Federal Court  Cour fédérale

Date: 20220927

Docket: IMM-2554-21

Citation: 2022 FC 1349

Ottawa, Ontario, September 27, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

CHIGOZIE ULOMA LEWIS-ASONYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Lewis-Asonye, seeks judicial review of the April 9, 2021 decision of a Senior Immigration Officer [the Officer] that refused her application for permanent residence from within Canada on Humanitarian and Compassionate [H&C] grounds, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, the Application for Judicial Review is allowed.

I. Background

[3] Ms. Lewis-Asonye, a citizen of Nigeria, arrived in Canada in January 2014 on a Study Permit. She later obtained a Post Graduate Work Permit [PGWP], which expired on November 24, 2018. In April 2018, after being invited to apply for permanent residence pursuant to the Canadian Experience Class [CEC], she submitted her application and supporting documents. However, Ms. Lewis-Asonye's PGWP expired while her CEC application was being processed, leaving her without status or authorization to work.

[4] On January 10, 2019, she applied to restore her temporary resident status and to obtain a bridging open work permit. On February 7, 2019, her application for temporary residence restoration was refused. On April 16, 2019, her bridging open work permit was refused because she did not have temporary residence status or a valid work permit at the time of her application.

[5] On July 10, 2019, Ms. Lewis-Asonye's application for permanent residence pursuant to the CEC was refused [CEC refusal] because she did not have a valid work permit at the time her application was reviewed in June and July 2019.

[6] Ms. Lewis-Asonye's Application for Leave and for Judicial Review of the CEC refusal was denied at the leave stage on December 10, 2019. This decision was communicated to her in late 2019.

[7] Since arriving in Canada in 2014, Ms. Lewis-Asonye has lived with her brother, his wife, and their two young children. She has completed two post-graduate certificates from Ontario

colleges, worked as a warehouse distribution coordinator, volunteered with her church and community, and made many friends.

[8] She returned to Nigeria briefly in 2018 to marry. Her spouse continues to reside in Nigeria.

II. Decision Under Review

[9] Ms. Lewis-Asonye submitted her H&C application in August 2020 primarily based on her establishment, her family ties, the circumstances underlying her CEC application, her mental health and the country conditions in Nigeria.

[10] The Officer attributed positive weight to Ms. Lewis-Asonye's establishment and family ties, noting her education in Canada, including two post-graduate certificates, her employment, a letter from her pastor attesting to her volunteer work, and the supporting documents.

[11] The Officer acknowledged that Ms. Lewis-Asonye had been in Canada for seven years at the time of the H&C application and that there would be a period of adjustment upon return to Nigeria, but found that she would be returning to a familiar environment, given that she had lived, studied, and worked in Nigeria for 30 years and that her mother, siblings, and husband resided in Nigeria.

[12] The Officer also acknowledged Ms. Lewis-Asonye's close relationship with her brother and his family in Canada and the impact of their sister's death in 2019 on Ms. Lewis-Asonye and

her family. The Officer found that Ms. Lewis-Asonye's return to Nigeria would result in hardship due to family separation, but found that there was insufficient evidence that she could not maintain her family relationships in Canada through other means. The Officer made similar findings with respect to her relationship with her friends.

[13] The Officer also found that there was insufficient evidence that Ms. Lewis-Asonye would be unable to re-establish herself professionally and financially in Nigeria given her Canadian education and work experience, which the Officer viewed as giving her a competitive advantage.

[14] With respect to Ms. Lewis-Asonye's submissions regarding the impact of her uncertain immigration status on her mental health, the Officer acknowledged the social worker's report recounting that Ms. Lewis-Asonye felt depressed, stressed, and worried. The Officer noted that the social worker's report was based on a single consultation, conducted online nine months previously, and did not include a treatment plan. The Officer also noted that there was insufficient evidence that Ms. Lewis-Asonye had obtained further counselling or therapy or that she would not be able to obtain such assistance upon return to Nigeria.

[15] The Officer found that there was insufficient objective evidence demonstrating that there would be personal hardship to Ms. Lewis-Asonye based on the general country conditions in Nigeria.

