Federal Court  Cour fédérale

Date: 20180524

Docket: IMM-4709-17

Citation: 2018 FC 537

Ottawa, Ontario, May 24, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

AKM FIROJ SHAH, FARHANA SULTANA AND SAMAD ZAIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, a family from Bangladesh, seek judicial review of the decision of a Senior Immigration Officer [the Officer] refusing their application for an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] on humanitarian and compassionate grounds [H&C] pursuant to section 25 of the Act.

[2] For the reasons that follow, the Application is dismissed. The Officer did not apply an outdated approach to the H&C determination, nor did he fetter his discretion or fail to meaningfully assess the best interests of the children [BIOC] affected by the decision.

I. Background

[3] In 2008, the Principal Applicant and his wife moved from Bangladesh to the United Kingdom [UK], where the Principal Applicant obtained a Masters of Business Administration. They remained in the UK until November, 2014. The Principal Applicant visited family in Bangladesh for 19 days in May 2014, after which he returned to the UK. The Principal Applicant also travelled to the United States [US] at some point before coming to Canada. The Applicants did not seek refugee protection in the UK, because they considered the chance of success to be extremely low. They also did not seek refugee protection in the US. The Principal Applicant describes himself as a "blogger" who writes articles which are highly critical of the Awami League, the governing party in Bangladesh, and are supportive of the Bangladesh Nationalist Party, a minority party. He claims that as a result of his blogging, he faced problems when he visited Bangladesh in 2014, including being kidnapped.

[4] The Applicants came to Canada in November 2014 and made a claim for refugee protection in January 2015.

[5] The Applicants' claim for refugee protection was refused. They then applied for permanent residence in Canada based on H&C grounds. The Principal Applicant claimed on

behalf of himself, his wife, Farhana Sultana, and his four year old son, Samad Zain. The family also includes their two-year old Canadian born daughter, Zunaira.

A. *The RPD decision*

[6] The RPD found that the Applicants' failure to claim asylum in the UK or in the US indicated a lack of subjective fear. The RPD also found that the Principal Applicant had not demonstrated that he was a high profile individual who would be targeted by the Bangladeshi government.

[7] The RPD noted that the majority of the Principal Applicant's blogs were written after his arrival in Canada and, given that there is no guarantee he would be able to stay in Canada, undermined the well-foundedness of his fear of returning. The RPD characterized the main purpose of the blogs as to embellish the strength of his claim.

[8] The RPD also noted several credibility concerns relating to the Principal Applicant's claim that he was kidnapped because of his blogging, including that his Basis of Claim [BOC] did not set out why he was kidnapped. Further, while the Principal Applicant testified that he reported his kidnapping to the police, he omitted this detail from his BOC. The RPD also noted that there was no corroborative evidence of the kidnapping. The RPD concluded that it was more likely that the Principal Applicant was the victim of a random attack, rather than one motivated by his blogging. The RPD also held that the Principal Applicant had not rebutted the presumption of state protection.

B. *The RAD decision*

[9] The RAD confirmed the RPD's decision. The RAD agreed with almost all of the RPD's conclusions, with the exception of the RPD's finding that the Principal Applicant had not indicated the motive behind his kidnapping in his BOC form. The RAD noted that, in his BOC, the Applicant stated that he was kidnapped because of his blogging.

II. The Decision Under Review

[10] The Applicants raised three main grounds in their application for permanent residence on H&C grounds: discrimination and adverse country conditions upon return to Bangladesh; their ties to Canada; and, the best interests of their children. Their application was refused on September 15, 2017

[11] The Officer took note of the findings of the RPD and RAD, including that the Principal Applicant's evidence contained a number of inconsistencies which impugned his credibility regarding his claimed high profile. The Officer noted that the Applicants did not provide any new evidence or submissions to address the credibility concerns or findings of fact made by the RPD and RAD. The Officer found that the Applicants had not rebutted the findings regarding the Principal Applicant's claimed risk as a blogger.

