Federal Court  Cour fédérale

Date: 20210413

Docket: IMM-6332-19

Citation: 2021 FC 321

Toronto, Ontario, April 13, 2021

PRESENT: Mr. Justice Andrew D. Little

BETWEEN:

GRABIEL GARCIA DIAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review arises from a decision of a visa officer on an application for permanent residence based on a sponsorship or, alternatively, for permanent residence based on an exemption under subs. 25(1) of the *Immigration and Refugee Protection Act* (the "*IRPA*"), SC 2001, c 27, on humanitarian and compassionate ("H&C") grounds.

[2] The applicant, Mr Grabiel Garcia Diaz, is a citizen of Cuba and resides there. His mother, Ms Margalis Diaz Rodriguez, is a citizen of Cuba and resides in Canada. Ms Diaz Rodriguez was the applicant's proposed sponsor and the applicant is her only child. She is a permanent resident of Canada and has lived here since 2004. She has lived alone since her divorce from her Canadian husband in 2013. She has no other relatives in Canada and applied to sponsor her son under the *Immigration and Refugee Protection Regulations* (the "*IRPR*"), paragraph 117(1)(*h*), the so-called "lone Canadian" provision.

[3] In 2016, Ms Diaz Rodriguez applied to sponsor the applicant to come to Canada as a permanent resident. The visa officer concluded that she could not sponsor Mr Garcia Diaz under the applicable provisions of the *IRPR*. The officer also declined to grant the applicant an exemption on H&C grounds.

[4] The applicant submits that in denying the application for H&C relief, the officer failed to provide him with procedural fairness. The applicant contends that he should have had an opportunity to make submissions about the best interests of his child before the officer made an adverse H&C decision. The child is a boy born in 2008 who resides in Cuba with his mother. The child's mother has full custody of the child, though a custody agreement entitles the applicant to "normal" access to his son (every other weekend, half of the school breaks and half of the holidays).

[5] In this case, although there was evidence about the child filed with the H&C application, the two written submissions filed on behalf of the applicant did not make arguments about the

best interests of that child. In this Court, the applicant contended that if the officer intended to assess the child's best interests under the H&C application, the officer should have provided the applicant with a further opportunity to argue, in effect, that it is in his Cuban child's best interests that the applicant leave Cuba and come to Canada as a permanent resident on an H&C exemption to be with his lonely mother, the child's biological grandmother.

[6] The applicant also challenged the reasonableness of the officer's decision concerning the officer's assessment of the best interests of the child and the officer's assessment of the mental health evidence related to his mother, Ms Diaz Rodriguez.

[7] For the reasons that follow, I must conclude that on the facts in this case, the applicant was aware of the case to meet and had a meaningful opportunity to make submissions on his application, particularly as it concerned the best interests of his child in Cuba. The process was procedurally fair to the applicant.

[8] I also conclude that the officer did not commit a reviewable error that justifies the intervention of this Court on judicial review.

[9] Accordingly, this application must be dismissed.

I. Facts and Events Leading to this Application

[10] At the outset, I would like to recognize the challenges Ms Diaz Rodriguez has been facing. Since separating from her former husband in 2012, she has lived alone in Canada, with

no family here and in particular, without her beloved son close to her for love and support. Even before her separation and for more than a decade before today, she has attempted to reunite with her son in Canada. Her mental health has suffered. Despite the challenges she has faced, she has persisted and succeeded in building up her own small business as a highly skilled seamstress, to support herself and her son.

[11] In late 2003, Ms Diaz Rodriguez married a Canadian man in Cuba. She landed in Canada in September 2004. The couple separated in January 2012 and were divorced in Cuba in 2013.

[12] The applicant was not able to accompany his mother to Canada when she moved here in 2004. He was, however, listed as a non-accompanying dependent on Ms Diaz Rodriguez's application for permanent residency. At the time, the applicant was 17 years old and had not completed his two–year mandatory military service in Cuba. For that reason, he could not immediately accompany his mother to Canada. After he completed his military service, Ms Diaz Rodriguez and her husband applied to sponsor him to come to Canada. Ms Diaz Rodriguez was approved as a sponsor in late May 2008 and sent in the application for processing in June 2008.

[13] From there, several unfortunate but well-meaning deceptions and misunderstandings affected the progress of the applicant's attempts to secure permanent residence. While the first (2008) application was pending, the applicant advised Ms Diaz Rodriguez that he and a girlfriend had fallen in love and were expecting a child. The applicant did not tell his mother the entire truth at that time. Ms Diaz Rodriguez understood at the outset that her son and the woman were living together as a couple in Cuba, in what could be called a "common law" relationship in

Canada. Ms Diaz Rodriguez also testified that she mis-translated the words for “living together” from Spanish into “common law” in English, even though the applicant did not have a “common law” relationship as she now understands it under Canadian law. Ms Diaz Rodriguez later learned that in reality, the applicant only had a sexual relationship with the woman and that she had become pregnant. They were living under the same roof during the pregnancy but they were not a romantic couple.

[14] After she learned of the perceived “common law” relationship of her son, Ms Diaz Rodriguez disclosed it to Canadian immigration officials for the purposes of the applicant’s pending application for permanent residence. At the time in 2008-2009, Ms Diaz Rodriguez understood that her son’s relationship caused him to be ineligible for sponsorship and she ultimately withdrew her son’s application. It was only later, after she learned the truth about the applicant’s relationship, and following her own divorce, that she discovered she had misunderstood the Canadian sponsorship requirements and her son was still eligible to be sponsored.

[15] Given her new understanding that her son’s relationship with his child’s mother in Cuba was not “common law” or its equivalent, Ms Diaz Rodriguez applied again to sponsor him. She submitted a second application for permanent residence on his behalf in 2016.

[16] The applicant’s second application for permanent residence is the one at issue in this judicial review application.

[17] The applicant (or more precisely, Ms Diaz Rodriguez) filed numerous documents to support the second application, including a Statutory Declaration from Ms Diaz Rodriguez dated September 14, 2016 and two letters from professional representatives (an immigration consultant and a lawyer), one dated in 2016 and another in 2019. I will describe the relevant contents of each of these three documents. There are additional documents related to the custody of the child and to the medical evidence, which I will also discuss later in these reasons. The applicant did not file a statement or statutory declaration.

Ms Diaz Rodriguez's Statutory Declaration

[18] Ms Diaz Rodriguez's Statutory Declaration described her meeting and marrying her husband in Cuba, and her arrival in Canada in September 2004. As described above, Ms Diaz Rodriguez explained that at the time she was sponsored, her son (the applicant) was included on her application as a non-accompanying dependent. After he completed his two-year military service in Cuba, she could still sponsor him.

[19] In paragraphs 5 to 13 of her Statutory Declaration, Ms Diaz Rodriguez explained that while the applicant was carrying out his military service, he met a woman on one of his holiday leaves and they started a sexual relationship. She explained that he had no long-term plans to be with this woman. After he completed his military service, he returned to live with his grandmother. The woman claimed she was pregnant with his baby. Ms Diaz Rodriguez testified that the woman "pursued him and pursued him until it became apparent that she was not going to relent, so the applicant resigned himself to the idea that he could be the father" and decided to

have the woman come and live with him and his grandmother to help her out and provide some support. Ms Diaz Rodriguez testified that she was devastated by these events and understood that the applicant's relationship status was "common law", but that in fact the applicant and the mother of his child lived under the same roof but not as a couple. Ms Diaz Rodriguez stated that "[t]his arrangement was set up entirely to ensure the mother had a safe place to be while she was pregnant, to have the baby and to care for the baby in the early months after its birth." Her son misled her into believing that he and the woman were in love, so Ms Diaz Rodriguez would not be so angry and disappointed.

