate hardship. The Officer notes that requiring the Principal Applicant to return to Chile to apply in the normal manner would cause disruption. However, the Officer was not satisfied that the Principal Applicant's situation is exceptional and not anticipated by the legislation. The Officer was also not satisfied that the situation that the Principal Applicant currently finds herself in was not primarily of her own making.

[25] The Officer finds that the Principal Applicant and Mr. Skouteris provide conflicting information as to the duration of their relationship. There is also no mention in Mr. Skouteris's letter that he has been involved in the lives of the Principal Applicant's children. The couple do not live together, nor do they live in the same place. The Principal Applicant lives in Toronto while Mr. Skouteris lives in Concord, ON. The Officer did not find that there was enough information and documentation provided to properly assess the *bona fides* of the relationship.

[26] The Officer comments that the Principal Applicant has continually violated the Act by working without authorization, by re-entering Canada after removal without first applying or receiving authorization to return, and by not divulging the whereabouts of her daughters who were also subject to a removal order. She concludes that the Principal Applicant is inadmissible for failing to comply with the Act.

[27] The Officer makes it clear that she has taken into account the best interests of the children. The Officer concluded that, while Jacob may have difficulties adjusting to a new environment, his mother would be there to assist him in adapting to a new culture and society. Also, Jacob's father is a permanent resident of Canada, so the boy may be able to stay in Canada with his father, or he could reside in Chile with his mother.

[28] The Officer finds that the Principal Applicant's daughter, Ruth, may have adjustment issues with respect to re-integrating into Chilean society and culture, but she was not satisfied that this is a disproportionate hardship. The Officer notes that Ruth's school marks were sufficient for university

but due to her illegal status in Canada she is not able to attend university. However, as a Citizen of Chile, she would be permitted to enrol at a university in her country of origin. The Officer notes that there is no information provided about whether Ruth is taking any courses with the Toronto school board or online courses with a university. The Officer acknowledges that, although Ruth has been in Canada for 10 years and is an adult, it may be difficult for her to return to Chile. However, it might be easier to cope with that situation as an adult. The Officer was not satisfied that Ruth's personal circumstances would give rise to a usual, undeserved or disproportionate hardship if she had to obtain a permanent resident visa from outside of Canada.

[29] The Officer found that neither the Principal Applicant nor Carolina provided information with regards to Carolina's level of establishment in Canada. There is insufficient evidence to show how Carolina has integrated into Canadian society other than her 25 hours of volunteer work. No other supporting information regarding her activities while in Canada was provided. Carolina has alternatives: her father is a permanent resident of Canada and could sponsor her.

[30] Although the Principal Applicant addressed her daughters' Spanish language inefficiencies, the Officer states that she spoke with the Principal Applicant in Spanish, as she admitted that her English was not good, which caused the Officer to question what language was being spoken at home. The Officer found that the Principal Applicant eluded the Officer's question of what language the Principal Applicant spoke with her children. The Officer gives very little weight to the Principal Applicant's statement that her daughters speak very little Spanish as there was no evidence to demonstrate this. The Officer accepted that their English may be stronger. However,

Spanish was their first language and they would not have many difficulties in becoming fluent in their native language if they were to return to Chile.

[31] After reviewing and carefully considering the best interests of the children, the Officer was not satisfied that it would constitute unusual or undeserved hardship if the two youngest children were to accompany their mother to Chile. With respect to disproportionate hardship, the Officer was satisfied that there may be adjustment issues, but the Officer was not satisfied they would be disproportionate.

ISSUES

[32] The Applicants raise the following issues:

1) Whether the Decision of the Officer was unreasonable as it failed to demonstrate the requirement of being alive, alert and attentive to the best interests of the Principal Applicant's children?
2) Whether a well informed member of the community would perceive bias when reading the evidence of the interview conducted by the Officer?
3) Whether there has been a breach of fairness and natural justice through the negligent conduct of the Applicants' former consultant?
4) Whether the Decision of the Officer was unreasonable?

