Federal Court  Cour fédérale

Date: 20180501

Docket: IMM-3880-17

Citation: 2018 FC 463

Ottawa, Ontario, May 1, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BRANDON-RYAN MICHAEL TREVOR DANIELS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of a Senior Immigration Officer [Officer] in Citizenship and Immigration Canada, dated August 21, 2017 [Decision], which refused the

Applicant's application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds.

II. BACKGROUND

[2] The Applicant is a citizen of South Africa. He arrived in Canada in 1995, around the age of six, along with his family. The Applicant's mother and three sisters have all become Canadian citizens. Unfortunately, his father passed away in 2005.

[3] The Applicant says that, after his father's death, he began having behavioral problems. After falling in with a bad crowd in his late teens, the Applicant was convicted of forcible confinement in 2010. The incident involved him accompanying a friend to a hotel where the friend attempted to recover money from a woman. The Applicant says that he pleaded guilty because he was offered a plea bargain that would see him sentenced to time served in pre-trial custody plus one further day in jail.

[4] The Applicant married a Canadian citizen, Deandra Haynes, in January of 2016. Together they have a daughter, Isabella, who was born on December 3, 2015. Deandra has been diagnosed with a variety of serious mental illnesses for which she has been hospitalized in the past.

[5] As a result of his criminal conviction, the Applicant was found to be inadmissible to Canada on grounds of serious criminality in 2015. The Applicant submitted an H&C application for an exemption from the requirements of the Act in 2016.

III. DECISION UNDER REVIEW

[6] The Officer determined that there are insufficient H&C considerations to warrant an exemption from the requirements of the Act.

[7] After summarizing the background to the Applicant's H&C application, the Officer evaluates the Applicant's establishment in Canada and finds that it merits some weight. While acknowledging that the Applicant has been in Canada for a significant time, the Officer finds that there is insufficient evidence about his educational and employment history. The Applicant established that he had applied to enroll at George Brown College but the evidence did not show that he had been accepted. The Applicant's 2015 tax return indicates that he received social assistance but his own statement does not provide details on how he meets his family's financial obligations other than stating that he does odd jobs to earn extra income. He claimed that he was in a serious car accident in 2014 that left him unable to walk for a period of time. But the Motor Vehicle Accident Report provided does not provide details of the extent of the Applicant's injuries or describe how the accident affected his ability to work. Letters from the Applicant's mother and three sisters show that he enjoys the support of extensive family in Canada and indicate his desire to lead a more productive life. The Officer found that these relationships, and the length of time the Applicant has been in Canada, result in some weight to be given to his establishment.

[8] The Officer also accepts that the Applicant's wife has suffered from serious mental health issues in the past and her claims that she relies on the Applicant for support, but finds that the

Applicant provided insufficient objective evidence of the couple's level of interdependence. The Officer notes that a Health Status Report from the Ontario Ministry of Community and Social Services, prepared in 2014, indicates that the prognoses for Deandra's conditions were listed as unknown and that the conditions could deteriorate, remain the same, or improve. The Officer states that much has clearly changed for the Applicant and his family since October 2014 and that it is the Applicant's responsibility to provide up-to-date information that may affect his application. The Officer also accepts that Deandra's mother will be unable to support her in the Applicant's absence but finds that, based on the letters of support they provided to the Applicant, it would be reasonable to presume that the Applicant's mother and sisters will provide necessary support to Deandra if required.

[9] Considering the best interests of the Applicant's daughter, Isabella, the Officer finds that there is insufficient evidence that she will be negatively impacted by the outcome of the Decision. As with the Applicant's establishment, the evidence does not show how the Applicant provides for his daughter's financial needs. There is also insufficient objective evidence about his wife's condition or its effect on her ability to care for their daughter to establish how the Applicant steps in when she cannot cope. The Officer also notes that the evidence does not establish that the same love and support that the Applicant's family provides to him would not be extended to his daughter.

[10] The Officer also takes into account the Applicant's criminal history and notes that, in addition to his 2010 conviction for forcible confinement, he was charged with possession of cannabis and possession for the purpose of trafficking in 2012. Even though the forcible

confinement conviction occurred approximately seven years before the Decision, and the drug charges were withdrawn in 2014, the Officer finds that the Applicant's criminal record weighs against him in his H&C application.