[20] Ms Diaz Rodriguez testified that "[m]y son became attached to his child but he knew he would have to leave him behind because the mother would not allow him [the child] to go" [i.e., to Canada]. The applicant allowed the mother of his child to stay in the applicant's grandmother's home for longer than anticipated so he could give his son the appearance of a family, but the applicant and his child's mother were not intimate and did not consider themselves to be a couple.

[21] According to Ms Diaz Rodriguez's testimony, the mother left many times, taking "my grandson with her when she entered relationships with other men". Ms Diaz Rodriguez testified that there was an agreement that "gave custody of my grandson Gabriel to his mother".

[22] Ms Diaz Rodriguez then explained in detail the events leading to the second application to sponsor the applicant to come to Canada. She described her relationship with her only child, her feelings of guilt that her son remained in Cuba because of her mistake about his eligibility to

be sponsored, and her guilt and unhappiness at being unable to share all of the wonderful things and opportunities that she has had in Canada. She explained that she and her husband had separated and then divorced, and that she was now “all alone”. She testified that she has no family in Canada and no emotional support from family. Ms Diaz Rodriguez testified that the applicant was the only person she had in the world that was close to her and that they communicated usually on a daily basis by telephone or text message. She provides him with some financial support. She visits Cuba as frequently as possible given her work obligations and when she can afford to travel.

[23] Ms Diaz Rodriguez also advised that she owns her own house through an agreement made with her ex-husband and that she is fully financially self-sufficient, with a full-time job as a dressmaker/seamstress. She testified that if the applicant were allowed to come to Canada, he would live with her until he is settled and she would support him. She testified that the applicant has opportunities and qualifications to work in the construction industry. The record included one offer to employ and one offer to interview the applicant from the owners of two construction companies.

The Consultant’s Letter

[24] As noted, Ms Diaz Rodriguez submitted two letters from her professional representatives to support the application for her son.

[25] First, Ms Diaz Rodriguez applied to sponsor the applicant for permanent residence in Canada by letter dated September 14, 2016 sent by a regulated Canadian immigration consultant and paralegal (the "Consultant's Letter"). She requested that the application be processed under the family class regime and under paragraph 117(1)(*h*) of the *IRPR*. Her position was that while her parents in Cuba were still living, she was unable to sponsor them due to their extremely poor physical and mental health condition and their inability to travel from Cuba to Canada. Because she had no other family or relatives in Canada, she maintained that she could sponsor the applicant. In the alternative, she requested that the application be considered for an H&C exemption under subs. 25(1) of the *IRPA*.

[26] The Consultant's Letter contained five single-spaced pages. It described Ms Diaz Rodriguez's background leading to the application. It explained why her parents could not be sponsored, given their advanced ages (77 and 83 at the time), poor health and because it was impossible for them, health-wise, to travel to Canada even if they were sponsored and approved. The Consultant's Letter explained that Ms Diaz Rodriguez and the applicant have a very close relationship and that she pretty much completely raised her son on her own, providing both emotional and financial support. This close relationship with her son continued while she was with her husband in Canada. After her divorce, Ms Diaz Rodriguez continued to rely heavily on the applicant for emotional support. The letter explained that she had made 23 trips to visit her son in Cuba between 2004 and 2016.

[27] The Consultant's Letter described Ms Diaz Rodriguez's life in Canada and then turned to describe the "Applicant's life in Cuba". The Consultant's Letter advised that the applicant has

one child from whom he was "recently estranged," but the child and his mother have "recently returned to his [the applicant's] hometown", having lived in another city with the mother's common-law partner for some time. The letter stated that the applicant "does not know how long his child will be in his life this time". It confirmed that the mother has custody of the child and that she comes and goes from the applicant's life when she meets a new man that she wants to be with. The Consultant's Letter stated that the applicant "never had any long-term plans to be with his child's mother. He only took her into his home at the time for the welfare of his soon–to-be-born child. The mother has full custody and has no interest in including the applicant in his son's life".

[28] I pause to note that the Consultant's Letter did not make any express submissions about the best interests of the child, the applicant's son. It did, as just noted, address the certain aspects of the child's life and relationship with the applicant in 2016.

[29] The Consultant's Letter then described the supporting documentation related to the mental health assessments of Ms Diaz Rodriguez. It quoted passages from a psychologist's report that diagnosed Ms Diaz Rodriguez with a major depressive disorder of "severe severity", which coexisted with anxious stress. The psychologist strongly cautioned that if her son were not granted permission to enter Canada, Ms Diaz Rodriguez "may very well suffer from a prolonged and debilitating depression and psychological breakdown… To deny her the opportunity to reunite with her only son constitutes extreme psychological hardship."

[30] The Consultant's Letter went on to discuss potential employment for the applicant and his integration into Canadian society and financial considerations. The letter concluded by summarizing the application, noting that the applicant was previously eligible to come to Canada but due to a misunderstanding, Ms Diaz Rodriguez had withdrawn her support to sponsor her son.

Counsel's Letter

[31] Over two years later, legal counsel for Ms Diaz Rodriguez sent a supplementary submission by letter dated April 15, 2019 ("Counsel's Letter"). The Counsel's Letter began by stating that counsel had been recently retained to represent Ms Diaz Rodriguez in her application to sponsor the applicant as a member of the "Family Class" under paragraph 117(1)(*h*) of the *IRPR*. Counsel's Letter advised that counsel was providing "further submissions and evidence" and that "[t]hese submissions and evidence ***supplement*** prior submissions and evidence, and in no way replace them" [original emphasis]. Counsel's Letter addressed both positions taken by Ms Diaz Rodriguez: that the applicant was a member of the family class under the *IRPA*, and that if not, the applicant requested an exemption on H&C grounds.

[32] On pages 2-4, Counsel's Letter described the pertinent facts, including the personal history of Ms Diaz Rodriguez and the applicant and many of the facts set out above. Counsel's Letter confirmed that during the processing of the application in 2008, the applicant disclosed to Ms Diaz Rodriguez that he had met a woman and had a "purely physical" relationship, which resulted in a pregnancy. The Counsel's Letter advised that the applicant and his partner were

never married or common-law partners nor had they the intention to be in a long-term relationship. They lived in the same house for some time as the applicant wanted to ensure that the mother and child's needs were cared for. Counsel's Letter confirmed that the applicant did not disclose to Ms Diaz Rodriguez the true nature of his relationship with the mother of his child, leading Ms Diaz Rodriguez to believe erroneously that they were deeply in love. Counsel's Letter set out Ms Diaz Rodriguez's misunderstanding of the couple's relationship.

[33] Counsel's Letter described Ms Diaz Rodriguez's divorce and the applicant's attempts to visit Canada on a Temporary Resident Visa. The applicant submitted several applications for such a visa, all of which were refused. In one case, the visa application disclosed that the applicant had a "common-law partner, one dependent son…"

[34] Pages 4-10 of Counsel's Letter submitted that the applicant was a member of the family class under *IRPR* paragraph 117(1)(*h*). Pages 10-14 contained submissions concerning the applicant's H&C application. Counsel's Letter made submissions on the law applicable to H&C application and Ms Diaz Rodriguez's mental health, stating that she was diagnosed with major depression and prescribed antidepressants. She was referred to a psychotherapist. The inability to bring the applicant to Canada over the previous 13 years had been "gravely traumatic" to her. The letter set out in detail certain excerpts from a mental health report prepared by a psychologist. It emphasized that she lived alone, without any family members to assist her or provide much-needed emotional support. She had a very limited support network. Counsel's Letter noted her feelings of guilt arising from her mistake in the original sponsorship application. The letter noted that loneliness and long-term frustration arising from the inability to be re-united

with the applicant had taken a toll on her health and that she was considering giving up everything she has built in Canada to return to Cuba, where she would have a diminished quality of life and not earn an income comparable to the one she earns in Canada. The applicant would lose financial support from her and they would probably live in poverty. The letter also referred to Ms Diaz Rodriguez as a productive member of Canadian society, employed as a seamstress with her own business and her own home.