STATUTORY PROVISIONS

[33] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11. (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

> child directly affected, or by
> public policy considerations.

STANDARD OF REVIEW

[34] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[35] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[36] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 61 (*Baker*), the Supreme Court held that the standard of review applicable to an officer's decision of whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness *simpliciter*. Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review

applicable to issues (1) and (4) to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[37] The Applicants have also raised procedural fairness issues to which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENTS

The Applicants

Best Interests of the Children

[38] The Applicants submit that the Officer does not consider the language difficulties of Jacob in her Decision. Although the Officer states that she considered the best interests of the children, including Jacob, she makes no determination on whether it would or would not be in the best interests of the Principal Applicant's family to forcibly leave Canada. The Applicants say that the Decision fails to demonstrate an approach which is alive, alert and attentive to the best interests of the children, particularly Jacob, and is unreasonable on this ground.

[39] The Applicants argue that the values underlying the exercise of a section 25 discretion are reflected in the wording of the section. A decision-maker must base his or her decision on "compassionate or humanitarian considerations." As well, decision-makers must focus on the best interests of any children affected by their decision. According to the Applicants, these words and meanings are central to a determination of whether an individual decision is a reasonable exercise of the power conferred by Parliament.

[40] The Applicants submit that the *Baker* guidelines indicate that compassionate or humanitarian discretion is warranted when an applicant will suffer unusual and undeserved or disproportionate hardship if compelled to leave Canada. As well, the Applicants note that the inclusion of the principle of the best interests of a child into the immigration legislation does not mean that the interests of the child outweigh all other factors. However, it is one of the many important factors that officers need to consider when making an H&C or a public policy decision.

[41] The Applicants submit that the Officer gave a superficial consideration to the interests of Jacob. In rendering a Decision that is inconsistent with the requirements of the guidelines and the purpose of a humanitarian review, the Officer rendered an unreasonable Decision. The Applicants submit that a more thoroughgoing analysis was required by the Officer in this case in order to comply with the standard set by this Court for an assessment of the best interests of the child: *I.G. v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1704 (F.C.T.D.) and *Love v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1904 (F.C.).

[42] The Applicants point out that the only reference made by the Officer to Jacob is that, if deported, the Principal Applicant would be with Jacob in order to help him adjust to life in Chile, or he may be able to stay in Canada with his father. The Officer does not offer an explanation as to why it would be in Jacob's best interests to be with his father and separated from his mother. The Officer also does not offer an explanation as to why a prolonged and indefinite separation from his mother would be in the best interests of Jacob. Nor does she discuss how taking Jacob out of Canada, to a country he has never lived, with learning issues and little knowledge of Spanish, would be in his best interests. The Applicants cite and rely upon *Jack v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1189 (F.C.T.D.):

> **4** … There is no reference whatsoever regarding the Canadian born child's involvement in schooling and in the community in Canada. Equally, there is absolutely no analysis of what the impact on the Canadian born child would be if his mother was forced to leave Canada and chose to leave without him…

[43] The Applicants conclude that the Decision of the Officer was not alive, alert and attentive to the best interests of the children and is unreasonable for this reason.

Reasonable Apprehension of Bias

[44] The Applicants submit that, throughout the telephone interview with the Principal Applicant, the Officer was aggressive, angry, called her a liar and would not listen to her and cut her off when she was speaking. The Officer also inquired why, if the Officer could learn another language at age 12, Jacob could not also pick up another language.

[45] The Applicants submit that a well-informed member of the community would perceive bias when reading the Officer's notes and reading the Applicant's affidavit evidence about what was said in the telephone interviews. The statements made by the Officer do not disclose the existence of an open mind.

[46] The Applicants cite and rely upon the dissent in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (*Liberty*) at page 394 for the test of reasonable apprehension of bias and upon *Baker* at paragraph 47.