[12] The Officer then reviewed the blogs and the country condition documents, which noted instances of violence towards advocates for secularism, atheism, and gay rights, in Bangladesh. The evidence also indicated that religious fundamentalism was on the rise. The Officer found

that this evidence demonstrated that the situation in Bangladesh is “far from ideal”. However, the Officer found this to be inapplicable to the Principal Applicant, who had not blogged about religion or gay rights. The Officer also noted a lack of corroborating evidence from family members in Bangladesh to indicate that the Principal Applicant was of any interest to Bangladeshi authorities. The Officer found insufficient evidence to suggest that the Applicants would face hardship based on his blogging.

[13] The Officer also found that the Applicants had not demonstrated that they would face hardship because of the employment situation in Bangladesh. The Officer noted that the Applicants had not linked the general evidence on the unemployment rate in Bangladesh to their personal circumstances, pointing out that the Principal Applicant had an MBA, was previously employed in Bangladesh, and had found work in both the UK and Canada. The Officer also noted the evidence suggesting that unemployment in Bangladesh was less than 5%, and that the economy was growing.

[14] With respect to their establishment since arriving in Canada, the Officer acknowledged the submissions that the Principal Applicant’s wife looked after a cousin with cerebral palsy for a few days a week, and that the Principal Applicant’s aunts provided childcare and financial assistance for the Applicants. The Officer noted, however, that the cousin did not indicate whether she would face hardship if the Applicants returned to Bangladesh or whether she could obtain assistance elsewhere (if she needed such on-going assistance). The Officer found that the letters from the aunts were not sufficient to show that the Applicants require full-time childcare or that they would be unable to obtain it in Bangladesh.

[15] The Officer noted that there was no evidence to support the Principal Applicant's assertion that his family in Bangladesh have shunned him as a result of his blogging, noting that this assertion was contradicted by his family members' provision of supportive evidence for his refugee claim.

[16] The Officer considered other evidence regarding the Applicants' establishment in Canada, including some evidence of employment, involvement in a fundraiser for a community centre, and some supportive letters from co-workers. The Officer noted that they have maintained a good civil record. The Officer placed positive weight on the Applicants' establishment, but found that the evidence did not show that they had integrated into Canadian society to such an extent that their departure would "cause hardship that was beyond their control and not anticipated by the *IRPA*." The Officer noted that a certain degree of establishment was expected for the family, as they lived in Canada for three years while benefitting from the "due process" of the immigration system. The Officer found there was no evidence that the Applicants' connections in Canada could not be maintained through modern technology, or that doing so would cause hardship.

[17] With respect to the BIOC, the Officer acknowledged his duty to be alert, alive and sensitive, while noting that BIOC was only one of many important factors in an H&C assessment.

[18] The Officer considered that Samad had been assessed by a paediatrician, Dr. Penner, in November 2015 as having "particular weaknesses in his communication and social skills, as well

as exhibiting some restrictive and repetitive behaviors", which best fit the diagnosis of Autism Spectrum Disorder (ASD). The paediatrician developed a plan to review available services to support Samad and to reassess him in 6-12 months. The Officer noted that the Applicants had not provided any evidence that Samad was ever reassessed and, as such, found that Samad's current needs were unknown. The Officer also noted that the paediatrician's report did not indicate that Samad's needs could only be met in Canada.

[19] The Officer considered the availability of ASD treatment in Bangladesh. He acknowledged the documents submitted by the Applicants, which consisted of an undated online article that failed to indicate the country referred to, an article from "theindependent", and an April 2016 article by a Dr. Ahmed, who notes that the health system infrastructure in Bangladesh has not developed to provide necessary capacity and supports for children with autism. The Officer also conducted additional research and concluded that, based on the objective evidence, treatment for ASD is available in Bangladesh. He cited information from a news article, which described various clinics and schools for students with autism, and which indicated that Bangladesh has established a National Advisory Committee on Autism. The Officer also referred to the website of the Autism Bangladesh Foundation, noting that it provided up-to-date information on events and treatment facilities. The Officer further noted that the website indicates there are three schools specializing in serving children with autism, including one in the Applicants' home area.

