Federal Court  Cour fédérale

Date: 20150608

Docket: IMM-5035-13

Citation: 2015 FC 719

Ottawa, Ontario, June 8, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

RICHARD ANTHONY MCKENZIE and ALLECIA ALLEN MCKENZIE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants' application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds was rejected by an officer of Citizenship and Immigration Canada. They are now applying for judicial review of this decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicants seek an order setting aside the negative decision, returning the matter to a different officer for redetermination within 30 days of such order and costs on a solicitor client basis.

I. Background

[3] The applicants are citizens of Jamaica. On July 19, 2008, they entered Canada and were granted visitor status for six months. They later applied for an extension, which was subsequently granted.

[4] The principal applicant has lived in Canada since 2008 doing pastoral work. The female applicant is a student in pastoral studies.

[5] On February 6, 2008, they gave birth to their daughter, Glorie-Ann Mckenzie, a Canadian citizen.

[6] On June 28, 2012, the principal applicant's temporary resident status as visitor expired.

[7] The female applicant's temporary resident status as visitor expired on June 21, 2012. She was issued a multiple entry student visa on January 9, 2012, which was valid until December 30, 2014; however, she did not present herself at a Canadian land port of entry to have the study permit issued.

[8] On October 24, 2012, the applicants submitted an application on H&C grounds with the assistance of Mr. Prescod of Prescod International Immigration Services (prior consultant).

[9] The applicants claim that they also obtained Mr. Prescod for other legal services, which included the female applicant's study permit. They claim Mr. Prescod failed to advise the female applicant that she needed to activate it at a port of entry.

II. Decision Under Review

[10] In a decision dated July 5, 2013, the officer found the applicants do not qualify for an exemption under H&C grounds and ordered them to leave Canada forthwith.

[11] For establishment, the officer found although the applicants' establishment and integration in Canada is admirable, the officer was not satisfied that they were established or integrated to the extent that leaving Canada would cause unusual, undeserved or disproportionate hardship.

[12] In making this determination, the officer reviewed the letters from the Makarios Ministries and Brampton Church of God Deliverance Ministries. It was found the principal applicant no longer performed duties for Makarious Ministries; and he sometimes preached at the Brampton Church of God Deliverance Ministries. The officer noted there was little evidence as to the amount of time the principal applicant dedicated in relation to his performance of religious duties and that it was unknown if the principal applicant was currently assisting this Ministry; therefore, it was found this Ministry would not be negatively impacted.

[13] The officer also reviewed the letter from Solid Rock Christian Assembly where the applicants volunteer for preaching and community activities. It was found although the applicants' departure may cause inconvenience to the Ministry and its members, it would not cause a significant negative impact. There was insufficient evidence that severing ties from this Ministry would result in unusual and underserved or disproportionate hardship.

[14] The officer then reviewed the letter from the Toronto Friendship Centre where the principal applicant provided pastoral care and outreach services. The officer found, should the principal applicant leave Canada, there was insufficient evidence that the Centre would be unable to make alternate arrangements for pastoral care and outreach services. Therefore, the principal applicant's departure would not result in a significant negative impact to the Centre, the individuals attending the Centre or to the principal applicant himself.

[15] The officer further acknowledged the letters on how the applicants developed family relationships with many "needy people" and changed their lives. This included Kevin Anderson whose letter was dated two years ago and Donlyn Skinner. The officer noted that these letters demonstrated community involvement, but there was insufficient evidence that these people were dependent on the applicants.

[16] Also, the officer observed that the principal applicant was a pastor in Jamaica from January 2004 to July 2008. The officer found there was insufficient evidence to establish that he could not return to Jamaica and continue to perform duties in a church in Jamaica.

[17] The officer then noted the female applicant was issued a multiple entry student visa on January 9, 2012, which was valid until December 30, 2014; however, she did not present herself at a Canadian land port of entry to have the study permit issued. Although the officer considered the explanation provided by the female applicant, the officer found she did not have legal immigration status in Canada. Further, the officer found the applicants did not articulate any hardship should the female applicant be unable to complete her studies in Canada.

[18] For the best interests of the child, the officer found the child residing in Jamaica would not result in a significant negative impact to her well-being. There was insufficient evidence to demonstrate she would not have access to adequate services, support and facilities in Jamaica. Also, the child would retain her Canadian citizenship regardless of where she was to reside.

[19] Therefore, the officer found there was insufficient evidence of unusual and undeserved or disproportionate hardship to warrant an exemption from the requirements of the Act.