[35] Counsel's Letter closed by referring to hardship for the applicant in Cuba, noting that there is no burden to establish that the applicant had been personally affected by country conditions in Cuba.

[36] Counsel's Letter did not make any express submissions about the best interests of the applicant's son (*i.e.*, Ms Diaz Rodriguez's grandson).

II. The Officer's Decision

[37] The decision at issue in this application is described in the Notice of Application as a "decision made by an officer in the Immigration Section [in the Canadian embassy in Mexico City]… dated August 29, 2019 and communicated on August 29, 2019 denying an application for permanent residence made on humanitarian and compassionate grounds and as a member of the family class…"

[38] The just-referenced letter to the applicant dated August 29, 2019 advised the applicant:

- "Your sponsor does not have the minimum income necessary to sponsor you."
- "In addition you failed to meet the requirements of the family class, as set out in section 117 of the Regulations …"
- "You do not meet the requirements of R 117(1)(h) because your sponsor has a relatives [sic] whom she may otherwise sponsor. You are not, therefore, a member of the Family Class."
- "I have taken into consideration the humanitarian and compassionate factors involved in your application but I do not find that they are sufficient to overcome your failure to meet the requirements for sponsorship in the Family Class".

I note that the conclusion that Ms Diaz Rodriguez had relatives (her elderly and infirm parents) whom she may otherwise sponsor was not an issue in this application, although it was unclear on what basis the officer made the determination that they could be sponsored given their poor health and inability to travel.

[39] In response to a request, by letter dated October 29, 2019, a representative of the Canadian embassy in Mexico provided a copy of the Global Case Management System ("GCMS") entries relevant to the decisions described in the August 29, 2019 letter, as well as many previous communications. GCMS entries on August 19, 2019 related to the negative determination of the application for inclusion in the Family Class.

[40] The GCMS notes on August 29, 2019 included the following entries:

> Lock-In date: 19 Sept. 2016. At Lock-In, PA [principal applicant] was aged 29 years old. His son was 8.

[…]

The main H&C ground of this application is the mental state of the sponsor who is said to have devoted 13 years to reuniting with her son… After her separation and divorce (2012-2013) she was alone and found out she might be able to sponsored her son. The next efforts to reunite appear to have been this sponsorship in 2016 and two applications for TRVs [Temporary Resident Visas] in 2017.

Letters on file from sponsor's GP dated June 2016 and August 2017 state that SPR [sponsor] is suffering from severe emotional stress (2016) to Major Depression and the inability to bring her son to Cda has been "gravely traumatic" (2017).

Psychologist Dr. J. Pilowsky writes on 6 July, 2016, that Ms Diaz Rodriguez suffers from depression, anxiety and guilt over being separated from her son and living in better conditions than he has in Cuba (inter alia). Pilowsky writes that she meets diagnostic criteria for "Major Depressive Disorder of Severe severity (single episode) coexisting with "anxious distress" there has been suicidal ideation. She told the psychologist that she had been diagnosed with depression "many years ago". At the time of the assessment Pilowsky said she impressed as being on the cusp of a psychological collapse" … "I strongly caution that if Ms Diaz Rodriguez's son is not granted permission to enter Canada, she may very well suffer from a prolonged and debilitating depression and psychological breakdown. This outcome would be extremely undue and undeserving considering her continued efforts to work and be self-sufficient, while simultaneously attempting to sponsor her son."

The sponsor's paternal grandfather died of suicide, according to the family information form on file, and her mother has now made an attempt at suicide, according to her medical report. Psychologist and GP do not indicate whether these events were disclosed to them. The sponsor had been diagnosed with depression "many years ago".

I am not satisfied that the sponsor's mental state is entirely or mainly due to separation from her son.

Custody docs on file grant custody of the PA's son to his mother, with normal access for [the applicant], although they refer to his departure to Canada. In considering the best interests of this child, I note that he and his father are in "proper communication" (as of 30 January, 2015) when he was 6 years old, and the father was to have him every other weekend, half of the school breaks and half

> of the holidays. His mother declares that the PA has complied with his responsibilities. I am not satisfied that it would be in the best interests of this little boy to remove his father from Cuba.
>
> The PA is not a member of the family class. The sponsor does not meet the minimal necessary income to sponsor him. He has responsibilities towards his son in Cuba. I am not satisfied that the humanitarian and compassionate factors in this application outweigh the failure to meet the requirements of R 117(1)(h) and R133(1)(j).
>
> [Underlining added.]

[41] As may be seen, the officer made detailed GCMS notes on two issues: (1) Ms Diaz Rodriguez's mental health (including her diagnoses, some facts related to them and the fact that she was alone in Canada after her divorce); and (2) the applicant's son in Cuba.

III. Overall Legal Principles

H&C Applications

[42] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. Those considerations are to include the best interests of a child directly affected. The H&C discretion in subs. 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA* and the *IRPR*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 (Abella J.), at para 19.

[43] Humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the [*IRPA*]": *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338, at p.350 as quoted in *Kanthasamy* at paras 13 and 21. The purpose of the H&C provision is provide equitable relief in those circumstances: *Kanthasamy*, at paras 21-22, 30-33 and 45.

[44] Subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Although not used in the statute itself, appellate case law has confirmed that the words "unusual", "undeserved" and "disproportionate" are appropriate to describe the hardship contemplated by the provision that will give rise to an exemption. Those words to describe hardship are instructive but not determinative, allowing subs. 25(1) to respond flexibly to the equitable goals of the provision: *Kanthasamy*, at paras 33 and 45. An applicant may raise a wide variety of factors to show hardship on an application for H&C relief. The H&C determination under sub. 25(1) is a global one, and relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances: *Kanthasamy*, at paras 27-28.

[45] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh <u>all</u> the relevant facts and factors before them: *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 SCR 817 (L'Heureux-Dubé J.), at paras 74-75; *Kanthasamy*, at paras 25 and 33.

[46] With respect to the interests of a child directly affected under subs. 25(1), an officer must always be alert, alive and sensitive to the child's best interests: *Baker*, at para 75; *Kanthasamy*, at para 38; *Canada (Minister of Citizenship and Immigration) v. Hawthorne*, 2002 FCA 475, at para 10. An officer must also abide by the guiding admonition that children will rarely, if ever, be deserving of any hardship: *Kanthasamy*, at para 59.

[47] The onus of establishing that an H&C exemption is warranted lies with the applicant: *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 (Nadon JA), at paras 35, 45 and 61. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635 (Evans JA), at paras 5 and 8.

Standards of Review

[48] On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond: see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR

121 (Rennie, JA) ("*CPR*"), esp. at paras 49, 54 and 56; *Baker*, at para 28. In *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).

[49] The standard of review of the officer's substantive H&C decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Baker*, at paras 57-62; *Kanthasamy*, at para 44. In conducting a reasonableness review, a court considers the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. The onus to demonstrate that the decision is unreasonable is on the applicant: *Vavilov*, at paras 75 and 100.

[50] The focus of reasonableness review is on the decision made by the decision maker, including both the reasoning process (i.e. the rationale) that led to the decision and the outcome: *Vavilov*, at paras 83, 86; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at para 12. The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision-maker: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, at para 31; *Vavilov*, at paras 91-96, 97 and 103.

[51] When reviewing for reasonableness, the court asks whether the decision demonstrates the hallmarks of reasonableness (i.e., justification, transparency and intelligibility) and whether the decision is justified in relation to the relevant factual and legal constraints that bear on the

decision: *Vavilov*, at para 99. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to the outcome to render the decision unreasonable: *Vavilov*, at para 100.