[47] The Applicants submit that the requirement of an officer to approach a determination in an open, unbiased way is one of the essential components to a fair hearing or process. They cite *Sterling v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 652 (F.C.) where this Court held that the comments made by an Officer in an H&C interview indicated a reasonable apprehension of bias and an unfair hearing.

[48] The Applicants conclude on this issue that a well-informed member of the community would perceive bias when hearing and reading the comments of the Officer, as they do not disclose the existence of an open mind by the Officer.

[49] The Applicants assert that whether or not the Officer considered other factors in her Decision is irrelevant if bias is established. The Decision is in breach of procedural fairness and natural justice; therefore, it is a nullity: *Liberty*.

[50] The Applicants further submit that the requirement to complain about bias at the first opportunity is only applicable in the context of a tribunal hearing with counsel present. A different standard has to apply where the decision-maker is an Officer conducting a telephone interview with an uninformed client.

Negligence of Counsel

[51] The Applicants submit that the inaccurate recording of information which the Applicants' consultant provided to Canada Immigration was an act of negligence by the consultant that had a significant impact on the final determination of the Applicants' claim. The Officer in this case may have decided the application differently if she had not believed that the Principal Applicant provided inconsistent information regarding issues of language, separation from her former spouse, and the duration of her present relationship.

[52] The failure of counsel to represent his or her client properly can amount to a breach of natural justice. The Court has indicated that it will only review a decision on this basis where: the effect of the incompetence is to completely deny the claimant the opportunity to be heard; where it is possible to determine the "exact dimensions of the problem" where there is a "precise factual foundation" and where the allegations of incompetence is sufficiently specific: *Shirwa v. Canada (Minister of Employment and Immigration),* [1994] 2 F.C. 51 (F.C.T.D.); *Sheikh v. Canada (Minister of Employment and Immigration),* [1990] 3 F.C. 238 (F.C.A.) and *Huynh v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 642 (F.C.T.D.)**.**

[53] The Applicants submit that the above conditions are satisfied in the case at bar. The record before this Court clearly discloses the acts of incompetence by former counsel in failing to provide accurate information to Canada Immigration. The Applicants relied upon that counsel to put forward evidence on their application. The Applicants state that important pieces of information, such as Jacob's language issues, the Principal Applicant's separation from her former spouse and her present relationship were all inaccurately presented. The Principal Applicant submits that she informed her counsel of the correct information. Therefore, the effect of this incompetence was to deny the Applicants a fair and full hearing of their application.

[54] As counsel is a consultant and not a member in good standing with a Law Society, no complaint to a Law Society is possible: *Nunez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 555 (F.C.T.D.).

[55] The Applicants state that the impact of this error is sufficiently clear to conclude that natural justice has been breached in this case. A full and accurate evidentiary picture of the Applicants' lives was not presented for the Officer to consider. This evidence may have made a difference to the Officer's Decision.

[56] The Applicants submit that the Principal Applicant retained the consultant for her immigration work. The Principal Applicant was entitled to rely on the advice that she paid for and this advice was negligent: *Shirwa* and *Huynh.*

Unreasonable Decision

[57] The Applicants also submit that the Decision was unreasonable for the following reasons:

- She advised the Applicants to stop working as it was illegal to work without a work permit. The very nature of the H&C program is to regularize the status of non-status persons in Canada who are otherwise well established. Work history is one of the important factors considered. A person without status cannot, by the nature of their status, work legally in Canada. In directing that the Applicants stop working, and by taking into consideration this illegal work as a factor that was not favorable to the Applicants, the Officer acted unreasonably by taking into account a factor which should be irrelevant;

- The Officer stated in her notes that the Applicants' employers will not be detrimentally affected by [their] leaving Canada as they can find substitute employees to take [their] place. This is an irrelevant factor which contributes to the unreasonableness of the Decision;

- The Officer relied on her own immigration background to judge the Applicants. This is unreasonable;

- The Officer appeared angry and aggressive. This is an unreasonable approach to an H&C determination;

- The Officer failed to consider that, having left Chile in 1995, returning the Applicant girls after 13 years would cause hardship.