III. Issues

[20] The applicants raise three issues for my consideration:

1. The officer committed an error on the face of the record as the officer employed the wrong legal test as in *Pokhan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1453, [2012] FCJ No 1569 [*Pokhan*], in assessing the best interests of the Canadian born child, Glorie-Ann, who was five years old at the time of the officer's decision.

2. The officer erred in law and in fact in refusing the applicants' application for permanent residence on H&C grounds.

3. The applicants were denied procedural fairness due to the incompetence of their previous consultant in specifically failing to allow them an opportunity to respond to the issue of the female applicant not being in possession of a valid study permit which factor formed part of the refusal.

[21] The respondent raises one issue in response: the officer's finding that there were insufficient H&C grounds to grant the applicants' permanent residence application was not unreasonable.

[22] In the respondent's further memorandum, it objects to the admission of the further affidavit submitted by the applicants and raises one additional issue: the applicants have not complied with Federal Court Procedural Protocol.

[23] In my review, there are five issues:

A. Is the evidence from the further affidavit admissible?

B. What is the standard of review?

C. Was the applicants' prior counsel incompetent as to deny them procedural fairness?

D. Did the Board misunderstand the test for the best interests of the child assessment?

E. Was the Board's decision reasonable?

IV. Applicants' Written Submissions

[24] The applicants submit the standard of review for questions concerning the application of facts is that of reasonableness and a purely legal question is that of correctness. They argue the standard of correctness should be applied when reviewing the legal test used by the officer in examining the best interests of the child and the standard of reasonableness applies to the officer's application of evidence.

[25] The applicants submit the applicable legislation in this case is found in subsection 25(1) of the Act.

[26] First, for the best interests of the child, the applicants submit the officer erroneously referred to basic and adequate services rather than "best interests" in its assessment. The present case is similar to *Pokhan* and that in the present case, the officer erred in applying the wrong legal test in assessing the best interests of Glorie-Ann. They argue the officer committed the following errors: i) the officer never considered the best interests of the child if her parents were permitted to stay in Canada only that she will leave and live in Jamaica; ii) the officer determined that the child would have access to adequate services, support and facilities in Jamaica; and iii) the officer used adequate and basic care as a standard, rather than the best interests legal test.

[27] Second, the applicants submit the officer erred in law in applying the test of unusual, undeserved or disproportionate hardship to those who would be affected by the applicants'

departure. The officer's recognition of the applicants' community involvement as "admirable" is at odds with the officer's conclusion that their departure would not have a negative impact. They argue the officer erred in fact in assuming that Kevin Anderson no longer resides with them. Their departure would cause Mr. Anderson hardship.

[28] Third, the applicants submit they were denied procedural fairness due to the incompetence of their previous consultant. They argue the officer erred in fact in concluding that the female applicant did not articulate any hardship in not being able to complete her studies. They observe that the consultant advised the immigration officer that he never received the letter instructing the female applicant to validate her study permit, yet the letter was found in the file returned to them. The consultant failed to address the issue of hardship and disruption to the female applicant's schooling. They further provide that a complaint has been reported to the Immigration Consultants of Canada.

V. Respondent's Written Submissions

[29] The respondent submits an officer's assessment of an H&C application is generally subject to a reasonableness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 45, 47, 48, 49 and 53, [2008] 1 SCR 190). Unlike the applicants' submission, the respondent argues the question as to whether the officer applied the right test in the analysis of the best interests of the child is also determined on the standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2010] FCR 360 [*Kisana*]; and *Moya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 971 at paragraphs 25 and 26, [2012] FCJ No 1046).

[30] The respondent submits section 25 of the Act, providing for the H&C considerations, is an exceptional and discretionary remedy (*Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at paragraph 20, [2006] FCJ No 425). The respondent argues that it cannot be "a back door when the front door has, after all legal remedies have been exhausted, been denied in accordance with Canadian law"(*Mayburov v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 953 at paragraph 39, 6 Imm LR (3d) 246). The respondent quotes paragraph 5.10 of the IP-5 Guidelines which defines the notion of "unusual and undeserved" and "disproportionate".