[52] The reviewing court does not determine how it would have resolved an issue on the evidence, nor does it reassess or reweigh the evidence on the merits: *Vavilov*, at paras 75, 83 and 125-126; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paras 59, 61 and 64; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113, [2015] 1 FCR 335, at para 99; *Owusu*, at para 12. The task of the reviewing court is to assess whether the decision maker reviewed and drew conclusions from the evidence and submissions in a manner that conforms to *Vavilov* principles.

IV. Analysis

[53] I will address each of the issues raised by the applicant in turn.

Best Interests of the Child

Procedural Fairness

[54] Although the H&C application focused on the mental health of the applicant's mother, the applicant focused in this Court on procedural fairness as related to the officer's assessment of the best interests of the child ("BIOC").

[55] The applicant submitted that the officer erred by conducting a BIOC analysis with respect to his non-accompanying child without giving him an opportunity to make submissions on the issue. The applicant noted that he did not raise the child's best interests as an H&C factor warranting consideration by the officer in his application for permanent residence. The applicant submitted that in law, an officer has a duty to be alert, alive and sensitive to the best interests of a child who may be adversely affected by a parent's removal from Canada, but only when it is sufficiently clear from the material submitted on the H&C application that the applicant relies on this factor, at least in part (citing *Owusu*, at para 5). The applicant further argued that the Federal Court of Appeal in *Kisana* "clearly established" that fairness may require an officer to obtain further and better information concerning the BIOC, for example by way of issuing a procedural fairness letter, depending on the facts of each case.

[56] The applicant submitted that he did not ask the officer to consider his child's best interests on this H&C application, and therefore had not put forward "any evidence as to his child's best interests". On this submission, the officer's finding that the child's best interests should be weighed against other H&C factors raised in the application "could not have been

anticipated". Following this line of argument, the applicant maintained that at a minimum, the officer should have provided the applicant with notice that his child's best interests were a concern and should have granted the applicant the opportunity to make submissions on that issue. According to the applicant, those submissions might have altered the outcome of the H&C application.

[57] The respondent disagreed. The respondent submitted that the applicant must have known that *IRPA* subs. 25(1) requires an officer to take into account the best interests of a child directly affected, and must have been aware that the interests of his child could or should be considered in his H&C application. The respondent argues that the applicant must have been aware of the relevance of his child to the H&C application because he filed custody documents which confirmed that he had been granted regular access to his son. The respondent also noted the applicant filed evidence from the child's mother stating that the applicant had complied with his responsibilities regarding his son. According to the respondent, the best interests of his child were clearly raised on the evidence submitted with the H&C application, and the applicant had an opportunity to address the issues. In that context, the officer had no duty to ask for additional information.

[58] The respondent further submitted that both this Court and the Federal Court of Appeal have concluded that the H&C provision obliges the decision-maker to consider the best interests of a child when deciding whether H&C considerations justify exempting an applicant from the normal selection criteria and granting permanent resident status. The respondent referred to a number of decisions, including *de Guzman v. Canada (Minister of Citizenship and Immigration)*,

2005 FCA 436, [2006] 3 FCR 655 (Evans JA), at para 105 and *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 (Décary JA), at paras 11-12. The respondent further submitted that the Federal Court of Appeal's decision in *Owusu* only holds that an officer has no *duty* to consider the best interests of an affected child when it is not raised or relied on in the H&C application; the Court did not decide that the officer *may not* do so. The onus was on the applicant to provide any evidence he wanted the officer to consider about the best interests of his son in Cuba. His own failure to elaborate or present adequate legal submissions on the best interests of his child does not give rise to a breach of procedural fairness.

[59] In reply, the applicant sought to distinguish the cases relied upon by the respondent on their facts. The applicant submitted that this Court is being asked, for the first time, to treat the BIOC element of *IRPA* subs. 25(1) as though it were a "regulated criterion" for H&C applications, similar to the criteria for permanent residence in other classes under the *IRPA* or *IRPR*. That, the applicant contended, would place an obligation on the applicant to present evidence even though he did not rely upon his child's best interests in his application, something the law does not require. The applicant further submitted that the respondent's authorities establish that where an issue of concern to an officer is not one that arises directly from the requirements of the statute or regulations, as in this case, a duty to provide an opportunity for the applicant to address the officer's concerns may arise (citing *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501 (Mosley J.), at para 21-24). The applicant disputed that the evidence clearly raised the issue of the child's best interests, as the respondent contended.

[60] For the reasons set out below, I agree substantially with the respondent based on the evidence and circumstances of this case. Having regard to the evidence in the record, the officer was not obliged to provide the applicant with an additional opportunity to make submissions related to the best interests of his child and how those interests should be assessed on his H&C application. As I will explain, the evidence filed by the applicant sufficiently raised the best interests of the applicant's child in Cuba as an issue. The applicant filed two written submissions more than two years apart in which he had an opportunity to made submissions on why the BIOC should not prevent him from becoming a permanent resident of Canada, but he did not do so. In the circumstances, there was no breach of procedural fairness.

[61] I should note several points that the applicant did not argue. First, the applicant did not submit that he would have adduced additional evidence related to the BIOC, nor point to any specific evidence that he would have adduced, if the officer had drawn the BIOC issue to his attention. The applicant only contended that the officer should have asked for additional BIOC submissions from the applicant. Second, the applicant did not argue that the child was not "directly affected" under *IRPA* subs. 25(1). Third, the applicant did not contend that a child in Cuba who has never been to Canada could not be considered in a BIOC assessment: see *Owusu*, at para 13.

[62] As discussed, on procedural fairness, the ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, chance to respond: *CPR*, esp. at para 56; *Baker*, at para 22. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific": *Vavilov*, at para 77; *Baker*, at paras 22-23. If a duty of procedural

fairness arises, the procedural requirements imposed by the duty are to be determined with reference to the context and all the circumstances, including the *Baker* factors: *Vavilov*, at para 77; *Baker*, at paras 21-28; *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, [2002] 2 FC 413.

[63] The Federal Court of Appeal and this Court have held, applying the *Baker* factors, that the procedural fairness obligations owed by an officer to a non-resident applicant for a visa are at the low end of the spectrum: *Khan*, at paras 30-32; *Hamza v. Canada (Citizenship and Immigration)*, 2013 FC 264 (Bédard J.), at para 23; *Asanova v. Canada (Citizenship and Immigration)*, 2020 FC 1173 (Norris J.), at para 28; *Singh v. Canada (Citizenship and Immigration)*, 2016 FC 509, [2017] 1 FCR 39 (Kane J.), at paras 24-28; *Patil v. Canada (Citizenship and Immigration)*, 2020 FC 495 (Ahmed J.), at para 37. See also *Vavilov*, at para 133.

[64] In this case, the applicant is a citizen of Cuba, is not a resident of Canada and was not present in Canada when the application was made. He had no vested rights in relation to this country. He applied for a permanent resident visa under *IRPR* paragraph 117(1)(*h*) and in the event that application failed, an exemption based on H&C considerations. The applicant's entitlement to a visa under *IRPR* paragraph 117(1)(*h*) has been characterized as derivative and dependent on the circumstances of his sponsor; that said, paragraph 117(1)(*h*) has as an objective to ameliorate the position of the sponsor with no relative in Canada: *Mahmood v. Canada (Minister of Citizenship and Immigration)* (2000), [2001] 1 FC 563 (Evans JA), at para 16; *Bousaleh v. Canada (Citizenship and Immigration)*, 2018 FCA 143, [2019] 2 FCR 787 (Gauthier

JA), at para 67. With all the legal and factual considerations in mind, in my view the duty of procedural fairness remains towards the lower end of the scale. The level of procedural fairness protections afforded to the applicant will inform the Court's analysis of whether the officer had an obligation to obtain additional submissions from the applicant.

[65] I repeat here that the applicant has the onus to adduce all relevant evidence to be considered by the officer on an H&C application: *Kisana*, at para 45. Failure to do so is at the peril of the applicant: *Owusu*, at paras 5 and 8.