[58] The Applicants say that although the Officer acknowledged the Principal Applicant's evidence that Jacob has learning difficulties this was not factored into the rationale of the Decision. Given the cryptic comment that the Principal Applicant "eluded her question" it is unclear what the Officer believed. Without a more complete reference to the Officer's rationale and an explanation as to why it would be in the best interests of Jacob to leave Canada, given his learning problems, it appears the Officer ignored this factor in her deliberations. As well, the finding that Jacob could live with his father was not based on evidence and was unreliable. The fact that Jacob would continue to

live with his mother, his only care giver, has to be assumed. Any other assumption by the Officer would be perverse.

The Respondent

Best Interests of the Children

[59] The Respondent submits that the Applicants do not dispute that their evidence was limited. There is no indication that the Applicants adduced evidence on their establishment or relationships in Canada. Instead, the Applicants challenge the manner in which the best interests of Jacob were considered. The Applicants indicate that the Officer's consideration was superficial and that she erred in assuming that the Principal Applicant had the option of taking Jacob to Chile or leaving him in Canada with his father. They also say that the Officer also did not appreciate the hardship that would be caused by Jacob's learning difficulties and because he speaks limited English.

[60] The Respondent submits that the Officer's reasons clearly acknowledge that he "had difficulties understanding English" and, as per a recent assessment in May 2007, "had difficulty understanding linguistic concepts" in the English language. Therefore, the Respondent says that the Applicant's complaint that this factor was ignored cannot be maintained.

[61] The Respondent states that the Officer did not "assume" that Jacob could live with his father in Canada. The Applicants did not adduce any evidence on this point other than that Manuel is the father of Jacob. Therefore, there was nothing unreasonable or incorrect with the Officer noting that

she was not provided with any information on the custody of Jacob, but that his father is a permanent resident and that he “may” be able to stay with his father.

[62] The Applicants H&C application did not indicate that Jacob would have to move to Chile or that he would face any particular hardship if he moved. The only mention of Jacob was that he was a Canadian citizen, enrolled in school and that he spoke no Spanish at all. The Respondent states that the onus is on the Applicants to demonstrate that they would face unusual and undeserved or disproportionate hardship by having to apply for permanent resident status outside of Canada. The Applicants are not entitled to any particular outcome except a fair consideration of their application: *Tartchinska* at paragraph 17; *Baker; Bandzar; Ogunfowora; Arumugam* at paragraphs 16-17 and *Dunsmuir* at paragraphs 47, 49 and 53. The Respondent concludes that there is no evidence that the Applicants’ application was not given fair consideration.

[63] The Respondent points out that the reasons demonstrate that the Officer considered all of the factors put forward by the Applicants. In the end, the Applicants’ submissions amount to a disagreement with the weight assigned by the Officer to the limited evidence they adduced regarding Jacob. However, the weighing of relevant factors is not the function of a Court reviewing the exercise of ministerial discretion: *Agot v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 436 at paragraph 8 and *Legault v. Canada (Minister of Citizenship and Immigration),* [2002] 4 F.C. 358 (F.C.A.).

[64] The Respondent emphasizes that the Officer was entitled to consider and weigh the evidence before her against a wide variety of factors. No one factor, including the best interests of the child, was determinative given the following:

1) The Applicants' immigration history;
2) The fact that they are not alleging any risk in return;
3) Their failure to adduce sufficient evidence of their establishment in Canada;
4) The fact that they all speak some Spanish; and
5) The lack of evidence of hardship on the Canadian born child should his mother decide he should accompany her to Chile.