[31] First, the respondent submits that the officer's assessment for the best interests of the child is proper. It argues that there is no specific "formula" that an officer is expected to follow in conducting the best interests of the child analysis (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paragraph 7, [2003] 2 FC 555 [*Hawthorne*]; and *Miller v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1173 at paragraph 24, [2012] FCJ No 1253 [*Miller*]). Here, the officer acknowledged the applicants attempted to provide their daughter with the best available care in Canada and considered the love and support she would get from her parents should they reside in Jamaica; but also found there was insufficient evidence that they would not be able to provide her with basic necessities in Jamaica. Unlike what the applicants submitted, the officer here did not indicate that the best interests of a child would only be relevant where basic amenities would be denied. The best interests of a child to reside with her parents in Canada is only one factor that must be weighed. The respondent submits the officer reasonably considered the submissions regarding the child's best interests and concluded that the applicants had failed to establish that an exemption was warranted.

[32] Second, the respondent submits the officer considered relevant factors when assessing the applicants' level of establishment and there is no merit to the applicants' argument. The officer considered work experience as well as community involvement. It argues that this Court's jurisprudence holds that hardship is inherent in having to leave Canada after residing here for a period of time (*Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906, 101 ACWS (3d) 995). Here, the applicants' allegations amount to a disagreement with how the officer assigned weight to the various factors.

[33] Third, the respondent submits the incompetence of counsel alleged by the applicants is not substantially related to the H&C application. It argues in proceedings under the Act, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances." The applicants must demonstrate that there is a reasonable probability that the result would have been different, but for the incompetence of the representative (*Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196 at paragraph 36, [2012] 2 FCR 350; and *Huynh v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 642 at paragraphs 14 and 15, 65 FTR 11). The respondent argues the applicants' allegations lack persuasive value. Here, the officer considered the female applicant's submissions and rejected her explanation and further observed that there was no articulation of hardship should the female applicant be unable to complete her studies. Also, there was no evidence submitted to the officer demonstrating that there was no comparable institution in Jamaica. Therefore, the respondent objects to the inclusion of any information in the applicants' affidavit that was not before the decision-maker.

[34] Also, the respondent submits that the applicants will be held to the consequences of their choice of counsel (*Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 at paragraphs 5 and 6, [2001] FCJ No 482 [*Cove*]; *El Ghazaly v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1329 at paragraph 20, [2007] FCJ No 1724; and *Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 173 at paragraph 15, [2008] FCJ No 231 [*Betesh*]). It further points out the alleged incompetence and negligence are only supported by the applicants' affidavit evidence. Any potential further omissions are clearly speculative. The respondent submits that therefore, the applicants have not submitted the "very clear proof" required to establish that his former immigration consultant was incompetent.

VI. Applicants' Further Written Submissions

[35] The applicants argue their allegations are not merely a disagreement on the assigned weight of the evidence. They also argue the incompetence of prior counsel is not only substantiated by affidavit evidence, but also the letter that was subsequently found in the released file.

[36] They submitted additional affidavit evidence containing the following material: i) status update on the complaint; ii) documents concerning Glorie-Ann, indicating that she is excelling in Canada; iii) letters of support which they would have submitted had they been properly informed by their prior consultant; and iv) the principal applicant is currently counselling an innocent victim and his family involving gun violence.

VII. Respondent's Further Written Submissions

[37] In the respondent's further memorandum, it submits as a preliminary issue that the applicants' further affidavit contains evidence that was not provided to the officer prior to the decision. Therefore, it objects to the admission of this evidence.

[38] The respondent is at issue with the applicants' submissions on the incompetence of counsel. The respondent provides analysis under the three elements below.

[39] Firstly, it submits the applicants have not complied with Federal Court Procedural Protocol. It provides that the new protocol which came into effect on March 7, 2014 requires the applicants who are pleading incompetence, negligence or other misconduct by their former counsel or authorized representative as a ground for relief must: "1) satisfy themselves that there is some factual foundation for the allegation; and 2) notify the former counsel or authorized representative in writing with sufficient details of the allegations and advise that the matter will be pled in an application described above." This is to provide notice to counsel and an opportunity to respond (*Vieira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 626 at paragraph 29, [2007] FCJ No 848 [*Vieira*]). The respondent argues that although the application was initiated prior to this date, leave was granted in September 2014, after the protocol was implemented. It observes that it is unclear if the applicants served a copy of the perfected application to their prior consultant. Therefore, the respondent argues the applicants should not be allowed to rely on the argument of incompetence of counsel.

