Federal Court  Cour fédérale

Date: 20240308

Docket: IMM-4048-22

Citation: 2024 FC 398

Ottawa, Ontario, March 8, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MUMTAZ DANIAL SHAH
ARUNA PERVEEN SHAH

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicants ask the Court to review and set aside a decision dated April 8, 2022, of a Senior Immigration Officer [the Officer] of Immigration, Refugees and Citizenship Canada denying their application for permanent residence in Canada. They sought an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27, on humanitarian and compassionate [H&C] grounds, pursuant to section 25 of the Act.

[2] For the reasons that follow, I grant this application and set aside the decision of the Officer. Among other errors, the Officer unreasonably took a hardship lens in reviewing the Applicants' H&C application and improperly discounted relevant H&C factors on the sole basis that the Applicants are in Canada without status.

I. Background

[3] The Applicants are 79- and 78-year-old married citizens of Pakistan and members of the Christian faith. They have two adult children, one of whom, their son, they live with in Orangeville, Ontario, with the Applicants' daughter-in-law and two young grandchildren. Mr. Mumtaz Danial Shah [the Principal Applicant] also has two brothers who reside in Canada, one in Scarborough, Ontario and one in Etobicoke, Ontario.

[4] The Applicants have resided in Canada for ten years. They entered on August 29, 2014, on valid temporary resident visas issued to them on April 22, 2013. They submitted a claim for refugee protection on October 9, 2014, that was refused by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] on March 13, 2015. The Refugee Appeal Division [RAD] of the IRB dismissed their appeal on June 24, 2015.

[5] Following the failure of their refugee protection claim, the Applicants made numerous attempts to obtain permanent resident status in Canada. On four occasions (in 2017, 2019, 2020, and 2021), they filed applications for permanent residence on H&C grounds. They also filed applications for pre-removal risk assessments in 2016 and 2019. Each time, Canadian immigration authorities refused the Applicants' applications.

[6] As of the date of this judicial review, the Applicants remain in Canada without status.

II. Decision under Review

[7] The decision that the Applicants challenge is the refusal of their fourth application for permanent residence on H&C grounds, filed on June 14, 2021, and denied on April 8, 2022. In their application, the Applicants listed several H&C considerations and provided many letters of support and other supporting documents. In the letter supporting their application from counsel, the Applicants note that their "primary reason for this [H&C] application relates to [the Principal Applicant's] medical health conditions and the barriers to access the treatment he would require in Pakistan."

[8] The Officer analyzed the four factors for consideration put forward by the Applicants in support of their application: 1) their degree of establishment in Canada and family reunification; 2) the best interests of their grandchildren; 3) medical considerations; and 4) adverse country conditions.

[9] With regard to the Applicants' degree of establishment in Canada, the Officer first reviewed the family reunification factors raised by the Applicants. The Officer acknowledged that the Applicants have family in Canada, including their son and grandchildren with whom they live and the Principal Applicant's brothers. The Officer noted that one of the Principal Applicant's brothers stated that he relies on the Principal Applicant to assist him as he is a disabled person, although it was also noted that there is little objective documentary evidence to corroborate this claim. The Officer further noted that despite the Applicants' desire to "live

these last few years of [their] lives in the company of [their] children," family separation was an "inherent reality" when the Applicants' son immigrated to Canada. Further, the Officer found little objective documentary evidence to indicate that the Applicants are not able to reside on their own or that they require constant care and supervision. Overall, he afforded family reunification "minimal weight" in his assessment of the Applicants' application.

[10] In reviewing the other submissions related to the Applicants' degree of establishment in Canada, the Officer reviewed the Applicants' lack of employment in Canada, their voluntary contributions to their community, and letters of support from their friends. The Officer found it to be a negative factor that the Applicants were not financially self-sufficient as they relied on the Ontario Disability Support Program. The Officer further noted that the Applicants were heavily involved in the United Apostolic Church of Canada although the project which the Principal Applicant was working on concluded its funding on March 15, 2021, prior to the H&C application's filing date. The Officer finally acknowledged the many letters of support that the Applicants provided but found that "separation is one of the inherent and unfortunate outcomes which may arise from the immigration process, especially when residing in a country without permanent status." He further noted that the Applicants may maintain contact with friends and family through mail, telephone, and via the Internet, as they likely already do given that some of their family and friends do not reside in the same city or province as them. Given these findings, the Officer concluded that while he gives "some positive weight to the [Applicants'] establishment in Canada," this weight is "mitigated by the fact that they did not obtain the required authorization to remain in Canada." Overall, the Officer gave the Applicants' factors for establishment minimal weight.