[16] With respect to the best interests of the children [BIOC] affected—Ms. Lewis-Asonye's two nephews—the Officer acknowledged their close relationship. The Officer stated that he gave the BIOC "weight," but noted the lack of evidence that the nephews could not visit Nigeria or

that Ms. Lewis-Asonye could not visit them in Canada. The Officer acknowledged that BIOC is one of many important factors in an H&C assessment, but is not the determinative factor.

[17] With respect to other H&C considerations advanced, in particular, Ms. Lewis-Asonye's efforts to obtain permanent residence pursuant to the CEC program, including the delay beyond the estimated processing time, her belief that she continued to have status while the CEC application was in process, and her efforts to restore her temporary resident status and authorization to work once she was made aware that this was necessary, the Officer characterised the outcome as a "disappointment" to her. The Officer stated, "numerous applications for permanent residence to Canada are rejected because they do not meet the criteria." The Officer noted that the H&C application is not an appeal of the CEC refusal, rather a separate process, which is an exceptional and discretionary measure and not an alternative means to obtain permanent residence.

[18] In conclusion, the Officer stated, "while I view the applicant's previous employment and education efforts positively, I must also note that the applicant's degree of establishment is not unlike others in similar situations." The Officer also concluded that Ms. Lewis-Asonye's establishment was not to "such an extent that there would be an associated hardship in departing Canada and applying for permanent residence from outside of Canada." The Officer also concluded that she could maintain her family relationships and friendships from abroad.

III. The Applicant's Submissions

[19] Ms. Lewis-Asonye submits that the Officer's decision is unreasonable; the Officer failed to apply the jurisprudence, which calls for an equitable lens to be applied, and made other reviewable errors.

[20] Ms. Lewis-Asonye submits that the Officer did not address or apply the "test" for equitable relief as established in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 21 [*Kanthasamy*], which calls for a holistic assessment of all relevant factors. She argues that the Officer erred by focussing on whether the hardship of return to Nigeria would be manageable (and also erred by finding that it would), rather than assessing all relevant factors, including the circumstances of her CEC refusal, despite her significant efforts and achievements in Canada over the last seven years.

[21] Ms. Lewis-Asonye acknowledges that her H&C application is not an appeal of the CEC refusal. However, she submits that the circumstances of her refused CEC and her efforts to meet the criteria are relevant H&C factors. She submits that the Officer mischaracterized her submissions about her CEC application.

[22] Ms. Lewis-Asonye argues that the Officer also erred in discounting the social worker's assessment of her mental health because it was based on an online consultation, necessitated by the COVID-19 pandemic restrictions, nine months earlier, and was not conducted by a professional or licensed mental health professional.

[23] Ms. Lewis-Asonye submits that the Officer's characterization of her emotional state as mere "disappointment" is not consistent with the social worker's assessment, which attributed her mental health and emotional vulnerability to her uncertain immigration status.

[24] Ms. Lewis-Asonye further submits that the Officer's finding that she could maintain her relationship with her brother and nephews through other means is based on speculation and ignores the evidence regarding their close relationship and extended family unit.

[25] Ms. Lewis-Asonye also submits that the Officer speculated by finding that her Canadian education and work experience would place her at a competitive advantage in Nigeria. She argues that the Officer missed the entire point of her H&C application and her supporting evidence regarding her education, work experience, volunteerism and family ties, which was not about how this could assist her to re-establish in Nigeria, but how this would establish her in Canada and support her application for permanent residence from within Canada.

IV. The Respondent's Submissions

[26] The Respondent submits that there is no reviewable error in the Officer's decision; the Officer did not overlook or misunderstand the evidence and there are no sufficient shortcomings in the decision.

[27] The Respondent submits that Ms. Lewis-Asonye is seeking a reweighing of the evidence with respect to her establishment, family ties and BIOC, which is not the role of the Court.

[28] The Respondent disputes the submission that the Officer failed to apply the correct "test" or approach to determine an H&C application. The Respondent notes the extensive jurisprudence with respect to the purpose and scope of an H&C exemption, including its exceptional nature.