Analysis

[66] The applicant submitted that he did not raise the BIOC in his application and therefore, as a matter of law, before the officer could conduct a BIOC assessment, the officer had to provide him with another opportunity to make submissions on that issue.

[67] I do not agree with the applicant in the circumstances of this case. While the evidence and the submissions filed on the H&C application are determinative of the procedural fairness issue raised in this Court, I will first address the legal argument raised by the applicant.

[68] The applicant's argument was based on the proposition that an officer is only required to conduct a BIOC assessment if it is sufficiently raised in the application: *Owusu*, at para 5. The applicant's submission is essentially a proposed corollary, that if the BIOC are not raised expressly by the applicant's submissions in the application, the officer *may not* conduct the

BIOC assessment, or at least could not do so in this case without giving the applicant an opportunity to make additional submissions.

[69] However, as the respondent observed, there are cases (including cases binding on this Court) in which mandatory language appears in relation to a consideration of the BIOC: see *Kanthasamy*, at para 10; *de Guzman*, at para 105; *Legault*, at paras 11-12; *Kandiah v. Canada (Citizenship and Immigration)*, 2018 FC 1096 (Walker J.), at para 37; *Mebrahtom v. Canada (Citizenship and Immigration)*, 2020 FC 821 (McHaffie J.), at para 7; and *Faisal v. Canada (Citizenship and Immigration)*, 2014 FC 1078 (Strickland, J.), at para 18. That is not to say that the BIOC is a mandatory consideration in every H&C case. Obviously, the BIOC may be irrelevant in some applications, for example if no children are affected. Where a child's interests arise on the evidence in the application, the statutory language in subs. 25(1) provides that the Minister may grant an exemption if the Minister is of the opinion that it is justified by H&C considerations relating to the foreign national, "taking into account the bests interests of a child directly affected" [underlining added]. As noted earlier, neither party in this case disputed that the child was "directly affected" for the purposes of subs. 25(1).

[70] In addition, in general, an officer has no obligation to inform the applicant of weaknesses in an H&C application or to seek clarification or further information before rendering a decision: *Kisana*, at para 45; *Alameddine v. Canada (Citizenship and Immigration)*, 2019 FC 1285 (Walker J.), at paras 31-32; *Salamanca v. Canada (Citizenship and Immigration)*, 2014 FC 259, at para 37 and the cases cited there; *Thandal v. Canada (Citizenship and Immigration)*, 2008 FC 489 (Phelan J.). Similarly, if a statute or regulation sets out criteria that a decision maker must

consider and an applicant fails to address one or more of those criteria, the decision maker has no obligation to make inquiries before making a decision: *Hassani*, at para 24; *Hamza*, at para 22; *Gomes v. Canada (Citizenship and Immigration)*, 2020 FC 451 (Favel J.), at para 20.

[71] Subsection 25(1) of the *IRPA* expressly contemplates that the BIOC be considered if a child is directly affected. That has been the expressed intent of Parliament for more than 20 years, during which time the provision has always included the BIOC language applicable to this application. In my view, Parliament's express recognition of the child's best interests in the statute, together with the importance of that consideration and the required contents of a BIOC assessment as described in *Kanthasamy,* imply that the best interests of a child cannot be ignored if the officer determines the child is directly affected. As such, while it is not a mandatory requirement in every H&C application, if the evidence reveals to the officer that a child is directly affected as contemplated by subs. 25(1), an applicant's failure to make arguments about the BIOC does not of necessity require an officer to make further inquiries or to seek additional submissions from the applicant before making a H&C decision. An officer may in any case decide to seek additional information from the applicant in order to assess the BIOC, but in my view is not, as a matter of law, required to do so in every instance. I note that this approach is consistent with *Kisana,* in which the Federal Court of Appeal declined to answer the certified question, noting that an obligation to obtain additional information will depend on the facts of each case: *Kisana*, at paras 2 and 62.

[72] The applicant's submission relied on the Federal Court of Appeal's decision in *Owusu.* In that case, the applicant had "not adequately raised the impact of his potential deportation on the

best interests of his children so as to require the officer to consider them" (*Owusu*, at para 8). As Nadon JA pointed out in *Kisana*, the conclusion in *Owusu* was that an H&C officer was not under a positive obligation to make inquiries concerning the BIOC in circumstances where the issue was raised only an "oblique, cursory and obscure" way: *Kisana*, at para 45, citing *Owusu*, at para 9.

[73] In *Kisana* itself, the issue was whether there was a duty on the officer to pursue further inquiries so as to uncover the existence of additional elements to support a case of hardship resulting from the children's separation from their parents. The Federal Court of Appeal held in part that it was the applicants who failed to discharge their burden of proof, rather than the officer who failed to conduct a better interview of the children, that resulted in a possible vacuum of evidence (esp. at paras 56-57). The Court of Appeal held that, having asked the children to bring additional information to an interview and having also conducted an interview of their aunt (with whom they lived), the officer did not have a duty to make further inquiries and that, in the circumstances, fairness did not require the officer to provide the applicants with another opportunity to produce documents and/or information in support of their application (at para 60). See also the concurring reasons of Trudel JA, at paras 70-71.

[74] In that context, Nadon JA, writing for the majority, did "not rule out the possibility that there may be occasions where fairness may or will require an officer to obtain further and better information. Whether fairness so requires will therefore depend on the facts of each case": *Kisana*, at para 62.

[75] Turning therefore to the evidence and submissions in the present case, the written submissions in the Consultant's Letter and in Counsel's Letter did not make any explicit arguments about the BIOC. However, one section of the Consultant's Letter did address the "Applicant's life in Cuba", and that section discussed the applicant's relationship with his son. In that sense, the then-counsel for the applicant did make an effort to frame and characterize the evidence related to the applicant and his son, albeit without making express submissions about the best interests of the child.

[76] An assessment of the contents of the Consultant's Letter and Counsel's Letter does not end the inquiry, because in my view, the materials filed by the applicant did include evidence about his child and did more than just raise the BIOC in an oblique, cursory and obscure manner. As I will explain, it was "sufficiently clear from the materials submitted to the decision maker" (to adopt a phrase from *Owusu*, at para 5) that the child was directly affected and that the best interests of the child had to be considered.

[77] The facts related to the applicant's child was a central part of the narrative in the H&C application. The birth of the child and the applicant's relationship with the child's mother explained why the previous application in 2008-2009 for a permanent residence had been withdrawn, and why the mix-up by Ms Diaz Rodriguez about the applicant's relationship with the child's mother occurred.

[78] It is significant, however, that the applicant's evidence on the H&C application updated the child's circumstances and some facts related to the child's relationship with the applicant

well beyond the 2008-2009 time period, up to the time of the permanent resident / H&C application in 2016. The Consultant's Letter referred to the child's recent return with his mother to the applicant's hometown. The evidence filed by the applicant on the H&C application included a ruling from the Peoples Municipal Tribunal of the Republic of Cuba dated January 30, 2015 (which the parties characterized as a custody agreement). It stated that the child would stay "under the custody and care" of his mother and that "the communication rules with his father [the applicant] will be determined by a normal regime, allowing [the applicant] to take him with him every other weekend, during half of the school breaks and during half of the holidays." In addition, the applicant filed a statement from the child's mother made in June 2016 that the applicant had "complied with his obligations as a father until today" and that she had "full custody of [the child] and he won't travel to the exterior" (i.e., outside Cuba) (official translation). Further, the child's mother provided a written statement dated May 3, 2016 (a translation for which does not appear in the Certified Tribunal Record or the Application Record in this Court, although a translation is listed in the Index to the CTR).