[20] The Officer concluded that Bangladesh has the resources available to treat Samad, and that the evidence did not indicate that it would be contrary to Samad's best interests to access the available treatment in Bangladesh.

[21] The Officer found that the Applicants' claim that the status of females, the rise of Muslim fundamentalism, and the inferior infrastructure in Bangladesh will negatively affect their daughter, Zunaira, was vague, speculative, and not supported by evidence. The Officer concluded that the country conditions in Bangladesh would not negatively impact Zunaira to the extent that a positive H&C determination was warranted.

[22] The Officer also found that the Applicants' claim that Zunaira would be negatively impacted by Bangladesh's poor healthcare and education systems was not supported by objective evidence, nor was there any evidence that Zunaira required any specialized healthcare. The Officer acknowledged that the objective evidence regarding Bangladesh's education and health care systems showed that it was not perfect, but it is available.

[23] The Officer acknowledged that there may be an economic impact for the Applicants. The Officer also found that, given the children's young age, it was reasonable to expect that the transition would have a minimal impact on them. The Officer added that the Applicants had extended family in Bangladesh, who could presumably help with the transition.

[24] The Officer concluded that it would not be contrary to the children's best interests to return to Bangladesh and that the consequences of returning would not have a "negative impact…to the extent that an exemption is justified".

[25] The Officer noted that the H&C process is not designed to eliminate hardship, nor is it meant as an alternative route to obtaining permanent residence in Canada, but rather a mechanism for relief in exceptional cases. The Officer concluded that upon balancing all the factors, the difficulties the Applicants would face if returned to Bangladesh were not such that an exemption under section 25 was justified.

III. The Issues

[26] The Applicants argue that the Officer breached procedural fairness by relying on extrinsic evidence with respect to the resources available for children with autism in Bangladesh.

[27] The Applicant also argues that the decision is not reasonable, primarily because the Officer did not undertake the appropriate analysis for an H&C exemption as guided by the Supreme Court of Canada's decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*].

IV. The Standard of Review

[28] The standard of review of a discretionary decision is reasonableness (*Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835 at para 6, [2006] FCJ No 1061 (QL);

see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57-62, 174 DLR (4th) 193 [*Baker*]).

[29] More particularly, the standard of review of an Officer's decision with respect to an H&C application is reasonableness (*Kanthasamy* at para 44).

[30] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker and the Court will not re-weigh the evidence.

[31] Issues of procedural fairness are reviewed on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

V. The Officer did not breach procedural fairness

[32] The Applicants argue that the Officer breached procedural fairness by relying on his own internet research with respect to the services available to support children with autism in Bangladesh (citing *Do v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1064, [2017] FCJ No 1128 (QL) [*Do*]).

[33] The Respondent submits that the evidence reviewed by the Officer from the Officer's search was publicly accessible and not *prima facie* extrinsic (*Azizian v Canada (Minister of Citizenship and Immigration)*, 2017 FC 379, [2017] FCJ No 385 (QL) [*Azizian*]). The Respondent submits that the Officer only turned to this evidence because the Applicants put the availability of autism treatment in Bangladesh in issue, and provided insufficient evidence to support their claim that no treatment was available.

[34] I do not find that the Officer breached the duty of procedural fairness owed in the circumstances of this case by referring to sources not submitted by the Applicants, including the Autism Bangladesh Foundation website. An Officer's reference to online resources does not automatically trigger a duty to provide the applicant with an opportunity to respond. The jurisprudence has evolved and establishes that a more contextual approach to the treatment of such evidence is required.

[35] In *Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294, 427 FTR 285 [*Majdalani*], Justice Bédard carefully analyzed the prevailing jurisprudence regarding reliance on websites and publicly available documentation in the context of an H&C application. She began by noting the principles established by the Supreme Court of Canada in *Baker* regarding the duty of procedural fairness, the scope of which varies with the context and is guided by several factors. Justice Bédard observed that the pre – *Baker* jurisprudence generally took the approach that the applicant should be informed of "novel and significant information" which shows a change in country conditions that would affect the disposition. Justice Bédard added that in the post – *Baker* jurisprudence, the courts have generally taken a contextual

approach, which considers, *inter alia,* the nature of the decision and the possible impact of the evidence on the decision.