[29] The Respondent submits that it is not an error for the Officer to consider the hardship or consequences of removal to Ms. Lewis-Asonye relative to other cases (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 265, at para 19 [*Huang*]). The Respondent notes that some hardships are inherent and the onus was on Ms. Lewis-Asonye to provide sufficient probative evidence that her circumstances warranted exceptional H&C relief.

[30] The Respondent further submits that the Officer reasonably assessed Ms. Lewis-Asonye's establishment in Canada, noting that it is reasonable and necessary for the Officer to consider whether the skills she acquired in Canada could assist her in re-establishing herself in Nigeria.

[31] With respect to the social worker's report, the Respondent submits that the Officer reasonably identified shortcomings that limited the probative value of the assessment, including that the report was based on one consultation and that no treatment was recommended.

V. The Issue and Standard of Review

[32] The issue is whether the Officer's decision is reasonable. As noted above, Ms. Lewis-Asonye argues that the Officer made several errors, resulting in an unreasonable decision.

[33] H&C decisions are discretionary and are reviewed on the reasonableness standard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57–62, 174 DLR (4th) 193; *Kanthasamy* at para 44).

[34] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*], the Supreme Court of Canada confirmed that reasonableness remains the standard of review for discretionary decisions and provided extensive guidance to the courts in conducting the review.

[35] The court begins by examining the reasons for the decision with respectful attention, seeking to understand the reasoning process followed by the decision-maker to arrive at their conclusion. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at paras 85, 102, 105–07).

[36] In *Vavilov*, at para 100, the Supreme Court of Canada noted that decisions should not be set aside unless there are "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" and that "the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable."

VI. The H&C Exemption

[37] It is useful to consider the purpose of an H&C exemption and the jurisprudence that guides the Court in its review of H&C decisions.

The relevant provision in the Act states:

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

[38] In other words, subsection 25(1) provides that permanent resident status or an exemption from applicable criteria or obligations of the Act may be granted if justified by H&C

considerations. In the present case, the H&C application, if granted, would result in permanent resident status for Ms. Lewis-Asonye while remaining in Canada, rather than returning to Nigeria and again seeking to apply to immigrate to Canada.

[39] In *Kanthasamy*, the Supreme Court of Canada provided extensive guidance about how subsection 25(1) should be interpreted and applied. The Court endorsed the approach previously set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*], which described H&C considerations as referring 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 *Immigration Act*." In *Chirwa*, the Immigration Appeal Board acknowledged that this definition implied "an element of subjectivity," noting that there must also "be objective evidence upon which the relief ought to be granted" (*Kanthasamy* at para 13, citing *Chirwa*, at p 350).

[40] In *Kanthasamy*, at para 23, the Court noted that "[t]here will inevitably be some hardship associated with being required to leave Canada," which on its own is generally not sufficient to grant relief, adding that the H&C exemption was not intended to be an alternative immigration scheme.

[41] The Court explained that what will warrant relief under subsection 25(1) varies depending on the facts and context of each case. The significant aspects of *Kanthasamy* are the Court's clear directions to avoid imposing the threshold of unusual, undeserved or

disproportionate hardship, which had been applied in previous cases, to consider and weigh all of the relevant facts and factors, and to "give weight to all relevant humanitarian and compassionate considerations in a particular case" (at para 33; see also para 25) [emphasis in original].

[42] In *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596, relied on by Ms. Lewis-Asonye, Justice Norris considered the guidance in *Kanthasamy* and found on the facts of that case that the Officer had applied the wrong test by considering hardship alone and by imposing the "unusual, undeserved and disproportionate" hardship standard rejected in *Kanthasamy*. At para 37, Justice Norris found:

> While the question of hardship is of course germane under s 25(1), and various forms of hardship were emphasized in the applicant's submissions, the officer used the language of "unusual and undeserved or disproportionate hardship" in a way that limited the officer's ability to consider and give weight to all relevant humanitarian and compassionate considerations in the applicant's case (cf. *Kanthasamy* at para 33; *Marshall* at paras 33-37).

[43] Although the jurisprudence confirms that the H&C exemption remains "exceptional" (see for example, *Huang* at para 17), it should not be impossible to obtain.