[11] The country conditions in South Africa do weigh in the Applicant's favour but the Officer finds that this is only one factor within the assessment and that there is insufficient evidence that all parts of South Africa are dangerous. The Applicant claimed that he has no significant connections in South Africa, having not resided there for over 20 years. And the Officer acknowledges that the documentary evidence does report instances of arbitrary arrests, vigilante and mob violence, and officials acting with impunity that make it possible that the Applicant could face hardship. The Officer notes, however, that the Applicant is an English-speaking adult with some work experience and education which could assist him in re-establishing himself in South Africa.

[12] Taking all of these factors into account and weighing them together, the Officer was not satisfied that there are sufficient H&C considerations to justify an exemption from the requirements of the Act.

IV. ISSUES

[13] The Applicant submits that the following issues arise in this application:

1. Does the Officer apply the wrong test when considering the best interests of the Applicant's child?
2. Is the Officer's assessment of the best interests of the child [BIOC] unreasonable?

3. Does the Officer improperly rely on withdrawn criminal charges against the Applicant?

V. STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[15] The Applicant submits that the standard of review for whether the Officer applied the proper test for the BIOC is correctness. See *Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894 at para 27 [*Segura*]. The Respondent submits that an immigration officer's decision on an H&C application is reviewable under the standard of reasonableness. See *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*], *Abeleira v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008 at para 28, and *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18.

[16] I acknowledge that this Court has expressed divided views on the standard of review applicable to an officer's selection of the legal test in an H&C application. See *Zlotosz v Canada*

(Immigration, Refugees and Citizenship), 2017 FC 724 at paras 13-15 [*Zlotosz*]. It seems to me, however, that despite *Segura* being a decision rendered after *Dunsmuir*, the notion that the proper test for the BIOC is an extricable question of law subject to correctness review has been overtaken by the evolving principles of the common law of judicial review. In *Kanthasamy*, the Supreme Court of Canada held that the existence of a certified question did not change the standard of review of a decision on an H&C application from reasonableness to correctness. See *Kanthasamy*, above, at para 44. And despite giving extensive guidance on the proper approach to be applied in an H&C application, see *Kanthasamy*, above, at para 33, the Supreme Court still reviewed the matter by considering the clarified test's application to the facts of the case under a reasonableness standard. See *Kanthasamy*, above, at para 45, and *Roshan v Canada (Citizenship and Immigration)*, 2016 FC 1308 at para 6. This approach avoids needless formality regarding the precise words used to articulate the test. Given that the question of whether the proper test was applied will almost always involve an evaluation of how the test was applied in the circumstances, as it does here, the Court's attention should focus on the proper issue to be decided. See *Segura*, above, at para 29, and *Dunsmuir*, above, at para 145. The Officer's consideration of the BIOC, including whether the Officer applied the appropriate test, will therefore be reviewed under a reasonableness standard, although even if I were to apply a correctness standard the result would be the same.

[17] The parties agree, as do I, that the issue of whether the Officer improperly considered the Applicant's withdrawn criminal charges is reviewable under a reasonableness standard. See *Kharrat v Canada (Citizenship and Immigration)*, 2007 FC 842 at paras 15-16 [*Kharrat*].

[18] 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." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only 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."

VI. STATUTORY PROVISIONS

[19] The following provisions of the Act are relevant in this application:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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	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

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.	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.

VII. ARGUMENT

A. *Applicant*

(1) Best Interests of the Child

[20] The Applicant submits the Officer incorrectly applies a hardship standard when finding that there is insufficient evidence that Isabella's best interests would be "negatively impacted by the outcome of his request for an exemption." In *Kanthasamy*, above, at para 59, the Supreme Court of Canada endorsed the Federal Court of Appeal's observation that "[c]hildren will rarely, if ever, be deserving of any hardship": quoting *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 9. The Applicant says the proper approach is to assess what is actually in the child's best interests and that he was not required to show that his child would suffer if he is removed. See *Judnarine v Canada (Citizenship and Immigration)*, 2013 FC 82 at para 45, and *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at para 67.