The Respondent says that the Applicants have not shown that the Officer's determination was not one within the range of outcomes that could reasonably have been made in this case.

Reasonable Apprehension of Bias

[65] The Respondent submits that the test for reasonable apprehension of bias is whether or not an informed person, viewing the matter realistically and practically, and having thought the matter through, would think it more likely than not that the decision-maker would unconsciously or consciously decide an issue unfairly: *Liberty* and *Ahumada v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 605 (F.C.A.) at 615 (*Ahumada*).

[66] The Federal Court of Appeal has cautioned, however, that a "reasonable person whose view of the matter is determinative of the existence of bias is not synonymous with the losing party in the process." Canadian jurisprudence supports the proposition that a real likelihood or probability of bias must be demonstrated and that, the losing party's "mere suspicion is not enough": *Ahumada* at paragraphs 19, 23; *R v. R.D.S.*, [1997] 3 S.C.R. 484; *Paramo-Martinez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 261 (F.C.T.D.) and *Khakh v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 548 (F.C.T.D.).

[67] The Respondent submits that the Applicants have not demonstrated that there is an arguable issue regarding the impartiality of the Officer, or that a reasonable person would think that it is more likely than not that the Officer was biased in making her Decision. Firstly, the Principal Applicant's evidence is unreliable. The Principal Applicant asserts that the Officer "told me that if she could do this, why couldn't Jacob." On the contrary, the Officer swears that she made no such statements and in fact was born in Canada. As the Principal Applicant's assertion is clearly mistaken on such a specific point as the Officer's supposed immigration to Canada, the reliability of other accusations (repeatedly calling her a "liar") and speculations ("it appeared she was suggesting that my ex-husband and I were somehow still together"), which are also denied by the Officer, cannot be taken as reliable.

[68] Secondly, the Respondent submits that the Officer did not simply base her Decision on the many discrepancies she found in the Principal Applicant's evidence, but rather she gave the Applicants the opportunity to correct the record and provide more information, which they did. The

Officer based her Decision, in part, on evidence that all of the Principal Applicant's children speak some Spanish. This finding was not the result of any bias, but is based on the updated information that was provided. There is no evidence to support the Applicants' speculations that the Officer thought the Principal Applicant and her ex-husband were still together or that it played any role in the Decision.

[69] The Respondent submits that any suggestion that bias is evident merely because the Principal Applicant perceived the Officer to be "aggressive" in the interviews is neither borne out by the reasons themselves, which are reasonable, nor by the Principal Applicant's evidence, which lacks reliability. The Applicants impliedly waived their right to complain of a breach of natural justice stemming from the interview process because the Principal Applicant did not voice any concerns with the manner in which the interview was conducted at the time it took place. These objections were only raised after receiving the negative Decision: *Yassine v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. No. 949 (F.C.A.) at paragraph 7; *Mohammadian v. Canada (Minister of Citizenship and Immigration),* [2000] 3 F.C. 371 (F.C.T.D.) at paragraph 29, appeal dismissed at 2001 FCA 191 at paragraph 14; *Re Human Rights Tribunal and Atomic Energy of Canada Limited,* [1986] 1 F.C. 103 (F.C.A.), leave to appeal to SCC dismissed [1986] 72 N.R. 77n.

Negligence of Counsel

[70] The Respondent submits that the complaints made by the Principal Applicant about her immigration consultants do not warrant relief. The Respondent cites section 18.1(4)(*b*) of *The Federal Courts Act* which states that:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1(1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
…	…
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
…	…
(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	*b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

[71] The Respondent submits that, since the Officer was never apprised that the consultant had negligently compiled the H&C application, the Officer could not consider the matter. Although this Court has acknowledged that it may grant relief where it is obvious that the Applicant's story did not come out clearly due to the fault of counsel, that is not the case here: *Huynh.*

[72] The Respondent submits that the Applicants chose to abdicate the entire process of preparing the application to a consultant. Prior to the form being completed, they declared that they understood that they must provide “truthful, complete and correct information” and that any false statements “may result in the refusal of [their] application.” The Applicants never reviewed the application for accuracy nor requested a copy of it. Although the Principal Applicant states that she realized something was wrong after the November 2007 interview, she made no effort to obtain a copy of the application as filed, or to review it, or to make new submissions. Therefore, the Respondent concludes that it is the fault of the Applicants, not their immigration consultant, if misinformation was put before the Officer.