[79] On the evidentiary record, I conclude that the BIOC was raised sufficiently in the materials before the officer to raise the legal issue of the BIOC of the applicant's child in Cuba, and how the applicant's move from Cuba to Canada as a permanent resident would affect the interests of the child. By filing that evidence about his child and his relationship to his child in his application for a visa and alternatively for H&C relief under subs. 25(1), the applicant must be taken to have understood that the best interests of his child were relevant to the H&C application.

[80] There are some circumstances in which an officer is required to make disclosure of specific concerns, issues, facts or documents of which the applicant is unaware, so the applicant knows the case to meet and has a reasonable opportunity to adduce additional evidence and/or to make submissions in relation to that disclosure. In the decisions of this Court, these principles may apply when, for example:

- the officer identifies evidence giving rise to credibility concerns: see e.g. *Hassani*, at paras 24-28; *Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 (Mosley J.), at paras 37-38; *Likhi v. Canada (Citizenship and Immigration),* 2020 FC 171 (Fuhrer J.), at paras 33-35 and 38;

- the officer identities evidence of a possible misrepresentation by the applicant, including when that misrepresentation may lead to inadmissibility: see e.g. *Khan; Asanova*, at para 30; *Likhi*, at paras 26-27 and 41; *Mohammed v. Canada (Immigration, Refugees and Citizenship),* 2019 FC 326 (St. Louis J.) at para 30; *Ntaisi v. Canada (Citizenship and Immigration),* 2018 CanLII 73079 (FC) (Barnes J.) at para 10; *Toki v. Canada (Immigration, Refugees and Citizenship),* 2017 FC 606 (Diner J.) at para 17; and

- the officer identifies new, salient internal information or extrinsic evidence that is not available to the applicant: see e.g. *Khan*, at para 28; *Gomes*, at para 19; *Krishnamoorthy v. Canada (Citizenship and Immigration)*, 2011 FC 1342 (Mosley J.), at paras 32-39; *Rukmangathan*, at paras 22-23; *Mekonen v. Canada (Citizenship and Immigration)*, 2007 FC 1133 (Dawson J.), at paras 12-27. An obligation may not apply if the documents are the applicant's own documents, at least in relation to a factor in (or directly related to) the provision being applied by the officer: *Gomes*, at paras 20-21.

I note that more than one issue may arise in a given case (as occurred in *Likhi*). These cases are also not intended to be an exhaustive classification or description of the circumstances in which these principles may apply.

[81] In each case, the specific circumstances must be carefully assessed and will dictate what (if any) disclosures are required, and what will constitute a meaningful opportunity to respond –

keeping in mind that procedural fairness is not procedural perfection: *Khan*, at para 22. When doing so, the applicant's (and his representatives') awareness of the officer's concerns is relevant: see, for example, *Chiau v. Canada (Minister of Citizenship and Immigration)* (2000), [2001] 2 FC 297 (CA); and *Khan*, at paras 29 and 33-34.

[82] In the present case, the officer did not make a credibility finding (expressly or implicitly), did not rely on a misrepresentation or on any grounds for inadmissibility and did not refer to or rely on any new or extrinsic documents. Further, in my view, the present circumstances are not analogous to the decided cases above and did not require the officer to make a disclosure to the applicant. The officer reviewed the record and relied upon evidence that the applicant submitted in the H&C application, including statements from the child's mother and documents related to the custody arrangements in Cuba. It was not extrinsic evidence, or information gathered independently by the officer, of which the applicant had no knowledge. It all emanated from the applicant's filings, made through an immigration consultant and then through legal counsel, to support the H&C application. Further, the 2016 evidence related to the child is principally, if not only, relevant to an assessment of the BIOC in the H&C application. Consideration of the BIOC was triggered by the filed evidence about the applicant's child, as he was a child directly affected by the H&C application.

[83] The source of the BIOC information was the applicant, and the issue of concern – the BIOC – was expressly identified by Parliament as an important consideration in *IRPA* subs. 25(1). Having introduced material evidence about his child in Cuba, the applicant, and his professional advisors before the officer's decision, cannot have been taken by surprise when the

officer considered the BIOC. The officer cannot be faulted for considering the BIOC without seeking additional submissions from the applicant, given the nature and content of the evidence the applicant submitted on the application and the requirements of the *IRPA*.

[84] I find therefore that the applicant knew the case to meet in relation to the BIOC. In addition, the applicant had meaningful opportunities to respond and to advocate for his position on the BIOC in the two written submissions filed on his behalf – the Consultant's Letter in 2016 and Counsel's Letter in 2019 (written by a lawyer with "fresh eyes" to the application).

[85] Two other points. As mentioned, the two written submissions filed by the applicant's professional representatives focused on the hardship suffered by his mother and did not expressly raise the BIOC as an issue for the officer to consider. The absence of BIOC submissions may have been an oversight, or it may have been a conscious choice given that the application focused on the mental health of Ms Diaz Rodriguez. We do not know why the omission occurred, as the applicant filed no evidence before this Court to explain it. However, neither an oversight nor a decision to diminish the impact of the BIOC in his application renders the BIOC irrelevant to the officer's H&C decision under subs. 25(1).

[86] On this application, the applicant argued that his permanent residence in Canada may in fact benefit his son in Cuba, in that he could send the child more financial assistance due to having a well-paying job in Canada. The applicant provided evidence that he could work in construction in Canada and his mother, Ms Diaz Rodriguez, provided evidence to the effect that that a job was waiting for him. That was certainly an argument that the applicant may have

advanced prior to the officer's decision, but it does not support an argument that he was treated with an unfair process.

[87] For these reasons, I conclude that on the evidence filed, the applicant sufficiently raised the best interests of his child in Cuba. The express reference in subs. 25(1) of the *IRPA* to the best interests of a child directly affected by the H&C application, and the case law concerning an officer's obligations to consider the BIOC, are consistent with and support the conclusion that, on the evidence here, the officer was not required to seek additional submissions from the applicant or his representatives. It was sufficiently clear from the materials before the officer that the child was directly affected and the BIOC were engaged. The cases requiring an officer to seek additional information or submissions from an applicant do not apply and are not analogous to the present circumstances. The applicant knew, or must be taken to have known, the case to meet on the BIOC from the evidence he filed on the H&C application under *IRPA* subs. 25(1). He had a meaningful opportunity to respond to it in two written submissions to the officer. There was no breach of procedural fairness in the circumstances.

Reasonableness of the Officer's Decision on BIOC

[88] The applicant's next submission challenged the reasonableness of the officer's BIOC decision, applying the principles in *Vavilov*. The applicant submitted that the officer failed to uphold the obligation confirmed in *Kanthasamy* to be alert, alive and sensitive to the BIOC, based principally on the two points: the officer had insufficient evidence on which to assess the

BIOC and should have requested more information; and the officer improperly weighed the evidence that was available.

[89] Specifically, the applicant argued that the officer failed to consider evidence of the applicant's potential prospects for employment upon arrival in Canada and that he would be better positioned to improve his child's circumstances in Cuba through financial remittances; the officer failed to consider the possibility that the child could later be sponsored as a member of the family class once the applicant becomes financially established in Canada, something not mentioned in the officer's reasons; the officer wrongly referred to the applicant's "removal" from Cuba; the officer did not address whether the child's relationship with the applicant could be sustained through visits to Cuba; and before assigning weight to the BIOC, the officer should have considered the relationship between the applicant and his child and what emotional dependence the child has on the applicant, as well as the impact of immigration to Canada, matters that were not in the evidence.

[90] The respondent submitted that the officer's decision was reasonable, given the facts and evidence on the application, particularly the custody evidence and the statement from the child's mother. In any event, the respondent contends, it was "reasonable to conclude that the best interests of an approximately 10-year-old child favour having his father in his life in a regular, consistent, tangible way, rather than having his father living in another country, even if he may be able to send him more money."