[44] In *Huang*, the Chief Justice addressed what is required to meet the *Chirwa* "test" to warrant an H&C exemption, noting at para 19:

> Section 25 was enacted to address situations in which the consequences of deportation "might fall *with much more force on some persons … than on others,* because of their particular circumstances …": *Kanthasamy*, above, at para 15 (emphasis added), quoting the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy*, Issue No. 49, 1st Sess., 30th Parl., September 23, 1975, at p. 12. Accordingly, an applicant for the exceptional H&C relief provided by the IRPA must

> demonstrate the existence or likely existence of misfortunes or other H&C considerations *that are greater than those typically faced by others who apply for permanent residence in Canada*.
>
> [Emphasis in the original]

[45] In *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16, Justice Roy noted that:

> Nothing in *Kanthasamy* suggests that H&C applications are anything other than exceptional: the *Chirwa* description itself, the fact that it is not meant to be an alternative immigration scheme, the fact that the hardship associated with leaving Canada does not suffice are all clear signals that H&C considerations must be of sufficient magnitude to invoke section 25(1). It takes more than a sympathetic case.

[46] In *Turovsci v Canada (Citizenship and Immigration)*, 2021 FC 1369, Justice Roy noted, at para 26, that the jurisprudence confirms that decision-makers err by using 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." Justice Roy added, at para 30, that "[h]ardship must by necessity be a relevant consideration, but it must not be the only consideration" noting that other H&C considerations may be at play.

[47] In summary, *Kanthasamy* and the post-*Kanthasamy* jurisprudence provides the following guidance:

- An H&C exemption is a discretionary and exceptional relief;
- Reviewing courts must not substitute their discretion for that of the Officer;

- While undue, undeserved and disproportionate hardship is not the standard, hardship remains a relevant consideration;
- Some hardship is the normal consequence of removal and that hardship, on its own, does not support granting the exemption;
- Applicants must demonstrate with sufficient evidence that the misfortunes or hardships they will face are relatively greater than those typically faced by others seeking permanent residence in Canada;
- All other relevant H&C factors—not just hardship—must be considered and weighed; and,
- The best interest of the child is an important consideration but is not determinative of an H&C application.

[48] Although the jurisprudence clearly states that an H&C application is not an alternative immigration scheme, where an H&C exemption is justified and is granted, it could be regarded as an alternative to other avenues or ways of immigrating to Canada because it exempts an applicant from other requirements of the Act or overcomes some ineligibility. While the H&C process is not intended to be an applicant's first option to seek permanent residence, there is no impediment—other than as stated in the Act—to seeking the exemption where other avenues of immigration are not available, or have been exhausted, and where sufficient H&C factors justify the exemption. The Supreme Court of Canada's guidance in *Kanthasamy* and adoption of the *Chirwa* test permits "the misfortunes of another" to be relieved where justified by the "facts established by the evidence." As noted, while an applicant must demonstrate that their misfortunes are relatively greater than those of others, the misfortunes of not achieving immigration status through other means could be relevant H&C considerations.

VII. The Decision is Not Reasonable

[49] I have applied the principles from the H&C jurisprudence noted above in considering whether the Officer's decision is reasonable in accordance with the guidance from *Vavilov*.

[50] Ms. Lewis-Asonye's primary argument is that the Officer failed to apply the *Chirwa* "test," adopted in *Kanthasamy*, because the Officer did not apply an equitable lens and did not conduct a global assessment of all the relevant H&C factors. In the particular circumstances of this case, I agree.

[51] In assessing the reasonableness of an H&C decision, the Court must be satisfied that there is a serious flaw or shortcoming given: the discretion that officers exercise in H&C decisions, the officers' experience in considering many and varied H&C decisions, the officer's role in assessing the evidence and assigning weight to the relevant factors, and the deference owed by the Court to such discretionary decisions. The Court's role is not to reweigh the evidence. Guided by the principles in *Vavilov*, the court looks at whether the decision reflects the jurisprudence, and whether other specific errors arise; for example, whether the evidence has been ignored or misunderstood and whether findings were made that are not supported by the evidence.

[52] I find that the Officer's conclusion that the H&C exemption was not warranted is not justified. The decision does not convey that the Officer was guided by the jurisprudence or that the Officer considered and gave weight to all relevant H&C considerations.