[21] The Applicant also submits that the Officer's BIOC assessment unreasonably segmented the analysis of Deandra's mental illness from her ability to care for their child without the Applicant's support. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*], Justice L'Heureux-Dubé held 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." The Applicant notes that the Supreme Court has since specified that "[w]here, as here, the legislation specifically directs that the best interests of a child who is 'directly affected' be considered, those interests are a singularly significant focus and perspective": *Kanthasamy*, above, at para 40. This is a contextual evaluation that must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity": *Kanthasamy*, above, at para 35. And "[b]ecause children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief": *Kanthasamy*, above, at para 41. This Court has held that "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 [be] reasonably determined": *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at para 11.

[22] The Applicant says that when the evidence is considered together, the Officer's finding that there is insufficient evidence that his daughter would be negatively affected by his removal is unreasonable. The Officer does acknowledge the medical reports about Deandra's condition when analyzing her relationship with the Applicant but expresses concern that the reports date

from 2014. While the Applicant also accepts that Deandra's medical reports do not address how her mental illness affects her ability to care for their daughter, he points out that her affidavit describes her problems in completing daily tasks, lack of family support, and her belief that she cannot raise their daughter without his support. The Applicant's affidavit details the support he provides in managing his wife's symptoms and caring for their child. These are sworn documents entitled to the presumption of truthfulness as the Officer provided no reason to doubt the Applicant's credibility. See *Maldonado v Canada (Minister of Employment & Immigration)* (1979), [1980] 2 FCR 302 (CA). Nor does the Officer explain why the affidavits were insufficient to establish that Deandra continues to suffer from serious mental illnesses and requires the Applicant's assistance. Together, this evidence demonstrates that his daughter is a young child with a seriously ill mother who requires his assistance. The conclusion that his daughter's best interests would not be negatively impacted by his removal is therefore unreasonable.

[23] The Applicant also says that he is not requesting that the Court reweigh the evidence. Instead, the Applicant asserts that the Officer's finding is not rationally supported because of the segmented approach the Officer unreasonably applies.

(2) Withdrawn Charges

[24] The Applicant submits that the Officer's reliance on charges that were withdrawn is also unreasonable. Withdrawn charges "cannot be used, in and of themselves, as evidence of an individual's criminality": *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at para 50 [*Sittampalam*]. As Justice MacTavish described in *Thuraisingam v Canada*

(Minister of Citizenship and Immigration), 2004 FC 607 at para 35, "a distinction must be drawn between reliance on the *fact* that someone has been charged with a criminal offense, and reliance on the *evidence* that underlies the charges in question. The fact that someone has been charged with an offense proves nothing: it is simply an allegation" (emphasis in original). The Applicant says that the Officer's reference to drug charges against him that were withdrawn could not have taken into account any evidence related to the charges because the Officer relies solely on notes from the Global Case Management System [GCMS].

B. *Respondent*

[25] The Respondent submits that s 25 of the Act is a highly discretionary, extraordinary remedy that requires substantial evidence to justify the granting of special relief. See *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29. The Respondent says that the Officer's reasons reflect the evidence the Applicant presented and that the Applicant's arguments are merely a request to reweigh that evidence.

(1) Best Interests of the Child

[26] The Respondent says that the Officer's finding that the best interests of the Applicant's daughter would not be negatively impacted by the failure to grant the Applicant an exemption from the Act did not apply the wrong legal test. In *Zlotosz*, above, at para 21, Justice Diner held that a fair reading of *Kanthasamy* shows that an evaluation of hardship can still form part of the BIOC assessment, so long as it is not "used as a threshold that requires demonstrating that the hardship imposed on a child must reach a particular level." Justice Diner went on to state that the

officer's observation that the applicants in *Zlotosz* failed to show that the child would be "'adversely and significantly affected'… [did] not equate to using the wrong lens identified in *Kanthasamy*": *Zlotosz*, above, at para 22.

[27] The Respondent says that, in the present application, the Officer's assessment of the BIOC factor reasonably turns on insufficient evidence. The Applicant asserted that he takes care of his daughter's financial needs, but the evidence was that he was on social assistance and that he picks up odd jobs to earn extra income. The evidence about his attempts to further his education only amounted to an acknowledgement of his application to George Brown College and a request for more documentation from the school. The Respondent says that the Officer does consider Deandra's affidavit evidence that she continues to suffer from serious mental illness and that the Applicant assists her with raising their child. But objective evidence of the level of interdependence between the couple was insufficient and hospital reports about Deandra's condition were from 2014. The evidence also shows that the Applicant has a close family that is willing to provide him with emotional and financial support. The Officer finds that there is insufficient evidence that this support would not be extended to the Applicant's child.