[91] In my view, the officer made no reviewable error in assessing the BIOC. First, given the onus on the applicant on an H&C application as described in *Kisana* and *Owusu,* I do not accept that the officer's decision was unreasonable on the basis of an absence of evidence. Certainly, additional evidence might have been useful to the applicant's cause and used by the officer in analyzing the BIOC, if the applicant had submitted such evidence. However, the applicant only provided certain documents, such as the custody agreement established in court, together with statements from his own mother and from his child's mother to characterize his relationship with his son. He did not submit his own testimony or a statement to the officer to explain his relationship with his son and how it might be affected by his departure from Cuba and permanent residency in Canada. In addition, any failure by the officer to consider certain arguments that might favour the applicant was a by-product of failing to make submissions on the BIOC proactively in either the Consultant's Letter or Counsel's Letter. Given that it was in the interests of the applicant to downplay any hardship that could be experienced by his son in Cuba, the applicant cannot now complain that the officer did not have sufficient information on which to assess that lack of hardship. The applicant could have explained his relationship with his son himself, in detail, but unfortunately did not do so.

[92] Second, it is well established that the Court on judicial review cannot reweigh or reassess the evidence on an H&C application: *Vavilov*, at paras 75, 83 and 125-126; *Kanthasamy*, above, at 2014 FCA 113, para 99. Several of the applicant's submissions ask the Court to do so and therefore cannot be sustained.

[93] Third, the officer's decision concluded, in the end, that the child's interests should be given considerable weight in the overall assessment of the H&C factors. Doing so was within the officer's discretion and compliant with Supreme Court's reasons in *Kanthasamy* and *Baker* requiring an officer to give the BIOC "serious" weight (at paras 57 and 65 respectively). Doing so was also consistent with the principle affirmed in *Kanthasamy* and *Hawthorne* that children will rarely, if ever, be deserving of any hardship (at paras 59 and 9 respectively).

[94] The applicant has therefore not persuaded me that the officer's BIOC reasons contain a reviewable error within the principles in *Vavilov*.

Psychological Hardship and Mental Health Evidence

[95] The applicant submitted that the officer did not properly engage with the evidence related to the psychological hardship faced by his mother and the mental health evidence. The applicant contended that the officer casually dismissed the evidence establishing that his mother's mental health issues were caused by, and were worsening as a consequence of, her continued separation from her son, and that the officer gave the medical evidence no weight. The applicant also challenged the officer's apparent conclusion that her mental health was more related to her family history of mental health issues than to her isolation and separation from her son. The applicant maintained that the officer implicitly, but wrongly and contrary to the medical evidence, reasoned that her poor mental health was genetic, rather than related to her very unfortunate circumstances of being alone in Canada and suffering prolonged and extensive depression related to her guilt at having failed in sponsoring the applicant to join her in Canada.

The applicant's submissions referred to excerpts from the medical reports concerning her mental health and its direct relationship to the absence of her son in Canada. The applicant further submitted that the officer had to consider the impact of the applicant's continued separation from his mother, in the same way that an officer on an application must consider the impact of removal on the psychological or mental health of an applicant (as described in *Kanthasamy*, at paras 46-50).

[96] In response, the respondent submitted that rather than assigning no weight to Ms Diaz Rodriguez's emotional and mental distress, the officer was not satisfied that her mental state was entirely or mainly due to separation from her son. The respondent maintained that this was a reasonable assessment on all of the evidence. The officer considered the opinion of the family doctor and the psychologist stating that the cause of Ms Diaz Rodriguez's mental health issues was the separation from her son. The officer considered that she had been diagnosed with depression "many years ago", and concluded was not clear whether her current diagnosis flowed from her separation from her son or from other causes. The respondent emphasized the considerable discretion and deference owed to officers making H&C decisions. The respondent further noted that the officer concluded that he was not satisfied that the mother's mental health was "entirely or mainly" due to her separation from her son, which is not the same as a finding that her mental distress and depression were hereditary or genetic.

[97] This Court has held, consistent with *Vavilov*, the assessment of clinical reports and psychological opinions are reviewed on a standard of reasonableness: *Sutherland v. Canada (Citizenship and Immigration)*, 2016 FC 1212 (Gascon J.), at para 12; *Sitnikova v. Canada*

(Citizenship and Immigration), 2016 FC 464 (Zinn J.), at para 37. In addition, an officer is not required to agree with psychological reports submitted with an H&C application. The officer can decide to give them little weight, so long as the officer provides clear and well-founded explanations for doing so: *Sutherland*, at para 24; *Jesuthasan v. Canada (Citizenship and Immigration)*, 2018 FC 142 (Crampton CJ), at paras 43, 44 and 48.

[98] Factual findings made by an officer are entitled to deference. Absent exceptional circumstances, a reviewing court will not interfere with a decision maker's factual findings: *Vavilov*, at para 125; *Khosa*, at para 89.

[99] The officer's reasoning on the issue is in the GCMS notes, which must be read in tandem with the record: *Vavilov*, at paras 91-95. Those notes expressly state that the officer understood the main ground of the application was the "mental state of the sponsor", who had devoted 13 years to reuniting with her son. The officer also demonstrated a clear awareness of the key contents of the physician's and psychologist's opinions filed by the applicant in relation to Ms Diaz Rodriguez's mental health and the anticipated impact of an unsuccessful application for permanent residence (i.e., continued separation from her son).

[100] Specifically, the officer mentioned the (very brief) letters from Ms Diaz Rodriguez's physician dated June 2016 and August 2017, noting both the physician's statement that she was suffering from severe emotional stress and major depression and that the physician's first letter concluded that the inability to bring her son to Canada "ha[d] been gravely traumatic". In addition, the officer set out in the GCMS notes the conclusions and excerpts from the

psychologist's report dated July 6, 2016, including that Ms Diaz Rodriguez "suffered from depression, anxiety and guilt over being separated from her son". The officer noted that Ms Diaz Rodriguez had experienced suicidal ideation and that she told her psychologist that she had been diagnosed with depression "many years ago". The officer was also clearly aware of and stated the psychologist's conclusions that Ms Diaz Rodriguez "impressed as being on the cusp of a psychological collapse" and the psychologist's caution that if her son were not granted permission to enter Canada, Ms Diaz Rodriguez "may very well suffer from a prolonged and debilitating depression and psychological breakdown".

[101] The officer gave reasons for why (s)he was not satisfied that Ms Diaz Rodriguez's mental state was "entirely or mainly" due to separation from her son. The officer noted Ms Diaz Rodriguez's family history of suicide or attempted suicide, which the officer located in the H&C file. The officer found that her family history of suicide had not been disclosed to the medical professionals. The officer stated that Ms Diaz Rodriguez had been diagnosed with depression "many years ago". (The application materials did not disclose the date at which Ms Diaz Rodriguez had originally been diagnosed with depression. It may have been after she left Cuba in 2004, or it may have been earlier.)

[102] Having considered the officer's reasons holistically and contextually, and in the context of the record, as *Vavilov* requires (at paras 91-96, 97 and 103), I have reached the conclusion that the officer did not commit a reviewable error.

[103] First, it is clear from the GCMS notes that the officer read and engaged fully with the relevant evidence, and specifically the key medical evidence. Second, as I read the officer's reasons, they did not disregard the diagnosis of depression made by the psychologist, but rather came to a different view about the factual cause(s) of Ms Diaz Rodriguez's condition. The applicant's submissions in substance ask the Court to review the officer's conclusion as to an issue of causation. Causation is a question of fact or inference based on the evidence, and involves an assessment and weighing of the evidence (in this case, a mix of the facts and opinion evidence from the physician and the psychologist). Specifically, the issue identified by the officer was whether the cause of the applicant's depression and mental health challenges was solely her separation from her son, or whether other factors may have also had a causal connection – factors that included a family history of depression and suicide or attempted suicide, and a prior diagnosis that Ms Diaz Rodriguez had suffered from depression "many years ago" and continued to do so.