[73] Since the Officer called the Applicants to obtain more information and correct the record, the Respondent submits that there is no evidence that the Applicants were “completely denied the opportunity to be heard.”

[74] The Respondent also notes that the Applicants have not reported any consultants to the Society of Immigration Consultants for investigation. The Respondent cites *Patricia Cove v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 266 and *Nunez* at paragraph 19 to support the Respondent’s submission that the Applicants claim of a breach of natural justice because of a consultant’s alleged incompetence has not been made out in this case.

[75] The Respondent also says that, even if one ignores the Principal Applicant’s decision to sign a blank application and allow a third party to file the completed documents without reviewing them,

the Applicants had ample opportunity to consider the situation and make submissions to the Officer regarding how they had been prejudiced. They failed to do so; therefore, there was no breach of natural justice.

Unreasonable Decision

[76] The Respondent submits that subsection 11(1) of the Act provides that all foreign nationals seeking admission to Canada must first apply to an officer for a visa or for any other document that may be required by the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (Regulations) prior to entering Canada.

[77] The Respondent submits that, pursuant to section 25 of the Act, the Minister is authorized to grant a foreign national permanent residence status or an exemption from any applicable criteria or obligations of the Act if the Minister is of the opinion that it is justified by humanitarian or compassionate considerations. The Decision of an Officer to grant an exemption under section 25 of the Act, in no way removes the right of the Applicants for landing from outside of Canada.

[78] The onus on the Applicants is to demonstrate that they would face unusual and undeserved or disproportionate hardship by having to apply for permanent residence status outside of Canada: *Arumugam v. Canada (Minister of Citizenship and Immigration),* [2001] F.C.J. No. 1360 at paragraphs 16-17 (F.C.T.D.).

[79] The Respondent emphasizes that the Applicants are not entitled to a particular outcome and, in order to successfully attack a negative decision, the Applicants must show that the Officer's Decision is unreasonable because he erred in law, acted in bad faith, or proceeded on an incorrect principle: *Tartchinska v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 373 (F.C.T.D.) at paragraph 17; *Baker; Bandzar v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 772 (F.C.T.D.) and *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 459 (F.C.T.D.).

ANALYSIS

[80] The Applicants have withdrawn their negligence of counsel issue in this application. In addition, I have carefully reviewed the grounds put forward for a reasonable apprehension of bias and, in accordance with the well-known test stated in *Liberty v. National Energy Board*, 1978 1 SCR 369, at page 394, I do not believe that such an apprehension exists. The Officer's telephone calls to the Principal Applicant are just as consistent with an attempt to tidy up and resolve an inaccurate and incomplete application as with any animus on the part of the Officer against the Principal Applicant. In addition, the strong language regarding elusion and avoidance on the part of the Principal Applicant does not suggest an inappropriate degree of suspicion on the part of the Officer. Given the history of the Principal Applicant's dealings with immigration authorities in this country and her obvious determination to remain in Canada at all costs (illegally returning after deportation and defying the authorities regarding the whereabouts of her daughters) I do not think that suspicion was without justification. In any event, it did not prevent the Officer from clearing up

anomalies and inconsistencies on the file and addressing the application on its merits and in accordance with her duty under section 25 of the Act.

[81] In my view, the only issues of merit raised by the Applicant are whether the Officer handled the best interests of Jacob appropriately, and whether there is anything in the Decision which, either separately or cumulatively, renders it unreasonable.