[28] The Respondent submits that none of this amounts to a segmented review of the evidence and that it was open to the Officer to note the lack of current medical evidence. The Officer's conclusion addresses the concerns and evidence put forward by the Applicant and is therefore reasonable. See e.g. *Gayle v Canada (Citizenship and Immigration)*, 2017 FC 867 at para 48.

(2) Withdrawn Charges

[29] The Respondent also submits that the Officer's assessment of the Applicant's criminal record is reasonable. The Officer recognizes that the 2012 drug charges were withdrawn but considers this in light of the Applicant's assertion that his 2010 conviction for forcible confinement reflected his poor choice of friends at the time and that he was committed to change. The Respondent says that it was open to the Officer to consider the drug charges, not as evidence of the Applicant's criminality, but of his behaviour subsequent to his first conviction. See *Kharrat*, above, at paras 20-21, quoting *Sittampalam*, above, at para 50. The Respondent submits that it was therefore within the Officer's discretion to conclude that the Applicant's criminal record weighed against him.

VIII. ANALYSIS

[30] The Applicant has raised three principal grounds of review and I will deal with each in turn.

A. *Wrong Test for Best Interests of Child*

[31] The Applicant argues as follows:

> 40. In the case at bar, the Officer similarly erred in conducting the best interests analysis through the lens of hardship, as the Officer found that she was not satisfied that the Applicant had provided sufficient evidence that Isabella would be "negatively impacted" by the outcome of the Applicant's H&C application. The Applicant was not required to show that Isabella would suffer (i.e., that her interests would be negatively impacted) should the Applicant be removed.

[32] It was the obligation of the Applicant and/or his advisors to provide the Officer with "sufficient" evidence to support his case for H&C relief, and any insufficiencies are not the fault of the Officer.

[33] As regards hardship, the Officer's BIOC analysis reads as follows:

> With respect to the best interest of the child I am aware that it is an important factor and should be given significant weight in the assessment of an H&C application; however I am also aware that it is not necessarily a determinative factor. In this particular case the applicant has an 18 month old daughter Isabella, who is under the care of the applicant and her mother. The applicant states that he takes care of Isabella when Deandra is having trouble with her mental illness and needs extra support to manage her symptoms. The applicant ensures their daughter has a safe and nurturing environment which is a sharp contrast to the turbulence he experienced in his life without a father. Despite the applicant's statements, I am note [*sic*] satisfied sufficient evidence has been presented that the best interest of Isabella will be negatively impacted by the outcome of his request for an exemption. The applicant stated he takes care of his daughter's financial needs, however provides insufficient evidence of how it is accomplished. With respect to his spouse's mental health condition and how the applicant steps in when his spouse is unable to manage, I note there insufficient objective evidence regarding her condition and its effects on her ability to care for their child. I also note the applicant has ongoing love and support from his family as indicated in the statements made in their letters and the mother's willingness to share her home. There is insufficient evidence it would not be extended to the applicant's child as well.

[34] Clearly, the Officer does not apply a hardship standard in assessing the BIOC. The Officer considers how "the best interest[s] of Isabella will be negatively impacted by the outcome of [the Applicant's] request for an exemption," but does not require that such impact rise to any degree of hardship.

[35] Had the Officer not looked at negative impact – or hardship – he would have committed a reviewable error. Ironically, when the Applicant argues that the Officer's BIOC analysis is unreasonable, he relies upon case law that says hardship must be considered. He cites paragraph 74 of *Baker*, above, which reads as follows:

> 74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is "wholly a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, *and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner*. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.
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> [Emphasis added.]

[36] The Applicant also cites and relies upon the Supreme Court of Canada decision in *Kanthasamy*, above, which at para 41 says: "Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief" (emphasis added).