[104] Read alongside the record, the officer's statements that Ms Diaz Rodriguez had experienced suicidal ideation and had told her psychologist that she had been diagnosed with depression "many years ago" appear to refer to a statement in the psychologist's letter (on page 3) that Ms Diaz Rodriguez "was diagnosed with depression many years ago, after she confided in her physician about her distress and suicidal ideation". The psychologist's letter seems to make a connection between her diagnosis with depression many years ago and her suicidal ideation at that time.

[105] The officer also doubted whether the medical professionals were aware of the family history, which, I have confirmed, none of the three medical letters in the record mentioned (although there were many other facts in the psychologist's letter). The respondent noted that that the absence of a complete factual understanding in a psychologist's opinion has been considered a reasonable ground not to rely on the opinion: *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1168 (Martineau J.), at paras 3 and 7.

[106] Although this Court may not have reached the same conclusion as the officer did in assessing the evidence on this issue, a reviewing court is not permitted to reassess or reweigh the evidence. The officer's assessment of the evidence generally, and evidence as to causation in particular, is entitled to deference. In *Vavilov* terms, the Court may only intervene if there is a fundamental flaw in the reasoning process used by the officer or if the officer's conclusions are untenable given the constraints imposed by the evidence: *Vavilov*, at paras 99-101, 105, and 125-126. In my view, the evidence in the present case did not act as a sufficient constraint to prevent the officer from reaching the conclusion stated in the GCMS notes. I also do not believe that the officer's reasons went so far as to provide an alternative "amateur diagnosis", as the applicant contended in oral argument (referring to *Li v. Canada (Citizenship and Immigration)*, 2014 FC 545 (Phelan J.), at para 12).

[107] Third, the officer provided reasons for not accepting the causal connection in the psychologist's letter. Those reasons, particularly with respect to the acknowledged diagnosis of depression "many years ago", are not illogical and are sufficiently related to the facts and the medical evidence in the record. The reasons are not untenable for *Vavilov* purposes.

[108] It is true that, in the concluding paragraph of the GCMS notes, the officer did not return to consider the conclusions about the medical evidence in the overall balance of whether to grant the exemption under subs. 25(1). However, given the officer's express recognition of the importance of the issue and engagement with the medical evidence in those notes, I do not consider that omission to be serious enough to warrant intervention by this Court.

[109] For these reasons, I cannot conclude, applying a deferential *Vavilov* reasonableness standard, that the officer's reasoning process was fundamentally flawed or was untenable on this issue, or that it lacked the justification, intelligibility or transparency required. There is therefore no basis on which this Court may intervene.

The Sponsor's Isolation

[110] The applicant submitted that the officer failed to consider the isolation experienced by Ms Diaz Rodriguez without any family in Canada. As the respondent noted, the officer's reasons expressly noted that she was "alone" in Canada. In the context of this case, that recognition was sufficient, given the basis on which the mental health evidence was presented to the officer and the officer's understanding of that evidence. I would not give effect to this submission by the applicant.

Other Arguments Raised by the Applicant

[111] The applicant included arguments about the officer's failure to appropriately weigh the evidence in making a determination of the H&C factors. As already noted, this is not a basis on which this Court may intervene.

[112] The applicant also submitted that the officer failed to follow *Kanthasamy* and the requirement in *Chirwa* to consider humanitarian and compassionate factors, not just hardship (citing *Marshall v. Canada (Citizenship and Immigration)*, 2017 FC 72 (Brown J.), at para 33). Having considered the GCMS notes carefully, I am not prepared to find that the officer failed to do so. The officer's notes do not reflect an appreciable absence of sensitivity to the circumstances faced by Ms Diaz Rodriguez or the applicant.

[113] The applicant also alleges various errors in the officer's assessment of whether the applicant and his mother (as his proposed sponsor) met the requirements for participation in the Family Class in the *IRPR*. However, the applicant's submissions also admitted that Ms Diaz Rodriguez as sponsor did not meet the financial requirements for sponsorship. That ends the argument on this point. In addition, as I read the submissions, the argument on the financial requirements links back to the officer's assessment of the H&C on the merits. The rest of the applicant's submissions under this heading fall in the category of a "treasure hunt" for errors, in which a reviewing court is not permitted to engage: *Vavilov*, at paras 91 and 102; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, at para. 54.

V. Conclusion and Proposed Certified Questions

[114] I conclude therefore that the application must be dismissed.

[115] Given the unusual circumstances giving rise to the procedural fairness argument, the parties both requested an opportunity to make submissions on a possible certified question after reviewing the outcome and reasons on the application. The Court provided the parties' counsel with a draft of these Reasons in order to allow them to make written submissions. Both parties did so.

[116] To be certified for appeal under *IRPA* paragraph 74(*d*), a proposed question must be a "serious question" that (i) is dispositive of the appeal, (ii) transcends the interests of the parties and (iii) raises an issue of broad significance or general importance: *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229 (Gleason JA), at paragraph 36. In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 FCR 674, Laskin JA explained at paragraph 46 that the test set out in *Lewis*:

> … means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness*), 2015 FCA 21, 29 Imm. L.R. (4th) 211, at paragraph 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186, at paragraphs 15, 35).

[117] In this case, the applicant proposed three questions for certification:

1) Can the best interests of the child be assessed as a factor weighing against granting an application under section 25 of the *Immigration and Refugee Protection Act*?
2) If so, does procedural fairness require that, prior to refusing an application, an officer concerned that the best interests of a child might be disserved by the granting of a permanent resident visa must give the applicant an opportunity to address those concerns?
3) Is the isolation of an individual who meets the definition of a sponsor under sub-section 117(1)(*h*)(i) of the *Immigration and Refugee Protection Regulations* a factor requiring consideration when assessing whether an exemption on humanitarian and compassionate grounds is warranted where the requirements of sub-sections 117(1)(*h*)(ii) and/or 133(1)(*j*)(i)(A) of the *IRPR* are not met?

[118] The respondent opposed certification of any of these questions.

[119] In my opinion, the first question cannot be certified because it is not dispositive of the appeal. A certified question "must be a question which has been raised and dealt with in the decision below": *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 (Pelletier JA), at para 12; *Canada (Citizenship and Immigration) v. Kassab*, 2020 FCA 10 (Dawson JA), at para 72; *Lewis*, at para 46. In this application, the applicant did not argue that the officer could not, as a matter of law, consider the BIOC as a factor weighing against an applicant in an H&C application. Nor do my reasons address that legal issue, which is considerably broader than the issue argued and decided (i.e. whether the officer should have

given the applicant a (further) opportunity to be make submissions before considering the BIOC).

[120] The second proposed question for certification concerns procedural fairness. The Federal Court of Appeal held in *Kisana* that this kind of procedural fairness issue must be resolved on the facts of each case, as it did in this application. The Federal Court of Appeal declined to answer a question of this nature that was certified in that appeal: *Kisana*, at paras 2 and 62. As a result, the issue in this application does not raise a certifiable question for appeal as its resolution turns on the particular circumstances of this case: *Lunyamila,* at para 46; *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, at para 15.

[121] The third question proposed for certification also cannot be certified because the outcome of the appeal will not turn on its answer. The officer's reasons acknowledged that the sponsor was alone in Canada. The weight to be given to that factor in this specific case does not give rise to a certifiable question.

[122] Accordingly, I conclude that no question may be certified for appeal in this application.

[123] There will be no costs order.

JUDGMENT in IMM-6332-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. The Court does not certify a question under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
3. There is no order as to the costs of this application.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	GRABIEL GARCIA DIAZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

Shannon Black	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shannon Black Barrister & Solicitor	FOR THE APPLICANT
David Cranton Attorney General of Canada	FOR THE RESPONDENT