[36] Justice Bédard referred to the jurisprudence that has applied the “novel and significant” test and the jurisprudence that has taken a broader contextual approach. She noted, in particular, *Molina de Vazquez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 530 [2014] FCJ No 548 [*Molina de Vazquez*], noting at para 35;

> [35] In *Molina de Vazquez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 530 at paras 27-28, [2014] FCJ No 548 [*Molina de Vazquez*], Justice de Montigny stressed that not all information available online can be considered as information publicly available. However, he found that the H&C officer was not required to disclose general information regarding the Argentinean school system even though he had gathered the information from an unorthodox website because it contained general information which was easily accessible elsewhere by the applicants:
>
> > 27 I agree with the Applicants' assertion that not everything found online can be considered as publicly available. If it were otherwise, as I stated in *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 (at para 39), it "would impose an insurmountable burden on the applicant as virtually everything is nowadays accessible on line". An officer should therefore be prudent when considering and relying upon "materials that could not be described as the kind of standard documents that applicants can reasonably expect officers to consult" (*Mazrekaj v Canada (Minister of Citizenship and Immigration)*, 2012 FC 953 at para 12). […]
> >
> > 28 That being said, it is not the document itself which dictates whether it is "extrinsic" evidence which must be disclosed to an applicant in advance, but whether the information itself contained in that document is information that would be known by an applicant, in light of the nature of the submissions made: *Jiminez v Canada (Minister of Citizenship*

> *and Immigration)*, 2010 FC 1078 at para 19; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 at paras 38-39. In the case at bar, while the particular websites consulted by the Officer might be considered somewhat unorthodox and are clearly not standard sources, they contained general information on the Argentinean school system which would have been reasonably accessible by the Applicants. They provide general information on the Argentinean school system that could have been found elsewhere by the Applicants, and that information can clearly not be characterized as "novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case", as stated by the Federal Court of Appeal in *Mancia*.
>
> [See also *Lopez Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778 at para 24, [2013] FCJ No 833 (J. Gagné); *Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 824 at para 36, [2013] FCJ No 896 (J. Strickland).]

[37] In *Majdalani*, Justice Bédard adopted a contextual approach, noting that the duty of fairness should be assessed in light of the applicant's allegations and the evidentiary burden. In that case, she noted that the H&C officer's research regarding home care options pertained directly to the applicant's allegation regarding her need to remain in Canada to care for her elderly mother, and that the Officer only turned to online information after concluding that the applicant's own evidence was insufficient. Similarly, Justice Bédard found that the Officer's reference to the website for the Ministry of Education and Higher Learning in Lebanon pertained to the applicant's allegation that her daughter could not continue her education in Lebanon as she had lost her proficiency in Arabic, which the Officer only consulted after finding that the Applicants' own evidence was lacking. Justice Bédard found that the evidence consulted by the Officer was not "significant" to the decision, as the Officer had already found that the Applicant

had provided insufficient evidence to establish her claims. Further, Justice Bédard noted that the information consulted by the Officer was "widely available" public knowledge, which the applicant could be "reasonably expected to know".

[38] More recently, in *Azizian*, in the context of a Visa Officer's decision, Justice Boswell found that consulting open source information was not extrinsic evidence and did not require the Officer to put the evidence to the applicant for a response. Although the duty of procedural fairness owed to a Visa applicant is recognized to be at the lower end of the spectrum, the conclusion of Justice Boswell is consistent with the prevailing jurisprudence that had also been applied in the H&C context:

> [29] I am not convinced that, in the circumstances of this case, the Officer was required to disclose the open-source documents that supported the inadmissibility decision. The basic rule in this regard was set out by the Federal Court of Appeal in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 565, [1998] 3 FC 461, (CA); there is no requirement to disclose published documentary sources of information before the decision is made. An officer's reliance upon information gleaned from websites has been found to be fair and not an improper resort to extrinsic evidence in several decisions of this Court (see e.g.: *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 58, 472 FTR 285; *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at paras 39-40, 164 ACWS (3d) 667; *De Vazquez v Canada (Citizenship and Immigration)*, 2014 FC 530 at paras 27-28, 456 FTR 124; *Pizarro Gutierrez v Canada (Citizenship and Immigration)*, 2013 FC 623 at para 46, 434 FTR 69).