[40] Secondly, the respondent submits the performance requirement is not met for a breach of natural justice. Without the benefit of an actual finding from a disciplinary committee regarding the applicants' complaint, there is insufficient evidence in this case to base a finding of incompetence (*Dukuzumuremyi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 278 at paragraphs 9 and 10, [2006] FCJ No 349 [*Dukuzumuremyi*]). It is a high threshold. In *Odafe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1429 at paragraphs 8 and 9, [2011] FCJ No 1762 and *Teganya v Canada (Minister of Citizenship and Immigration)*, 2011 FC 336 at paragraphs 29, 30 and 37, [2011] FCJ No 430, this Court ruled this high threshold was not met despite the mistake made by prior counsel.

[41] Thirdly, the respondent submits the outcome would not have been different (*R v GDB*, 2000 SCC 22 at paragraphs 27 to 29, [2000] 1 SCR 520 [*GDB*]) as to entitle the applicants to relief because the incompetence of counsel alleged by the applicants is not substantially related to the H&C application.

VIII. Applicants' Letter Reply

[42] The applicants faxed a letter to this Court providing email proof that communication was made to the prior consultant pertaining to this case. They state the requirement for the new protocol has been met.

IX. Analysis and Decision

A. *Issue 1 - Is the evidence from the further affidavit admissible?*

[43] The applicants' further affidavit provides four additions to the evidence: i) status update on the complaint; ii) documents concerning Glorie-Ann indicating that she is excelling in Canada; iii) the letters of support that would have been provided to the officer had the applicants been advised by their previous consultant following his conversation with the officer; and iv) the principal applicant is currently counselling an innocent victim and his family involving gun violence.

[44] An application for judicial review is limited to a review of the evidence that was before the decision-maker (*Tabanag v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1293 at paragraph 14, [2011] FCJ No 1575 [*Tabanag*]; *Mahouri v Canada (Minister of Citizenship and Immigration)*, 2013 FC 244 at paragraph 14, [2013] FCJ No 278 [*Mahouri*]; and *Isomi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394 at paragraph 6, [2006] FCJ No 1753 [*Isomi*]), except where a breach of procedural fairness is alleged.

[45] First, the information related to the status update on the complaint process goes to proving the applicants' allegation of incompetence of counsel. This allegation arose after the decision-maker had made the determination. I see no reason to not admit this piece of evidence; therefore, I would allow it to be admitted.

[46] Second, the documents concerning Glorie-Ann were not in front of the decision-maker. This evidence should have been submitted as a part of the applicants' H&C application. It is not my role to review evidence that was not before the decision-maker. Therefore, this evidence is not admissible.

[47] Third, the letters of support that form part of the applicants' claim of hardship were not in front of the decision-maker. The applicants claim they failed to submit this evidence due to the incompetence of their prior consultant. This evidence thereby goes to proving the applicants' allegation of incompetence of counsel in the context of procedural fairness. I would therefore allow it to be admitted and consider it in my analysis below.

[48] Fourth, the information regarding the principal applicant counselling an innocent victim and his family involving gun violence was not in front of the decision-maker. It is not my role to review evidence that was not before the decision-maker. Therefore, this evidence is not admissible.

B. *Issue 2 - What is the standard of review?*

[49] Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (*Dunsmuir* at paragraph 57).

[50] The issue of counsel incompetence in the context of procedural fairness is reviewable on a standard of reasonableness (*GDB* at paragraph 27):

> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[51] For questions of fact or mixed fact and law decided on an H&C grounds application, the standard is reasonableness (*Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 386 at paragraphs 21 to 23; [2010] FCJ No 583; *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11 at paragraphs 21 and 37; [2009] FCJ No 4; *Dunsmuir* at paragraph 53; and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 57 to 62, [1999] SCJ No 39 [*Baker*]).

[52] As for the assessment of the best interests of the child, in *Miller*, Mr. Justice David Near found at paragraph 15: "[w]hether the Officer applied the correct legal test is a legal question, to be reviewed on the standard of correctness. The Officer's conclusions, however, on the best interests of the children will be reviewed on a standard of reasonableness."

[53] The standard of reasonableness means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339 [*Khosa*]). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

C. *Issue 3 - Was the applicants' prior counsel incompetent as to deny them procedural fairness?*

[54] The new protocol which came into effect on March 7, 2014, "Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court" requires the applicants who are pleading incompetence, negligence or other misconduct by their former counsel or authorized representative as a ground for relief must: "… satisfy him/herself, … that there is some factual foundation for this allegation" and "… notify the former counsel or authorized representative in writing with sufficient details of the allegations and advise that the matter will be pled in an application described above." This is to provide notice to counsel and an opportunity to respond (*Vieira* at paragraph 29).