[82] As regards Jacob, bearing in mind the information provided by the Principal Applicant (as subsequently clarified by the Officer), the only issue that warrants examination by the Court is the Officer's approach to the Kindergarten Early Intervention Program (KELI) materials.

[83] In her Decision, it is clear that the Officer examined Jacob's report card and noted that "he had difficulty understanding linguistic concepts." She also refers to "Jacob's school reports from kindergarten progress report (*sic*)" and notes that the report indicates that "Spanish and English are spoken at home." That reference comes from page 1 of the Final Report. So there is every indication in the Decision itself that the Officer was cognizant of the KELI reports and took them into account in assessing the best interests of Jacob.

[84] The Applicants say that the Officer simply focuses on the Spanish as first language aspect of the KELI report, that she only refers to that aspect of the report that appears at page 53 in the Tribunal Record, and indeed that she did not understand the rest of the report and made the mistake

of assuming that some equivalent to the KELI program would be available to Jacob in Chile, when there is no evidence to support such an assumption.

[85] The Applicants say this is an unreasonable mistake because the KELI program was a special program for Jacob, involving qualified experts, which the Officer ignores and does not understand.

[86] The Officer was cross-examined on this issue. She makes it clear that she saw the reports and read them, which is consistent with the indicators in her Decision. She also agrees under cross-examination with counsel that "information about the ongoing therapy and treatment for a child with, in this case, I guess, a learning issue, is important information that should be considered when assessing the best interests of a child."

[87] However, the Officer makes it clear that "in this context I did not give it a lot of weight and I did not address it."

[88] She also says that "they could get the same treatment in Chile" even though she admits there is no evidence for this proposition.

[89] But she also makes it clear at page 53 of the cross-examination transcript that availability in Chile was not part of her assessment:

> Q. So you made that assessment without any evidence about it?
>
> A. Well, I didn't provide that assessment, so I didn't even put it in there.

Q. But you just told us that you believed he could obtain that same treatment in Chile, by you also …

A. But I didn't put that in the assessment. So…

[90] The reason given by the Officer as to why she did not put it in the assessment is "because I didn't feel that there was a huge concern regarding this application."

[91] Counsel for the Applicants agrees in the cross-examination of the Officer that the KELI reports deal with "literacy problems."

[92] The Officer's summary of her approach to this issue appears at page 56 of the cross-examination transcript:

A. Well, because I looked at everything in this context and, I mean, it's not that it's not important. I mean, I did review it. I didn't put in my rationale. I addressed only solely the language issue with the applicant and yes, there are improvements in you know, in his abilities, in Jacob's abilities.

And, also, I took into context, you know, that …. that, you know, those few sentences about that different, you know the language background and so forth, you know, such as Jacob's cannot be, you know, interpreted as their own indicators of natural abilities.

So with that, I mean, being that probably he knows that, you know, that he does, based on the report that he does speak Spanish and English.

Q. And I think you also told us earlier that you took into consideration that he could receive this kind of treatment in Chile, is that right?
But of course, you said you had no information about that?

A. That's correct, so it's an open-ended statement with no conclusion on that.

[93] In summary, I believe the evidence reveals the following:

1. The Officer read the KELI reports;
2. She thought the language issue was important i.e. the fact that Jacob speaks Spanish;
3. She read the caveats in the reports that appear at page 53 of the Tribunal Record and concluded that the reports were not a huge concern in the context of this application;
4. She also thought the same treatment would be available to Jacob in Chile, even though there was no evidentiary basis for this assumption and it was mere speculation.

[94] So the central issue before me in this application is whether this approach to the KELI reports renders the Decision unreasonable.