[39] In *Do*, relied on by the Applicants to support their argument that this "extrinsic evidence" should have been disclosed, Justice Ahmed commented on the Officer's reliance on his own research and found this to be improper. However, Justice Ahmed did not delve into the jurisprudence regarding extrinsic evidence, likely because his key finding was that the Officer's

conclusion contradicted the evidence overall, and more importantly, Justice Ahmed found that the Officer did not sufficiently consider the BIOC.

[40] At para 16, Justice Ahmed, notes:

> The research, as outlined in these two articles, concludes in general that two-parent households are better than a single-parent household which contradicts the Officer's conclusion that the Applicant's daughters are not disadvantaged by the removal of the Applicant from their home. This is blatant misuse of the Officer's own research in his assessment of the BIOC. It is conspicuous that the Officer never turned his mind to the BIOC in any detail.

[41] In the present case, the Applicants' submissions regarding BIOC focused, in large part on Samad's need for ongoing support for autism. Given the sparse nature of the evidence provided by the Applicants to support their contention that Samad could not obtain treatment for ASD in Bangladesh, the Officer did not err in turning to publicly available websites describing general information.

[42] The onus remained at all times on the Applicants to support their H&C application with sufficient evidence, including with respect to the BIOC. As in *Majdalani*, the evidence they provided in support of their view that their son could not be treated for autism in Bangladesh − all of which was considered by the Officer − was not sufficient, and was equivocal. Further, the objective information gathered by the Officer regarding schools and other support services could have been easily accessed by the Applicants, just as they accessed the articles they submitted. Therefore, the Officer had no duty to share those articles with the Applicants.

VI. Is the decision Reasonable?

A. *The Applicants' Submissions*

[43] The Applicants submit that the Officer had a duty to consider their H&C application in a flexible and contextual manner, while focusing on the underlying equitable purpose of H&C applications. They submit that *Kanthasamy* establishes that hardship is no longer the "litmus test" for H&C consideration.

[44] The Applicants' position is that the Officer's decision, read as a whole, shows that the Officer took a narrow and rigid approach, rather than a flexible approach, and began from the position that, having been denied refugee protection, the Applicants should not succeed on their H&C application.

[45] The Applicants argue that the Officer erred by: focussing narrowly on hardship; making findings without a clear evidentiary basis; conflating the RPD and RAD's findings of the Applicants' "risk" with the issue of "hardship" in the H&C context, such that the Officer fettered his discretion; making unreasonable findings regarding their establishment; failing to fully consider the evidence of their establishment in Canada, instead, focussing only on their return to Bangladesh; and, misapplying the jurisprudence and principles regarding the BIOC.

[46] With respect to the BIOC, the Applicants argue, among other things, that the Officer erred in finding that Samad's current needs are unknown. They point to Dr. Penner's detailed plan. They also submit that there is no evidence to suggest that Samad no longer needs treatment,

or that the services in Bangladesh would be “palatable” for him. They submit that there is no evidence that Samad could attend the schools identified by the Officer, or that they are comparable to available support in Canada.

[47] The Applicants’ argue that the Officer conceded that the children would face poverty and violence but failed to explain *why* this would not necessarily impact their best interests.

[48] The Applicants also submit that the Officer simply stated that he had taken their best interests into account, but did not conduct a meaningful analysis.

B. *The Respondent’s Submissions*

[49] The Respondent submits that the decision, read as a whole, shows that the Officer did not focus on hardship at the expense of a more holistic approach. Rather, the Respondent submits that the Officer thoroughly considered all the evidence, including with respect to the childrens’ best interests, and came to a reasonable conclusion.