[37] Justice Diner pointed out recently in *Zlotosz*, above, that hardship is a factor in a BIOC analysis and that addressing it does not mean that an officer is looking at best interests through a hardship lens:

> [21] An assessment of hardship can, therefore, form part of the BIOC assessment, even if it cannot be used as a threshold that requires demonstrating that the hardship imposed on a child must reach a particular level. In my view, a fair reading of *Kanthasamy* and the jurisprudence of this Court interpreting it, shows that there is no merit to the Applicants' submission that the Officer applied a wrong or incorrect test. Indeed, hardship a child may or may not face can support a favourable outcome based on BIOC (*Kanthasamy* at para 41; *Liang v Canada (Citizenship and Immigration)*, 2017 FC 287 at para 26 [*Liang*]; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 12.).
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> [22] Here, the Officer observed that the Applicants did not show the child would be "adversely and significantly affected". This does not equate to using the wrong lens identified in *Kanthasamy*. It is perfectly clear that while the Applicants would have preferred that the Officer come to a different conclusion, the Officer's approach was justifiable based on the evidentiary record presented. The Federal Court of Appeal has rejected the notion that consideration of the BIOC simply requires that the officer determine whether the child's best interests favours non-removal, as this will almost always be the case (see for instance *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 (CanLII) at para 11 [*Louisy*]; *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 (CanLII) at paras 46-47; *Nguyen* at para 7). Rather, the law is clear that the onus rests squarely with the applicant to provide sufficient evidence on which to exercise positive H&C discretion. Here, the Officer applied a contextual approach to BIOC and found that the Applicants failed to provide such evidence.

[38] The Officer's BIOC analysis in this case accords entirely with the jurisprudence of this Court as articulated by Justice Diner in *Zlotosz*.

[39] Alternatively, the Applicant says that, if the Officer does not apply a hardship test, then he assesses the BIOC through the lens of hardship and does not weigh all of the factors. The record shows, however, that there is very little evidence about Isabella's present and future needs. At this stage in her life, she simply needs to be cared for. It is the Applicant's case that his wife cannot do this without his presence and assistance. This is why most of the Decision deals with the medical and personal evidence regarding Deandra and with the contributions the Applicant brings to the situation, as well as the involvement of extended family members.

[40] In my view, a reading of the Decision as a whole makes it clear that the Officer neither applies the wrong test in her BIOC analysis or deals with Isabella's best interests through the lens of hardship.

B. *Unreasonable BIOC Analysis*

[41] The Applicant also argues that the BIOC analysis in the present case is unreasonable for the following reasons:

> 55. The Applicant submits that the Officer undertook a segmented review of the evidence pertaining to Deandra's mental health, her ability to care for Isabella, and her reliance on the Applicant. The Officer ought to have considered all of the relevant evidence together. The relevant evidence consists of reports from Deandra's hospitalization in 2014; a report from the Ministry of Community and Social Services, and affidavits from Deandra and the Applicant.
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> 56. When all of the evidence is considered together, it is clear that the Officer's assessment is unreasonable. The Officer was required to be "alert, alive and sensitive" to Isabella's best interests, and to take into account Isabella's age, capacity, needs and maturity. Isabella is a very young child with a seriously mentally ill mother who requires the assistance of Isabella's father in managing her symptoms and caring for Isabella. Considering the

> medical reports and the sworn statements of Deandra and the Applicant together, it was wholly unreasonable for the Officer to conclude that Isabella's interests would not be negatively impacted by the Applicant's removal from Canada.
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> 57. Furthermore, the Officer does not state why she found the sworn evidence provided by Deandra and the Applicant to be insufficient in establishing that Deandra continues to suffer from serious mental illnesses and requires assistance and support in caring for Isabella. The Officer failed to apply the principle in *Maldonado v Canada (Minister of Employment and Immigration)*, that facts sworn to be true are presumed to be true unless there is a valid reason to doubt their truthfulness. The Officer made no adverse findings regarding either Deandra or the Applicant's credibility with respect to the affidavits provided in support of the Applicant's H&C application. The Officer failed to explain why the Applicant and Deandra's sworn statements regarding Deandra's mental illness and her reliance on the Applicant were insufficient to establish these facts, and there was no reason for the Officer to doubt these statements.
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> [Emphasis in original.]

[42] By segmentation, the Applicant appears to mean that the Officer did not consider Deandra's medical reports together with the affidavit evidence of Deandra and the Applicant. He argues that, "[r]ead together, the medical reports and the affidavits clearly establish that Deandra has serious and chronic mental health issues that affect her ability to care for Isabella, and requires ongoing support from the Applicant to do so."