[55] In this case, the applicants have provided factual foundation for their allegation of incompetence of their prior consultant. Also, they have provided email proof that communication was made to the prior consultant pertaining to this allegation.

[56] Therefore, in my opinion, the applicants have complied with the Federal Court Procedural Protocol. Below, I will examine the merits of the applicants' allegation of incompetence of counsel.

[57] In *GDB*, the Supreme Court of Canada reviewed the test in examining counsel incompetence in the context of procedural fairness. It is twofold: i) the performance component; and ii) the prejudice component.

> 26 The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> […]
>
> 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> 29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland, supra*, at p. 697).
>
> [Emphasis added]

[58] First, I will examine the performance component. The onus is on the applicants to establish that the acts or omissions of counsel fall outside of reasonable professional judgment (*GDB* at paragraph 27).

[59] In the present case, the applicants state that the consultant advised the immigration officer that he never received the letter instructing the female applicant to validate her study permit, yet the letter was found in the file returned to the applicants. The consultant failed to address the issue of hardship and disruption to schooling. The applicants further provide that a complaint has been reported to the Immigration Consultants of Canada and the latest update provides that this complaint is being processed. This, to me, is a clear indication of negligence by counsel.

[60] Second, for the performance component to matter in the context of procedural fairness, this incompetence has to establish prejudice. In order to be successful in an allegation of incompetence of counsel, there must be an exceptional case where "counsel's alleged failure to represent or alleged negligence are obvious on the face of the record and have compromised a party's right to a full hearing" (*Dukuzumuremyi* at paragraph 18).

[61] The respondent argues the incompetence of counsel alleged by the applicants is not substantially related to the H&C application. I disagree. Although the female applicant's study permit might not have impacted the officer's overall determination, the evidence in the further affidavit on the hardship element is substantially related to the application.

[62] Nonetheless, I find the present case is analogous to *Betesh* where the evidence is insufficient to provide that the result might be different. Here, I am not satisfied that the applicants have presented sufficient evidence to warrant a new hearing. First, they have not shown the result might have been different if the officer had considered the additional letters of support they submitted in the further affidavit. Second, the letters of support are similar to the ones they have previously submitted.

[63] Therefore, I find the alleged incompetence of counsel does not establish a breach of procedural fairness.

D. *Issue 4 - Did the Board misunderstand the test for the best interests of the child assessment?*

[64] I agree with the respondent that there is no specific "formula" that an officer is expected to follow in conducting the best interests of the child analysis (*Hawthorne* at paragraph 7; and *Miller* at paragraph 24). In my opinion, the best interests of the child assessment is better examined based on the reasonableness of the officer's analysis.

[65] Mr. Justice Near reviewed in *Miller* the jurisprudence on the test for the best interests of the child assessment:

> 24 This Court has established that "what is required when conducting a best interests of the child analysis in an H&C context is an assessment of the benefit the children would receive if their parent was not removed, in conjunction with an assessment of the hardship the children would face if their parent was removed or if the child was to return with his or her parent" (*Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894, [2009] F.C.J. No. 1116 at para 32; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2002] F.C.J. No. 1687 at para 4). The obligation of officers to be "alert, alive and sensitive" to the best interests of the children has further been described as demonstrating "an awareness of the child's best interests by noting the ways in which those interests are implicated" (*Segura*, above, at para 34; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, [2008] F.C.J. No. 211 at para 9). Form is not to be elevated above substance when reviewing an officer's determination of the best interests of the child.
>
> [Emphasis added]

[66] Therefore, I will examine the officer's assessment of the best interests of the child in the context of the "alert, alive and sensitive" requirement below.

E. *Issue 5 - Was the Board's decision reasonable?*

[67] I find the officer's decision was reasonable. The officer's analyses of establishment, hardship and best interests of the child were transparent and intelligible.

[68] Section 25(1) of the Act governs the determination for an H&C application. It states:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[69] Insofar as establishment is concerned, I find the officer's determination was reasonable. The officer considered the applicants' work experience as well as community involvement. Here,

the officer's reasoning was transparent and intelligible. I agree with the respondent that the applicants' allegations amount to a disagreement with how the officer assigned weight to the various factors submitted by the applicants. Therefore, it is not my role to reweigh the evidence.

[70] Insofar as hardship is concerned, I find the officer was reasonable in the determination. The applicants submit the officer erred in fact to assume that Mr. Anderson no longer resided with the applicants. If the applicants were to leave, this would result in hardship for Mr. Anderson. However, it is the applicants' duty to establish hardship. Although the officer's assumption did not align with the factual situation, I can understand why the officer made the determination in light of the letter being two years old. The officer was not unreasonable to make this assumption in the absence of a more recently dated letter of support.