C. *The Decision is Reasonable*

[50] At the outset, the purpose of an H&C determination must be kept in mind. Section 25 provides that an exemption from some findings of inadmissibility and from other criteria or obligations of the Act may be granted on the basis of humanitarian and compassionate considerations, “taking into account the best interests of a child directly affected”. In this case, the Applicants sought permanent residence status without applying for that status from their

country of origin, as would otherwise be required. Contrary to the Applicants' view that this is not "exceptional", any relief that provides an exemption from the otherwise applicable legal requirements is, in my view, properly characterized as "exceptional". This relief is discretionary. It is not an "ask and you shall receive" type remedy for those who do not meet the requirements of the Act. The onus is at all times on an applicant to establish with sufficient evidence that this relief (or exemption or "exception") should be granted. Officers who conduct H&C assessments must consider all the evidence presented, while adopting a flexible and contextual approach. In each case, the Officer must be satisfied that the relief is justified in the particular circumstances.

[51] In *Liang v Canada (Minister of Citizenship and Immigration)* 2017 FC 287 at para 23, [2017] FCJ No 286 (QL), Justice Strickland captured the essence of an H&C determination as follows:

> [23] Subsection 25(1) of the IRPA states that the Minister may grant a foreign national permanent resident status, or an exemption from any applicable criteria or obligations of the IRPA, if the Minister is of the opinion that it is justified by H&C considerations, taking into account the best interests of a child directly affected. This relieves an applicant, on the basis of hardship, from having to leave Canada to apply for permanent residence through the normal channels (*Shrestha v Canada (Citizenship and Immigration)*, 2016 FC 1370 at para 11; *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at para 16; *Basaki* at para 20). An H&C exemption is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15 ("*Semana*")) and the onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 29; *Semana* at para 16; *D'Aguiar-Juman v Canada (Citizenship and Immigration)*, 2016 FC 6 at para 9).
>
> [Emphasis added]

[52] The Officer did not err in his analysis of H&C application. As noted above, a decision is reasonable where it is transparent, intelligible and justified. In the present case, the Officer thoroughly addressed all of the Applicant's evidence and submissions, referred to the relevant principles from the jurisprudence, and applied them reasonably. The Officer did not ignore or misconstrue any evidence. The Officer did not focus only on hardship, fetter his discretion, or fail to conduct a meaningful analysis of the BIOC. The decision bears the hallmarks of a reasonable decision to which deference is owed.

[53] I do not share the Applicants' view that the Officer's decision is narrow and rigid, or that the Officer treated the application as pre-determined.

[54] The Applicants argue that the Officer fettered his discretion by relying on the findings made by the RPD and RAD. I disagree. There is no dispute that an H&C application is different from a refugee claim (*Saygili* at para 7). However, an H&C Officer does not err in considering the same facts which had been asserted before the RPD and RAD, as long as these are considered in the H&C context. It is also not an error to take note of the findings of the RPD and RAD, so long as they are not treated as determinative of the H&C application. In the present case, the Officer did not simply adopt the RPD's and RAD's findings in the context of the H&C application. Rather, the Officer independently assessed the allegations that the Principal Applicant's blogging would expose the family to hardships upon return and also assessed all the other submissions made by the Applicants.

[55] The Applicants also argue that hardship is not the focus of an H&C determination and that a flexible assessment of a wide range of factors is required. While it is true that an H&C application requires a flexible assessment and must consider a wide range of factors, the nature of which will vary with the circumstances it is not true that hardship no longer plays a role.

[56] A significant aspect of *Kanthasamy* is the Court's clear direction to avoid imposing a threshold of *unusual, undeserved or disproportionate* hardship and to "give weight to *all* relevant humanitarian and compassionate considerations in a particular case" (at para 33) [Emphasis in original]. The Court did not state that hardship was no longer a consideration. The Court explained, at para 33:

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[57] The Officer did not err in considering the hardship that the Applicants may face, in addition to all the other relevant considerations. Moreover, as the Respondent notes, the Applicants made submissions that they would suffer hardship. The Officer cannot be faulted for addressing those submissions. Nor does the decision suggest that the Officer imposed a test of undue, undeserved or disproportionate hardship.