[53] First, the Officer did not address the purpose and scope of an H&C exemption or apply the guiding principles. Second, the Officer mischaracterized Ms. Lewis-Asonye's submissions and evidence regarding the CEC refusal by regarding this as an attempt to revisit a final decision. Third, the Officer discounted Ms. Lewis-Asonye's establishment because it was, in the Officer's view, what would be expected. Finally, although the Officer attributed positive weight to the factors considered, the Officer then discounted them relying on inferences, assumptions and speculation.

[54] One of the Officer's first comments in the decision is that Ms. Lewis-Asonye remained in Canada without status, which suggests that she is at fault for the CEC refusal and that the H&C process is not intended for those who have not met the criteria of other immigration programs. In addition, the Officer does not acknowledge Ms. Lewis-Asonye's explanation that she had always maintained her immigration status, but for the issue with the expiration of her PGWP while her CEC application was being processed. The Officer also does not acknowledge that, although Ms. Lewis-Asonye remained in Canada without status, she had sought leave for judicial review of the CEC refusal immediately and once leave was denied, she pursued the H&C application.

[55] The Officer's comments—that "numerous applications are rejected because they do not meet the criteria…" and that the H&C exemption is for "deserving cases"—suggest that foreign nationals who have not met the criteria for other immigration routes are not deserving. If this is the lens that the Officer applied, this undermines the whole purpose of the H&C exemption.

[56] In *Kashyap v Canada (Citizenship and Immigration)*, 2022 FC 961, Justice Diner addressed similar comments made by an officer in an H&C decision, noting at paras 24-26:

> [24] Furthermore, the remark about paying deference to the law and statutes of Canada suggests a significant misapprehension of the Officer's role in evaluating a s 25(1) application, which is not to simply pay deference to the ordinary operation of the law, but to weigh and consider whether H&C considerations warrant a flexible and responsive exception thereto (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 19 [*Kanthasamy*]).
>
> [25] First and foremost, the raison d'être of the H&C exemption is to overcome non-compliance or other obstacles posed by immigration rules, by offering equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 at p 350).
>
> [26] There were compassionate circumstances here that the Applicant submitted but the Officer simply did not address, instead reciting a need to be deferential to the law – which, again, includes an exception contained in s 25(1) of the *Act.* The Officer is owed significant deference in making this highly discretionary determination, but not to the point of failing to weigh all the relevant facts and factors before them (*Kanthasamy* at para 25).

[57] The same comments could be made in the present case.

[58] The Officer's only reference to the purpose of the H&C process is in the context of scrutinizing Ms. Lewis-Asonye's CEC refusal and noting that the H&C process is not an appeal. The Officer stated:

> I note the purpose of section 25(1) of the Act is to give the Minister the flexibility to render decisions on deserving cases which were not anticipated by legislation and where humanitarian and compassionate grounds compel the Minister to act. It is an

> exceptional and discretionary measure and not an alternative means to obtain permanent residence.

[59] The Officer did not acknowledge the jurisprudence that guides the determination whether the grounds exist to "compel the Minister to act."

[60] In applying the *Chirwa* approach, the consideration of what will "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes" of an applicant may vary among decision-makers. In *Chirwa*, the Immigration Appeal Board acknowledged that the definition "implies an element of subjectivity" but also noted that objective evidence was also required in order for the exemption to be granted (*Kanthasamy* at para 13).

[61] As noted, the Court's role is not to reweigh the evidence and make its own decision. However, the Court must be satisfied that the Officer applied the approach set out in the jurisprudence. *Kanthasamy* and the post-*Kanthasamy* jurisprudence confirm that "undue, undeserved and disproportionate" hardship is not required; nevertheless, hardship is a consideration and an applicant must show that the misfortunes they will face are relatively greater than those others will face if returned to their home country to seek permanent residence in Canada. This is a tall order for an applicant who is not in a position to compare their own situation to others seeking the same relief and in the absence of any benchmarks. An applicant can only advance their own circumstances to demonstrate that their hardships or misfortunes are of a sufficient magnitude to "excite … a desire to relieve the misfortunes." Ms. Lewis-Asonye attempted to do so with objective evidence.