[43] A plain reading of the BIOC analysis set out above makes it clear that the Officer considered both the evidence of Deandra's mental health condition as well as the affidavits and finds that "there is insufficient objective evidence regarding her condition and its effects on her ability to care for their child" and – with regards to the affidavits – concludes that "[d]espite the applicant's statements, I am note [*sic*] satisfied sufficient evidence has been presented that the

best interest of Isabella will be negatively impacted by the outcome of his request for an exemption." So, once again, the problem is the insufficiency of the evidence put forward by the Applicant to support his case. The Officer is clearly aware of Deandra's evidence about her difficulties in looking after Isabella because he acknowledges the evidence that the Applicant "takes care of Isabella when Deandra is having trouble with her mental illness and needs extra support to manage her symptoms," and further points out that Deandra's problems in looking after Isabella also have to be viewed in the context of the available support from the Applicant's family:

> I also note the applicant has ongoing love and support from his family as indicated in the statements made in their letters and the mother's willingness to share her home. There is insufficient evidence it would not be extended to the applicant's child as well.

[44] It is certainly possible to disagree with the weight given by the Officer to the evidence available to her, but it is not possible to say that she did not look at it all when assessing the BIOC. The medical evidence was dated (2014) and made clear that Deandra's future prognosis was unknown. Hence, the Officer reasonably required medical evidence of the current situation in order to make a proper assessment of Deandra's needs and capabilities in looking after Isabella. Such evidence was not provided, so that it was not unreasonable for the Officer to conclude that there was insufficient objective evidence about how Deandra's mental health affected Isabella's needs. The Applicant cannot fault the Officer for the Applicant's failure to provide the evidence needed to assess the best interests of Isabella. The Officer concluded that the personal evidence provided by the Applicant was not sufficient to fill any gaps. My review of the affidavits of the Applicant and Deandra suggest to me that the Officer was not unreasonable in requiring more up-to-date medical evidence before the BIOC could be fully assessed.

[45] It is also clear that the Officer found Deandra's sworn evidence to be insufficient because "there is insufficient objective evidence with respect to her more current condition."

C. *Relying on Charges that were Withdrawn*

[46] The Applicant says that the Officer "clearly took into account the withdrawn charges in assessing the Applicant's criminality" and that it is "well-established that it is an error for a decision maker to consider charges that were withdrawn in assessing criminality."

[47] The Officer's assessment on this issue is as follows:

> I have also taken into account the applicant's criminal record and note he was convicted of forcible confinement in 2010. Evidence in GCMS also indicates he was charged with possession of cannabis and possession with the purpose of trafficking in December 2012, however the charges were withdrawn in October 2014 when he attended court. With respect to the conviction [he] acknowledged his choice of friends was not the wise[st] and was not a positive influence on him. He stated that he is committed to improving the quality of his life and is committed to his spouse and child. While I note the offence occurred approximately seven years ago and the drugs charges were withdrawn, the applicant's criminal record does not weigh in his favor.

[48] As I read this paragraph, the Officer is simply saying that, even though the drug charges were withdrawn (and hence are not part of the Applicant's criminal record), what remains (e.g. the forcible confinement in 2010) "does not weigh in his favour." There is nothing unreasonable or inappropriate about this conclusion. The Applicant says that the Decision cannot be read in this way because of the use of "and" in the Officer's conclusion:

> While I note the offence occurred approximately seven years ago and the drug charges were withdrawn, the applicant's criminal record does not weigh in his favour.

[49] In my view, the Officer is not saying that the drug charges are part of the Applicant's criminal record; she is, in fact, noting that they are not because they have been withdrawn. It strains belief to think that a qualified Officer would consider withdrawn charges to be part of an applicant's "criminal record" that would count towards his inadmissibility.

[50] There is also some relevance of the withdrawn cannabis charges and what they say about the Applicant's behaviour since the time of his conviction. His evidence was that he had made unwise choices that led him into error and a criminal conviction, but that he was committed to change. The Applicant provided no evidence about the cannabis charges or why they were withdrawn that would allay obvious doubts about whether his behaviour and judgment had improved in a way that would make them a positive H&C factor. See *Kharrat*, above, at paras 20-21, and *Sittampalam*, above, at para 50.

[51] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-3880-17

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3880-17
STYLE OF CAUSE:	BRANDON-RYAN MICHAEL TREVOR DANIELS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 3, 2018
JUDGMENT AND REASONS:	RUSSELL J.
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APPEARANCES:

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