[11] In considering the best interests of the Applicants' grandchildren in Canada, the Officer accepted that the Applicants care for them while their parents are at work and that "some emotional discomfort" may arise should the Applicants leave Canada. However, the Officer was satisfied that the Applicants' bonds with their grandchildren will not be severed should they leave Canada and that the grandchildren will still benefit from the care of the Applicants' son and daughter-in-law, who can impart their culture on them. Overall, the Officer gave this factor "some weight."

[12] The Officer also considered the Applicants' submissions relating to their health concerns, particularly medical reports submitted from their doctor in Canada and a doctor in Pakistan. The Officer preferred the report of the Canadian doctor, who did not recommend surgery for the Principal Applicant (contrary to the Pakistani doctor's recommendation). The Officer also reviewed the submitted objective documentary evidence on healthcare in Pakistan, which he noted focused on the increasing privatization of healthcare in Pakistan, to the detriment of the poor. However, the Officer found that the documentary evidence indicates that healthcare services in Pakistan are adequate and accessible, and overall gave this factor minimal weight.

[13] Finally, the Officer considered adverse conditions in Pakistan. The Officer canvassed the risk of COVID-19 in Pakistan, pursuant to the Applicants' submissions that they would be at an elevated risk if they departed Canada. He found that Pakistan's healthcare system is adequate and well-equipped to treat COVID-19 and other diseases, and that the Applicants are no more vulnerable to disease in Pakistan than they would be in Canada. The Officer also commented that while there may be differences in the standards of living between Canada and Pakistan, the

purpose of section 25 of the Act is not to make up for these differences. He gave this consideration little weight.

[14] The Officer also considered the risk of persecution in Pakistan based on the Applicants' Christian faith, which he noted that the Applicants did not state themselves in their application but that did form the basis of their refugee claim and related to some of their submitted evidence. He found that the RAD upheld the RPD's finding that the Applicants "fabricated the story of their alleged confrontation with the neighbours regarding the use of the surname Shah and their allegation that they face persecution accordingly; neither does the panel find that the [Applicants] face a risk to life or unusual treatment or punishment or of torture should they return to Pakistan." While the Officer noted that he was not bound by the RPD's or RAD's findings, the Applicants provided little evidence to overcome them.

[15] Overall, the Officer found there was insufficient objective evidence that the Applicants would be unable to reintegrate or re-establish themselves in Pakistan, especially considering that they were born, raised, and educated in Pakistan. He gave some weight to this consideration due to the Applicants' current ages and prolonged absence, but ultimately refused the Applicants' H&C application.

III. Issue and Standard of Review

[16] The sole issue for determination is whether the Officer's decision is reasonable.

[17] The parties agree, and I concur, that the RPD's decision is reviewable on the standard of reasonableness, as articulated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. None of the exceptions based in legislative intent or the rule of law, as articulated by the Supreme Court in *Vavilov* and *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30, apply to displace the presumption of reasonableness as the standard of review. Indeed, the case law has established that reasonableness governs judicial review of a discretionary decision on an application made under subsection 25(1) of the Act: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paras 44–45; *Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 at para 21; *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at paras 24–25.

[18] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12–13. A court must give considerable deference to the decision-maker, as the entity delegated power from Parliament. He or she is equipped with specialized knowledge and an understanding of the "purposes and practical realities of the relevant administrative regime" and "consequences and the operational impact of the decision" that the reviewing court may not be attentive towards: *Vavilov* at para 93. Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker: *Vavilov* at para 125.

[19] That being said, reasonableness review is not a mere "rubber-stamping" process: *Vavilov* at para 13. It is the reviewing court's task to assess whether the decision as a whole is

reasonable; that is, it 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 para 85.

[20] Reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable:" *Vavilov* at para 81. However, reasons "must not be assessed against a standard of perfection" and administrative decision makers should not be held to the "standards of academic logicians:" *Vavilov* at paras 91, 104. Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis:" *Vavilov* at para 128.

IV. Analysis

[21] Subsection 25(1) of the Act provides that an exemption from the criteria or obligations set out therein may be granted based on H&C considerations "taking into account the best interests of a child directly affected." This is discretionary relief. If granted, it can permit an applicant to apply for permanent residence while remaining in Canada, rather than returning to their home country and seeking to immigrate to Canada in accordance with applicable eligibility criteria outlined in the Act. As such, the jurisprudence confirms that this exemption is "exceptional:" *Buitrago Rey v Canada (Citizenship and Immigration),* 2021 FC 852 at para 86.

[22] In *Kanthasamy*, the Supreme Court provided extensive guidance about how section 25 of the Act should be interpreted and applied. It endorsed the approach previously set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, which described H&C

considerations as "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:" *Kanthasamy* at para 13. However, the Supreme Court added at paragraph 23 that the H&C process is not an alternative immigration scheme and 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.

[23] The Supreme Court explained that what will warrant relief under section 25 of the Act varies depending on the facts and context of each case. The significant aspects of *Kanthasamy* are the Supreme Court's clear directions to avoid imposing a threshold of unusual, undeserved, or disproportionate hardship, 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" [emphasis in original]: *Kanthasamy* at para 33; see also para 25.

[24] The onus is on the applicant to demonstrate that H&C considerations exist that warrant applying the exemption: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at para 18.

[25] Courts tasked with reviewing decisions made pursuant to subsection 25(1) of the Act must be aware that these are highly discretionary decisions: *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4. Reviewing courts must take extra precautions to resist ruling on the application for judicial review based on the conclusion that it could have itself

drawn, even in situations where the factual context of the application arouses some sympathy: *Braud v Canada (Citizenship and Immigration)*, 2020 FC 132 [*Braud*] at para 52.

[26] In arguing that the decision is unreasonable, the Applicants make four main submissions.

A. *The Officer Used a Hardship Lens*

[27] The Applicants submit that the Officer erroneously assessed their entire application through a hardship lens when the Supreme Court in *Kanthasamy* advised that there is no longer a hardship test for an applicant to meet in their H&C application. They provide several examples where they say the Officer erred in this regard, including in the assessment of their relationships with their family and friends in Canada and the availability of healthcare in Pakistan. In both cases, they note that the Officer dismissed their H&C considerations by offering ways that their potential hardship may be alleviated. As examples, the Officer suggested that the Applicants and their family and friends visit one another and communicate virtually, and that the Principal Applicant may seek healthcare treatment in Pakistan. In focusing on hardship and its amelioration, the Applicants submit that the Officer failed to consider "humanitarian and compassionate factors in the broader sense:" *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 [*Marshall*] at paras 33-37.

[28] The Respondent submits that the Applicants misunderstand *Kanthasamy* and says that it actually stands for the proposition that an officer cannot ignore central elements of an application that invoke compassion over hardship. Citing Justice Diner in *Bhalla v Canada*, 2019 FC 1638 [*Bhalla*], the Respondent submits that an officer cannot be faulted for undertaking a legitimate

hardship analysis. The Respondent further argues that this Officer cannot be faulted for being responsive to the Applicants' submissions which rely heavily on the hardship they expect to face if they are removed to Pakistan: *Carter v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1019 at para 22.

[29] Notwithstanding the able submissions made by Respondent's counsel, I agree with the Applicants that the Officer took a hardship lens in reviewing their application, and this is sufficient to warrant a finding that the decision is unreasonable.

[30] I acknowledge under *Kanthasamy* that officers evaluating H&C applications may continue to consider hardship: *Bhalla* at para 20. I also acknowledge that many, but not all, of the Applicants' submissions relate to the potential hardship they would face if they departed Canada. I further acknowledge the Respondent's correct observation that the role of this Court on judicial review is not to reweigh factors considered by the Officer: *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at paras 33, 36; *Braud* at para 52. Nonetheless, I take issue that the Officer improperly and unreasonably considered the factors before him, regardless of the weight he ultimately assigned them.

[31] I first note that contrary to the Respondent's assertion, a fair number of the Applicants' submissions, especially related to their establishment in Canada, do not rely on the potential hardship they would face upon removal. The Applicants in their personal statement discuss, without reference to hardship, their health conditions, community involvement with their church

and the Charismatic Social Integration of Canada, and their desire to spend the rest of their remaining lives with their children.

[32] In regard to the Applicants' establishment in Canada, the Officer focused his analysis nearly exclusively on how the Applicants may mitigate their potential hardship if they depart Canada. For example, the Officer commented on how the Applicants' everyday activities demonstrate that they are able to care for themselves and live independently from their family. While the Officer is free to make these conclusions, he ought to have also assessed the degree of the Applicants' establishment independently.

[33] In *Marshall*, the Court found that the officer assessed the applicant's establishment through a hardship lens. The Court held at paragraph 35:

> In my respectful view, the Officer's assessment of the Applicant's establishment was indeed filtered through the lens of hardship. The Officer gave significant weight to the support he received in respect of his years of community volunteer work, radio work and music – but immediately discounts it by referring to his ability to do volunteer work in the USA, i.e., he will not suffer much hardship. In my view, this focus on what he can do in the USA also runs afoul of what Justice Rennie, then of this Court, said in *Lauture v Minister of Citizenship and Immigration*, 2015 FC 336 at 25: "... an analysis of the applicant's degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed."

[34] Similarly, the Officer in the case at bar discounted the weight afforded to the Applicants' establishment in Canada and their medical concerns by noting the ability of the Applicants to establish themselves and seek medical treatment in Pakistan.

[35] The correct legal test is not to assess the recited factors using a strict hardship lens, but a broader one that considers the humanitarian and compassionate factors that is responsive to the facts of the case: see *Kanthasamy* at para 25. The Officer failed to do so, and thus erred by applying an incorrect legal test.

[36] Though this is sufficient to find the decision unreasonable and send it back for redetermination, I will continue in my analysis for the benefit of the next officer assigned to this file. I agree with the Applicants that the Officer made several other errors that ought not to be repeated upon redetermination of their application.

B. *The Officer Unreasonably Assessed the Applicants' Establishment in Canada*

[37] The Applicants submit that the Officer unreasonably assessed their establishment in Canada. They advance several arguments related to this point.

[38] The Applicants submit that the Officer overlooked evidence in two ways. The first relates to evidence demonstrating the Principal Applicant's relationship with his disabled brother, particularly claiming that the Officer overlooked a letter from the brother stating that the Principal Applicant is his sole source of emotional support and that the Applicants provide assistance to him in ways like taking him to his medical appointments as neither he nor his wife are able to drive. They point to this Court's decision in *Elsemin v Canada (Citizenship and Immigration)*, 2022 FC 502 [*Elsemin*], which found at paragraphs 31-32 that the officer was required to "acknowledge and meaningfully grapple with" evidence relating to the applicant's role as a caregiver to her daughter, and the failure to do so rendered the decision unreasonable.

[39] The second way the Applicants submit that the Officer overlooked evidence relates to the letters of support demonstrating that their departure from Canada would have significant, detrimental effects on individuals close to them and their community.

[40] The Applicants further submit that the Officer failed to adequately consider their concern of preserving ties with their family members in Canada, which they argue is the primary factor driving their entire H&C application. They state that their case is analogous to *Singh v Canada (Citizenship and Immigration)*, 2022 FC 147 [*Singh*], where the applicant's family ties were central to his H&C application. In finding the officer's decision unreasonable, this Court wrote that the officer "did not show compassion and sensitivity for the misfortunes of [the applicant] and failed to give weight to all the particular factors related to the situation, and specifically the key family considerations that [the applicant] advanced:" *Singh* at para 30. The Applicants further cite this Court in *Al Jamil v Canada (Citizenship and Immigration)*, 2011 FC 865 at paragraph 14, to say that "the Officer had to at least address [the importance of the family connection which the applicant enjoys in Canada] in a clear and culturally sensitive manner."

[41] The Applicants also submit that the Officer's finding that the Applicants or their family could travel to see each other if the Applicants departed Canada is unintelligible. This is because they claim the Officer contradicted himself: the Officer first noted that there was little evidence that the Applicants or their family would face a financial or medical impairment to travel, and then stated that the Applicants were not financially self-sufficient. The Applicants also say that they had submitted evidence with their application demonstrating their son's modest income. In light of the contradiction and submitted evidence, they argue the Officer's reasons lacked

coherence. A similar error was found by this Court in *Taghiyeva v Canada (Citizenship and Immigration)*, 2019 FC 1160 [*Taghiyeva*] at paragraphs 33–36, which held that this flawed finding at least partly impacted the officer's assessment of all the H&C considerations, sufficient to find the decision unreasonable.

[42] The Applicants further took issue with the fact that the Officer mitigated the weight he assigned to their establishment in Canada, including their friendships and personal ties, and community engagement and volunteer efforts, by the fact that they did not obtain the required authorization to remain in Canada. They claim this is an error as this Court has repeatedly held that subsection 25(1) of the Act presupposes that an applicant has failed to comply with at least one statutory provision therein: *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 [*Mitchell*] at paras 23–28; *Toussaint v Canada (Citizenship and Immigration)*, 2022 FC 1146 [*Toussaint*] at paras 22–23; *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 [*Dowers*] at para 6; *Umeh v Canada (Citizenship and Immigration)*, 2022 FC 1226 at paras 19–20.

[43] Finally, the Applicants submit that the Officer was required yet failed to explain why the establishment they presented was "insufficient" in light of their many submitted letters of support: *Anquilero v Canada (Citizenship and Immigration)*, 2015 FC 140 at para 36; *El Thaher v Canada (Citizenship and Immigration)*, 2012 FC 1439 at paras 52–56; *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at paras 13–14, 20.

[44] Of the Applicants' many submissions, I am most compelled by their concerns that the Officer failed to adequately consider family reunification and did not adequately explain why their establishment was insufficient. I find that these concerns may be subsumed by the other issue they raise: that the Officer mitigated the weight he assigned to the Applicants' establishment in Canada by the fact that they remained in Canada without status. As this Court has held on numerous occasions, of which the Applicants cite several, officers assessing H&C applications must be aware that their role is to assess if there are compassionate and humanitarian reasons warranting the exemption of one or more provisions of the Act. In other words, it is a given that applicants of H&C applications are in contravention of the Act: *Mitchell* at para 23. While a decision-maker may assess the nature and severity of an applicant's non-compliance, they must not discount positive H&C factors solely on the basis of that non-compliance: *Dowers* at para 6. To do so would be contrary to the entire purpose of assessing H&C applications.

[45] That is exactly what the Officer did here. As the Applicants highlight, the Officer continuously discounted positive H&C factors related to the Applicants' establishment based on the Applicants' non-compliance. Again, while it was not improper for the Officer to consider the Applicants' unauthorized stay in Canada, he was required to "balance the need to respect Canada's immigration laws with the fact that H&C applications typically involve applicants who have failed to comply with the law:" *Toussaint* at para 22.

[46] In consistently discounting positive factors related to the Applicants' establishment, the Officer's decision is unreasonable. As Justice Lafrenière held in *Toussaint* at paragraph 23:

> Subsection 25(1) effectively presupposes a failure to comply with one or more provisions of the IRPA and is designed to provide relief from that non-compliance: *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23. In my view, it was contrary to this need for balancing and therefore unreasonable for the Officer to conflate and repeatedly discount positive H&C factors related to the Applicant's establishment because of non-compliance.

[47] Although not cited by the parties, I note that in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at paragraph 21, I wrote the following:

> The second area that I find troublesome has to do with comments the officer made when analyzing establishment. The officer writes: "I acknowledge that the applicant has taken positive steps in establishing himself in Canada, however, I note that he has received due process through the refugee programs and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society." Frankly, I fail to see how it can be said that the due process Canada offers claimants provides them with the "tools and opportunity" to establish themselves in Canada. I suspect that what the Officer means is that because the process has taken some time, the applicants had time to establish themselves to some degree. That is a statement with which one can agree. However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.

[48] While I understand the Respondent's concern that this Court is not to reweigh evidence, I find that the Officer here went beyond considering the Applicants' immigration history as a factor and instead took a misguided approach in assessing the Applicants' establishment in Canada based on that history.

[49] On the Applicants' remaining submissions related to their establishment in Canada, I am not persuaded that they are significant enough to render the decision unreasonable, at least on their own. I find that the Officer did not overlook evidence in the ways that the Applicants submit he did; the Officer acknowledged the letters of support from the Applicants' family and friends, including the Principal Applicant's disabled brother and related sister-in-law. As the Respondent points out, this case is different from *Elsemin* where there was a preponderance of evidence suggesting the applicant was the daughter's *sole* caregiver; a similar evidentiary record is missing here.

[50] I also find that the Applicants' submission relating to their and their family's ability to travel to visit one another is insignificant. In *Taghiyeva*, which the Applicant relies on, the officer concluded that the applicant could travel back and forth between Canada and her country of nationality despite also finding that the applicant lacked financial autonomy. The error in that case, coupled with at least one other erroneous finding of fact, was significant enough to affect the officer's assessment of the applicant's personal circumstances and the impact of family separation. Here, the Officer stated the Applicants, or their family, could visit one another *or* keep in touch through other methods such as mail and phone. The Officer did not base his assessment of family reunification only on the Applicants' ability to travel, unlike the officer in *Taghiyeva*.

[51] Despite these areas of disagreement, I find the Officer unreasonably assessed the Applicants' establishment in Canada through minimizing its weight solely on the basis of the Applicants' lack of status.

C. *The Officer Unreasonably Assessed the Best Interests of the Grandchildren*

[52] The Applicants submit that the Officer erred in assessing the best interests of their grandchildren, as the Officer did not actually discuss the impacts they would face by the Applicants' departure from Canada. They point to several decisions of this Court to demonstrate that the Officer was required to assess to an appreciable degree their grandchildren's best interests and how they would be impacted by the Applicants' departure: *Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516 at para 27; *Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352 [*Chamas*] at para 42; and *Lopez Alvarez v Canada (Citizenship and Immigration)*, 2022 FC 130 at para 45.

[53] The Applicants further submit that, as in *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 [*Osun*], the Officer erroneously substituted findings on hardship for assessing the best interests of the grandchildren. As this Court held at paragraph 21 of *Osun*, a lack of hardship is not a valid substitute for an analysis of the best interests of the children.

[54] I agree with the Applicants that the Officer's reasons fail to demonstrate that he assessed the best interests of the Applicants' grandchildren. The Officer noted that he was "alert, alive and sensitive" to the best interests of the child considerations but I find that he did not actually do an assessment of the best interests of the Applicants' grandchildren. He instead focused his reasons on how the Applicants' departure from Canada would affect the Applicants' son and daughter-in-law, who rely on the Applicants for childcare.

[55] As the Applicants cite, the facts are analogous to this Court's decision in *Chamas*, which held at paragraph 42:

> Yet once having decided that the Applicant, her daughter and granddaughter can somehow live their lives and carry on their relationship online through social media, the Officer stopped asking what, if any, impact the departure of the Applicant would have on H. The Officer never identified what would be in the best interests of H. and how her best interests would be affected by the Applicant's departure. The Officer's failure to undertake such an analysis suggests that the Officer is not being alert, alive and sensitive to H.'s interests.

[56] I am not persuaded that the Officer actually considered what impact the Applicants' departure from Canada would have on their grandchildren, who I note have been living with the Applicants in the same home for most of their lives. Although the Respondent is correct in noting that it was open to the Officer to find that the Applicants' absence would not cause their grandchildren's best interests to be compromised, nowhere in the reasons does the Officer explain what those best interests are.

[57] Subsection 25(1) of the Act clearly gives significant priority to the best interests of any children involved in assessing H&C applications. Though the Officer stated that he was aware this was an important factor, I am not convinced he actually considered it. For this reason, in addition to those I described above, I find the decision unreasonable.

D. *The Officer Reasonably Assessed the Applicants' Post-Removal Hardship*

[58] The Applicants submit that the Officer did not appreciate the hardship they may face in Pakistan on the basis of their Christian faith due to the Officer's inappropriate reliance on

findings from the RPD. As was the case in *Ayeni v Canada (Citizenship and Immigration)*, 2019 FC 1204, and *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73, the Applicants submit that the Officer was required to consider their evidence relating to their potential persecution in Pakistan for its probative value.

[59] The Applicants also submit that the Officer failed to consider their particular circumstances, particularly their older ages and deteriorating health as this Court has previously required: *Freund v Canada (Citizenship and Immigration)*, 2022 FC 746 at paras 26–29.

[60] I agree with the Respondent that the Applicants cannot fault the Officer for failing to respond to arguments and evidence that they did not raise in their H&C application. The Applicants' H&C application focused primarily on their medical issues and fear of COVID-19 should they return to Pakistan. They did not put forward submissions related to their fear of persecution in Pakistan based on their Christian faith, nor did they proffer any new evidence since their failed refugee claim on the same basis. I find it was reasonable for the Officer under these circumstances to rely on the findings of the RPD and RAD in considering whether this concern militated in favour of applying the H&C exemption.

[61] I also find, contrary to the Applicants' submission, that the Officer did consider and in fact gave some weight to the Applicants' circumstances, including their current ages. I agree with the Respondent that the Applicants' arguments on this point do not demonstrate a reviewable error.

V. Conclusion

[62] For the foregoing reasons, the application for judicial review is granted. The Officer unreasonably used a hardship lens in assessing the Applicants' H&C application. He unreasonably considered the Applicants' establishment in Canada, colouring his analysis by the fact that the Applicants remain in Canada without status. He further failed to address the best interests of the Applicants' grandchildren who live with them in Canada—a central feature of assessing applications made pursuant to subsection 25(1) of the Act.

[63] The parties raised no question for certification and I agree none arise.

JUDGMENT in IMM-4048-22

THIS COURT'S JUDGMENT is that this application is allowed, the decision under review is set aside, the Applicants' application for an exemption on humanitarian and compassionate grounds from the strict requirements of a permanent resident application is to be considered anew by a different officer, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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