[58] Contrary to the Applicants' submissions, the Court has not established that it is an error for an H&C officer to fail to articulate what level of establishment would be expected. Their reliance on the findings in *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258, [2014] 3 FCR 639, is misplaced. There, the Court explained that the Officer's error was a failure to provide any explanation as to why the applicant's extensive establishment evidence was "insufficient", or what "insufficient" meant in the circumstances. The Court went on to explain that the Officer also erred by failing to assess the Applicants' establishment in the context of their overall circumstances. Neither of these occurred here. In the present case, the Officer did not set some benchmark for establishment and find that it had not been met. The Officer considered all the evidence submitted with respect to the Applicants establishment in Canada and attached "positive" weight to it.

[59] The Applicants also argue that the Officer erred by noting that their establishment had occurred while they pursued their various claims. In *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, 414 FTR 268 [*Sebbe*], relied on by the Applicants, the Court stated at para 21:

> [21] The second area that I find troublesome has to do with comments the officer made when analyzing establishment. The officer writes: "I acknowledge that the applicant has taken positive steps in establishing himself in Canada, however, I note that he has received due process through the refugee programs and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society." Frankly, I fail to see how it can be said that the due process Canada offers claimants provides them with the "tools and opportunity" to establish themselves in Canada. I suspect that what the Officer means is that because the process has taken some time, the applicants had time to establish themselves <u>to some degree</u>. That is a statement with which one can agree. However, what is required is an analysis and assessment of the degree of establishment of these

> applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.
>
> [Emphasis in original]

[60] I do not agree with the Applicants that the Officer credited their establishment to the fact that they had remained in Canada while pursuing their refugee and H&C claims. As in *Sebbe*, the Officer's point is simply that "some measure" of establishment is expected, given that they have remained in Canada since 2014, while pursuing their claims. In the present case, in addition to this observation, the Officer actually considered the degree of their establishment in the context of all the evidence. Although the Officer attached positive weight to their establishment, the Officer reasonably concluded that the Applicants' evidence does not show that they have become integrated into Canadian society to such an extent that their departure would cause hardship that is beyond what is anticipated by the Act.

[61] The Officer did not err in his BIOC assessment and considered both Samad and Zunaira in this analysis.

[62] The best interests of the children are an important consideration in the H&C assessment, but are not determinative.

[63] The Supreme Court of Canada's decision in *Baker* set out the basic principles regarding a decision-maker's obligation to consider the best interests of the children when making H&C decisions:

> 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. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. (at para 75)

[64] More recently, in *Kanthasamy*, the Court reiterated that officers must be alert, alive and sensitive to the best interests of the child; simply stating that the interests have been considered is not enough.

[65] In *Kanthsamy*, the Court also reiterated that children are rarely deserving of any hardship. However, "any hardship" is not sufficient on its own to justify the H&C exemption. The language of "any hardship" originated in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9, [2003] 2 FC 555 [*Hawthorne*], which also provided guidance for the assessment of the best interests of a child in an H&C application. The principle that a child is rarely *deserving* of any hardship is not disputed, but "any hardship" does not provide a new threshold for determining the BIOC within the H&C application.

[66] In *Kanthasamy*, the Supreme Court of Canada notes the need to consider all relevant factors and calls for a more liberal interpretation of H&C considerations, but it also acknowledges that some hardship is inevitable, at para 23:

> There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1): see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para. 13 (CanLII); *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206 (F.C.T.D), at para. 12. Nor was s. 25(1) intended to be an alternative immigration scheme: House of Commons, Standing Committee on Citizenship and Immigration, Evidence, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40 (Peter MacDougall); see also Evidence, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 9:55 to 10:00 (Joan Atkinson).

[67] Contrary to the Applicants' submissions, the Officer did not concede that poverty in Bangladesh would negatively impact the children, and yet find that this did not impact the BIOC assessment. Rather, the Officer stated:

> The fact that poverty and violence exist might adversely impact a minor child as he is integrated into society; however, this does not necessarily impact the best interest of that child to the extent that an exemption to Canada's laws is required. No country, including Canada, which is built on the value of good governance, can provide a guarantee that poverty and hurtful incidents of a criminal or prejudicial nature will not occur in a child's lifetime.