[95] The Assessment Results for Jacob contained in the reports come with the following strong caveat, and this is what the Officer is referring to in her transcript and is the basis for her rationale as to why, in this context, she did not regard the reports as important:

> Please note that the standardized tests listed below were designed for children who speak standard English as their first language. They are therefore not valid for children from different backgrounds, like Jacob, and cannot be interpreted on their own as indicators of natural ability. That is, below average scores do not necessarily mean below average language learning ability. Standardized tests can be used cautiously for ESL children, however, to show change over time, to roughly estimate language age and to identify specific areas of difficulty for programming purposes.

[96] So it is obvious why the Officer thought the language issue was important. The reports tell her that it is, and they also tell us that Jacob speaks "Spanish and English" at home, and it is the Spanish that is highlighted by the report.

[97] In the application, the Principal Applicant (through her counsel) had indicated that Jacob spoke English at home. This was clarified by the Officer during the course of her phone calls with the Principal Applicant.

[98] So it was the Principal Applicant who induced the focus on language because of the inaccurate information she provided. She has attempted to blame her counsel for this mistake but it was and is her responsibility.

[99] The Reports make it clear that there are "no current health concerns" with Jacob as far as the Principal Applicant is concerned and she says that "his early language development" was "normal." But the Principal Applicant does not make clear, according to the reports, whether Jacob's early normal language development occurred in Spanish or English or both, but the reports do highlight "Spanish" as the home language even though English is spoken as well.

[100] So, Jacob's problems with language appear from the reports to begin at "the beginning of senior kindergarten."

[101] Jacob has attended the KELI Program but, overall, he has only made "slight progress" and it is pretty clear from the reports that he is facing significant problems.

[102] The reports do not suggest that Jacob has any problems in Spanish. Indeed, as the Officer pointed out, the reports make clear that Jacob's problems in English "cannot be interpreted on their own as indicators of natural ability." The testing was not devised for people like Jacob who comes from a "different language background," and it is also pretty clear that Jacob's different language background is Spanish.

[103] There are recommendations and strategies in the final report, but they all assume that Jacob will be staying in Canada and that he will be interacting with his peers.

[104] Hence, in my view, there was nothing unreasonable in the Officer deciding that the information in the reports should not be given a lot of weight when considering Jacob's best interests. Indeed, as I read the reports, it is obvious that Jacob has a "different language background" and that background is Spanish, and he is having problems in English. What is more, his involvement in the KELI Program has done very little for him. He has only made "slight progress" and he is confronting major difficulties in English.

[105] I think the Officer read the reports and I also think that she understood their import very well. The KELI Program has not done much for Jacob and it cannot be given much weight. In fact, the information in the KELI report suggests that Jacob would be better off if his education took place in Spanish because it is in English that he is having the difficulties.

[106] The Officer's remark at the cross-examination that the availability of assistance in Chile was something she considered but that it was not part of her assessment also makes sense. If the Applicants return to Chile, Jacob will be educated in Spanish. There is no suggestion he would have any problems in Spanish, which in the KELI report is emphasized at home. There is nothing to suggest he will need any kind of special program in Spanish. He will not need the equivalent of the KELI Program in Chile; or at least there is no suggestion that he will.

[107] So there was nothing unreasonable about the Officer's decision to give little weight to the KELI Program and its reports. The program has not assisted Jacob in any significant way. It has merely highlighted the fact that a child whose language background is Spanish is being forced through an English-speaking education system and is encountering significant difficulties because of that fact.

[108] I have also reviewed all of the other grounds raised by the Applicants as a basis for saying that the Decision is unreasonable and, taken either individually or cumulatively, I see nothing that would warrant the Court's intervention. Mistakes were made on both sides and mutual accusations have been traded but, when the Decision is viewed as a whole against the background of the

submissions made by the Applicants, this Decision falls well inside the range of possible, acceptable outcomes that are defensible in respect of both the facts and the law. Even though the Principal Applicant has shown that she has no qualms about defying Canadian law she continues to reap the benefit of its protections, and this Decision is no exception.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This Application is dismissed.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-207-08
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APPEARANCES:

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