[62] The Officer correctly noted that the CEC refusal was a final decision and the H&C process is not an appeal. However, the Officer mischaracterized Ms. Lewis-Asonye's submissions regarding the CEC refusal as her attempt to revisit her unsuccessful CEC application, rather than as a relevant H&C consideration.

[63] Ms. Lewis-Asonye provided evidence regarding the efforts she made, including her education, employment and other achievements, in order to meet the criteria for permanent residence under the CEC program, noting that she had been invited to apply for permanent residence. The evidence also demonstrated that she had consistently renewed her study and work permits and all other requirements for the CEC program, with the one exception of her failure to renew her PGWP while her application was pending for a longer period than she had been advised, and that she had promptly sought to restore her status. These submissions and evidence were advanced as H&C considerations.

[64] The Officer considered Ms. Lewis-Asonye's education and employment, but only in the context of the establishment factor. The Officer's finding that the evidence did not demonstrate that her establishment in Canada "is to such an extent that there would be an associated hardship in departing Canada and applying for permanent residence from outside Canada" is inconsistent with the evidence submitted and does not reflect a broader consideration of all H&C factors beyond hardship. The Officer relied on Ms. Lewis-Asonye's ability to live and work in Nigeria without accounting for the "associated hardship" of returning to Nigeria and restarting her application to immigrate to Canada from scratch.

[65] The Officer's focus on the hardship to Ms. Lewis-Asonye of returning to Nigeria and finding that this would be the normal hardship or consequences (i.e., upheaval and leaving family behind), fails to reflect the jurisprudence. For example, in *Huang*, where the Court found that such determinations require consideration of whether an applicant's particular circumstances make their "misfortunes" upon removal greater than those typically faced by others who apply for permanent resident status. The Officer did not consider how the consequences of returning to Nigeria and starting over to apply for immigration to Canada, after living in Canada for more than seven years, pursuing higher education, working, volunteering, receiving awards, and otherwise establishing herself with a view to remaining here through the CEC and complying with all, but one, of the requirements, were more than the ordinary hardship of removal.

[66] I note that the Respondent also acknowledges that the adverse consequences of the CEC refusal may be relevant in the assessment of the hardship Ms. Lewis-Asonye could face in applying for permanent residence from outside Canada.

[67] In addition, in assessing her establishment and finding it to be "not unlike others in similar situations," the Officer appears to suggest that there is some benchmark for establishment, without identifying what it may be.

[68] As noted by Justice Boswell in *Baco v Canada (Citizenship and Immigration)*, 2017 FC 694 at para 18:

> It was unreasonable for the Officer to discount the Applicants' degree of establishment merely because it was, in the Officer's view, "of a level that was naturally expected of them... [and it is not] beyond the normal establishment that one would expect the

> applicants to accomplish in their circumstances." The Officer unreasonably assessed the Applicants' length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to why the establishment evidence was insufficient or to state what would be an acceptable or adequate level of establishment.

[69] Although the Officer gave either "positive consideration" or "weight" to Ms. Lewis-Asonye's establishment, education, employment, family ties and BIOC, the positive factors were then discounted, including by speculation and inferences, rather than evidence. For example, the Officer discounted Ms. Lewis-Asonye's establishment in Canada by finding that she could re-establish herself in Nigeria and could gain a competitive advantage in employment in Nigeria, without any evidence of the job market related to the education and skills acquired here. The Officer also found that it was reasonable to expect that her brother could continue to assist her financially, as he had done while in Canada, until she was earning enough money to meet her needs in Nigeria, without any evidence that this was feasible. In addition, the Officer found that her nephews could visit her in Nigeria and she could visit them in Canada without assessing whether that would be feasible. While considerations beyond those advanced by an applicant may temper the positive H&C factors, it would be impossible for any applicant to be granted H&C exemption if every positive factor can be undermined by the Officer's views on how an applicant could adapt upon return.

[70] In conclusion, the Officer's decision is not justified in light of the facts and the law. As a result, the H&C application must be redetermined.

JUDGMENT in IMM-2554-21

THIS COURT'S JUDGMENT is that:

1. The Application is allowed.

2. The matter shall be remitted for determination by a different decision-maker.

3. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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