[71] Further, although the applicants submit the officer erred in law in applying the test of unusual, undeserved or disproportionate hardship to those who would be affected by the applicants' departure, they do not explain what errors in law the officer made. I find, rather, their arguments establish the errors in fact.

[72] Therefore, I find the officer's assessments of establishment and hardship were reasonable.

[73] Next, I find the officer's assessment of the best interests of the applicants' child was reasonable.

[74] A child's best interests are an important factor to be given substantial weight; however, it will not necessarily be the determining factor in every case (*Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paragraph 8, [2008] FCJ No 211).

[75] *Baker* at paragraph 75 states that an H&C decision will be unreasonable if the decision-maker does not adequately consider the best interests of the children affected by the decision, and requires the decision-maker to be "alert, alive and sensitive" to these interests:

> The principles discussed above indicate that for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.
>
> [Emphasis added]

[76] Mr. Justice Douglas Campbell defined the meaning of "alert, alive and sensitive" in the case of *Kolosovs* at paragraph 9:

> The word alert implies awareness. When an H&C application indicates that a child that will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated.
>
> [Emphasis added]

[77] Also, Justice Campbell reviewed the Guidelines: IP5 Immigrant Applicants in Canada made on Humanitarian or Compassionate Grounds at paragraph 9 of *Kolosovs*:

> 5.19. Best interests of the child
>
> The Immigration and Refugee Protection Act introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under A25(1), when examining the

> circumstances of a foreign national under this section. This codifies departmental practice into legislation, thus eliminating any doubt that the interests of a child will be taken into account. Officers must always be alert and sensitive to the interests of children when examining A25(1) requests. However, this obligation only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies, in whole or at least in part, on this factor.
>
> …
>
> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:
>
> - the age of the child;
> - the level of dependency between the child and the H&C applicant;
> - the degree of the child's establishment in Canada;
> - the child's links to the country in relation to which the H&C decision is being considered;
> - medical issues or special needs the child may have;
> - the impact to the child's education;
> - matters related to the child's gender.

[78] The element of "alive" was analyzed by Justice Campbell at paragraph 11 in *Kolosovs*, that the best interests factors need to be considered accumulatively:

> Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given

> fact scenario, including the child if this can reasonably [be] determined.
>
> [Emphasis added]

[79] In *Kolosovs*, Justice Campbell defined the element of sensitivity at paragraph 12 as a clear articulation of the suffering of a child from a negative decision:

> It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief.
>
> [Emphasis added]

[80] Here, I find the officer's reasoning about the best interests of the child does display the requirements of being "alert, alive and sensitive." I am satisfied that the officer understood the perspective of the child and that the officer was aware of the applicants' interests and the impact that a refusal of the H&C application could have on her future.

[81] In particular, the officer acknowledged the applicants attempt to provide their daughter with the best available care in Canada and considered the love and support she would get from her parents should they reside in Jamaica, but also found there was insufficient evidence that they would not be able to provide her with basic necessities in Jamaica. The officer found if the child resides in Jamaica, it would not result in a significant negative impact to her well-being.

[82] Further, I disagree with the applicants' reading of the officer's analysis. The officer did not use adequate and basic care as a standard. In my view, the officer considered the level of care the applicants' child would likely receive should she return to Jamaica with her parents.

[83] Therefore, I find the officer's assessment of the best interests of the child was reasonable.

[84] Cumulatively, I find the officer's decision was reasonable.

[85] For the reasons above, I would deny this application.

[86] The applicants submitted the following proposed serious question of general importance for my consideration for certification:

> Given the Federal Court Protocol on allegations of negligence by previous counsel issued March 4, 2014, should the Court take into account the results and findings of complaints to the ICCRC?

[87] The respondent opposes the certification of this question.

[88] I have considered the submissions of counsel and the guidelines set out in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637 at paragraphs 4 to 6, 176 NR 4. In my view, the question would not be dispositive of the appeal as no finding of negligence has yet been made. The matter is only proceeding to a hearing. Therefore, I will not certify the proposed question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question shall be certified.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
…	…
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Court.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5035-13
STYLE OF CAUSE:	RICHARD ANTHONY MCKENZIE AND ALLECIA ALLEN MCKENZIE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 10, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
DATED:	JUNE 8, 2015

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