[68] The point made by the Officer, when the passage from the decision is read in its context, conveys that not all negative impacts on children, including poverty, will justify an H&C exemption. BIOC is only one, albeit important, element of an H&C determination.

[69] In the present case, the Officer did not err in noting that the current needs of Samad were not known. The assessment from the paediatrician, Dr. Penner, regarding Samad was dated November 2015. The Applicants made their H&C application in May 2016, and the decision was rendered in September 2017. It appears that updated information was not provided before the

date of the decision. There was no evidence that the Applicants had attended a follow-up assessment after November 2015, as recommended by Dr. Penner, or that they had pursued any of the other aspects of Dr. Penner's plan. There was also no evidence that Samad's needs could only be met in Canada.

[70] With respect to the Applicant's argument that there was no evidence that Samad no longer needs treatment, this ignores the fact that the onus was on them to show that he did need treatment, and that this could not be provided in Bangladesh. I am also mindful of the jurisprudence – which remains applicable, although decided before *Kanthasamy* − which establishes that the Officer is presumed to know that living in Canada would offer the child opportunities that they would not otherwise have (*Hawthorne* at para 5), and that a comparison between life in Canada and life in the country of origin cannot be determinative to a BIOC analysis, as the outcome would almost always favour Canada (*Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292 at paras 29-30, [2006] FCJ No 1613(QL); see also *Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479 at para 44, 423 FTR 218).

[71] The Applicants also argue that the Officer did not conduct a meaningful BIOC analysis, in part because the Officer failed to explain why the positive factors were not sufficient to grant the Application. The also submit that the Officer erred by focusing only on the circumstances of their return to Bangladesh, rather than on their life in Canada, and the impact to them on losing it by being forcibly removed to Bangladesh. I do not agree that the Officer so erred.

[72] The Officer did not fail to assess the impact of the children on being removed from Canada to Bangladesh. The Officer's BIOC analysis is lengthy and focusses on the options for Samad in Bangladesh, with respect to ASD and the education and health care available for both children, along with their culture, customs, and connections to their extended family. The Officer also addressed the status of females and the rise of Muslim fundamentalism, as raised by the Applicants, with respect to the impact on their daughter. It cannot be said that the Officer did not consider the impact of their return to Bangladesh.

[73] Nor do I find that the Officer erred in not considering the BIOC in Canada. As noted above, the jurisprudence has established that a better life in Canada is not determinative. The Officer's reasons demonstrate that he assessed the BIOC from both perspectives – in Canada and in Bangladesh, if returned there. The Officer's conclusion, that the Applicants had not established that the consequences of returning to Bangladesh "would have a negative impact on the children *to the extent that an exemption is justified in this case*" is reasonable.

[74] In conclusion, the Officer did not err in his assessment of the BIOC. He addressed all the submissions with respect to the impact on the children of being returned to Bangladesh, and considered all the relevant circumstances including their young age and ability to adapt, their family unit, their family in Bangladesh, and the education and healthcare systems. The Officer's finding that the possible negative impact on the children would not be sufficient to justify an exemption reflects the jurisprudence which establishes that BIOC is but one consideration in an H&C assessment, albeit an important one.

[75] The Applicants pointed to many cases where the Court had found that the Officer's decision was not reasonable. However, each case must be determined on its facts to determine whether the Officer erred in such a way as to render the decision unreasonable. In this case, the Officer's decision that the "cumulative balance of the factors raised" does not justify relief – i.e., an exemption from the requirements of the Act − is justified.

JUDGMENT in IMM-4709-17

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review is dismissed

2. No question arises for certification

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4709-17
STYLE OF CAUSE:	AKM FIROJ SHAH, FARHANA SULTANA AND SAMAD ZAIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 9, 2018
JUDGMENT AND REASONS:	KANE J.
DATED:	MAY 24, 2018

APPEARANCES:

Mr. Robert Blanshay	FOR THE APPLICANTS
Mr. Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Blanshay Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT