Federal Court  Cour fédérale

Date: 20210820

Docket: IMM-121-20
IMM-124-20

Citation: 2021 FC 852

Ottawa, Ontario, August 20, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JOSE EUSEBIO BUITRAGO REY
MONICA ALEXANDRA BARROS CADENA
JUAN JOSE BUITRAGO BARROS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Jose Eusebio Buitrago Rey and Monica Alexandra Barros Cadena, a husband and wife, and their son, Juan Jose Buitrago Barros, seek judicial review of two decisions of an immigration officer [the Officer] made on September 30, 2019.

[2] In IMM-121-20, the Applicants challenge the Officer's decision refusing their application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds [the H&C decision] made pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. They argue that the Officer ignored evidence and made erroneous and speculative findings contrary to the evidence regarding their establishment in Canada and erred in the assessment of the best interests of their son.

[3] In IMM-124-20, the Applicants challenge the Officer's decision refusing their Pre-Removal Risk Assessment [PRRA] application made pursuant to subsection 112(1) of the Act [the PRRA decision]. The Applicants argue that the Officer misstated the purpose of a PRRA and failed to consider their new evidence together with the evidence of risk previously presented to the Refugee Protection Division of the Immigration and Refugee Board [RPD] and Refugee Appeal Division of the Immigration and Refugee Board [RAD].

[4] For the reasons that follow, the Application with respect to the H&C decision is dismissed. The Officer reasonably exercised their discretion and found that the H&C exemption was not warranted based on the evidence presented by the Applicants in support of their H&C submissions. Information provided by the Applicants, in response to a request by Immigration, Refugees and Citizenship Canada [IRCC] for, among other things, a police check, medical examination and proof of current employment was not part of the Applicants' H&C application in April 2018. The Officer was not required to consider this information. If applicants were permitted to provide additional or better information up until a decision is rendered, there would

be no finality to the H&C process. Applicants for an H&C exemption are required to provide a complete application and all supporting evidence at the time their application is made.

[5] The Application with respect to the PRRA decision is also dismissed. The Officer fully understood the purpose of a PRRA. The Applicants' new evidence was not linked to their personal circumstances and did not establish any risk not previously assessed by the RPD and RAD.

I. Background

[6] The Applicants are citizens of Colombia. The family arrived in Canada in January 2016 and claimed refugee protection in March 2016. They alleged a fear of persecution in Colombia from unknown agents because the male Applicant had reported a co-worker at the bank where he worked for wrongdoing related to money laundering. The male Applicant alleges that after he reported his co- worker, he was pursued by armed men, his wife was followed, and they received threatening phone calls at their home. The male Applicant also alleges that on December 26, 2015, an unknown person on a motorcycle pointed a gun at him. The male Applicant recounts that he reported the incidents to the District Attorney's Office on December 27, 2015. He then quit his job and the family obtained a visitor's visa and arrived in Canada in January 2016.

[7] The RPD rejected the Applicants' claim for refugee protection on May 31, 2016. The RPD found that the Applicants' claim under section 96 had no nexus to a Convention ground and that the Applicants were not entitled to protection under section 97 of the Act because they had

not sufficiently established that they faced a risk to their lives or of cruel or unusual treatment or punishment.

[8] The RPD noted that the agents of harm were unknown and that it was uncertain if they were involved in organized crime. The RPD also found that the fact that the male Applicant failed to report the incidents to the bank and remained in Colombia for six months following the first incidents led to the conclusion that the threats were not serious. While the RPD acknowledged that the gun incident was serious, it found that the Applicants had not established that this incident was related to the male Applicant's reporting his co-worker. The RPD also found that the Applicants had not rebutted the presumption of state protection.

[9] The RAD upheld the RPD's decision on October 18, 2017. The RAD agreed that the involvement of organized crime was speculative, that the Applicants did not know who the agents of harm were, and that they had not rebutted the presumption of state protection.

[10] On April 10, 2018, the Applicants filed their H&C application. Their H&C submissions focussed primarily on the best interests of their son to remain in Canada and to a lesser extent on their establishment in Canada.

[11] On November 15, 2018, the Applicants filed their PRRA application. The only new evidence submitted was a December 20, 2017 article entitled, "According to the Office of the Public Prosecutor, micro-trafficking is the crime that most impacts citizen security" published by Colprensa.

[12] By letter dated March 5, 2019, the Humanitarian Migration section of IRCC advised the Applicants that their H&C application had not yet been determined and requested that they undergo screening related to the requirements for admissibility to Canada in order to expedite the finalization of their application, in the event the H&C exemption were granted.

[13] The Applicants provided the requested documents, including a 2018 Notice of Assessment for the male Applicant that indicated an income of approximately $21,000 for 2018 and letters from the Applicants' employers indicating that the male Applicant had a part-time job since February 2019 and the female Applicant had been working since September 2018.

[14] The Applicants attached the documents submitted to IRCC as exhibits to the male Applicant's affidavit filed in support of this Application. These documents are not included in the Certified Tribunal Record [CTR].

II. The Decisions Under Review

A. *The H&C decision*

[15] The Officer's decision noted the relevant jurisprudence regarding the H&C exemption, the Applicants' submissions and the documentary evidence submitted.

[16] The Officer noted, in detail, the submissions of the Applicants with respect to their establishment in Canada, the best interests of their son, the adverse country conditions and the evidence submitted in support of each factor.

[17] With respect to financial establishment, the Officer found that the employment letter for the male Applicant did not contain information to indicate when he began as a subcontractor for the painting company, how often he works, or his wage.

[18] The Officer also noted the male Applicant's bank statements, which show deposits from the painting company totalling $3,025.00 for a five-month period, but found that this amount is not sufficient to meet the family's needs.

[19] With respect to e-transfers from other persons, the Officer noted that the total amount was only $ 2,395.00. The Officer concluded that the male Applicant had not provided evidence of other sources of income and had not met the burden of establishing that he can provide for his family in Canada.

[20] The Officer noted that the Applicants had not provided Notices of Assessment for 2016, 2017 or 2018 as required.

[21] With respect to other aspects of establishment, the Officer noted that the Applicants had been in Canada over three years and some level of establishment was expected. The Officer acknowledged that the Applicants had adapted, made friends, and attended church, but had no family in Canada. The Officer found that the Applicants had more ties to Colombia than Canada, noting that they spent their entire lives there until arriving in Canada in 2016, know all the customs, and were educated and have all their family in Colombia. The Officer cited *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at paras 23 and

25 [*Kanthasamy*], which notes the inevitable hardship associated with being required to leave Canada and guides officers to consider and weigh all relevant factors.

[22] The Officer attached no weight to the Applicants' establishment.

[23] The Officer also attached no weight to the adverse country conditions. The Officer noted the findings of the RPD and RAD that the Applicants did not face persecution or risk pursuant to section 96 or risk pursuant to section 97. The Officer noted that the Applicants had not asserted these risks as hardships in their H&C submissions.

[24] The Officer noted that the adverse country conditions were of general nature and that the Applicants had not explained how the adverse country conditions personally affected them or their son.

[25] With respect to the best interests of the child [BIOC], the Officer noted that the Applicants had not provided any objective evidence, such as the report of a psychologist or psychiatrist, to address the impact on their son, his friendships or his education if they returned to Colombia. The Officer considered the son's letter expressing his wish to stay in Canada and letters from the son's friends but found that the most important aspect in a child's life is the presence and role of their parents.

[26] The Officer also noted that the Applicants' son had adapted in Canada, although he knew nothing about Canada or its different customs or language when he arrived. The Officer found

that it would be reasonable to think that the Applicants' son would be able to do the same upon return to Colombia, where, among other reasons, he has family.

[27] With respect to the Applicants' submission that their son was attending English school in Canada, the Officer noted that their son speaks Spanish and there is no evidence that there are no bilingual schools in Colombia. In response to their concerns about the education system, the Officer noted that the male and female Applicants had been well educated in Colombia and, more generally, they had not met the onus on them to show that their son would not receive an education in Colombia, even if different from that in Canada.

[28] The Officer acknowledged that no child "should have to suffer difficulties" and attributed some weight to the BIOC factor.

[29] Overall, the Officer found, based on a global assessment, that the H&C considerations did not justify an exemption from the obligation to apply from abroad for permanent residence.

B. *The PRRA decision*

[30] The Officer found that the Applicants had relied on the same allegations of risk as assessed by the RPD and RAD: that they were threatened by unknown persons due to the male Applicant having reported his co-worker.

[31] The Officer reviewed the new evidence submitted by the Applicants — an article on the risks of micro-trafficking in drugs — and found that although it was published after the RPD

decision, it contained no new information and added nothing to the assessment of risk that had been conducted by the RPD and RAD.

[32] The Officer also reviewed the country condition documents.

[33] Overall, the Officer concluded that the Applicants had not demonstrated a well-founded fear of persecution or that they would face more than a mere possibility of risk under any Convention ground. The Officer also found that the Applicants had not established that they would face a risk of torture, a risk to life, or a risk of cruel and unusual punishment pursuant to section 97.

III. The Standard of Review

[34] H&C decisions, which are discretionary decisions, 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 [*Baker*]; *Kanthasamy* at para 44).

[35] An Officer's determination of a PRRA, which is an assessment of risk, is also reviewed on the reasonableness standard because it is a question of mixed fact and law (*Kadder v Canada (Citizenship and Immigration)*, 2016 FC 454 at para 11).

[36] 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 is the applicable standard of review for discretionary decisions and is the presumptive standard of review for other

decisions. The Supreme Court of Canada provided extensive guidance to the courts in reviewing a decision for reasonableness.

[37] 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 a 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, 105–10). The court does not assess the reasons against a standard of perfection (*Vavilov* at para 91).

[38] 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 "[t]he 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" [emphasis added].

[39] The Supreme Court of Canada identified two types of fundamental flaws that will render a decision unreasonable: "The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it" (*Vavilov* at para 101).

IV. The Applicant's Submissions

A. *The H&C decision*

[40] The Applicants argue that the Officer made findings with respect to their establishment in Canada, the best interests of their son and the hardship they would face upon return without regard to the evidence and in some instances in contradiction to the evidence they provided in March 2019.

[41] The Applicants argue that the Officer erred in attaching no weight to their establishment in Canada**.** The Applicants submit that the Officer failed to explain how the evidence was analyzed or weighed and why it was insufficient to warrant H&C relief.

[42] With respect to their financial establishment, the Applicants submit that it is absurd for the Officer to find that they could not support themselves because they clearly were supporting themselves, including paying their rent.

[43] The Applicants also argue that the Officer unreasonably minimized the relationships they had forged in Canada.

[44] The Applicants also argue that the Officer erred by using their ability to adapt in Canada as evidence that they could easily adapt and re-establish themselves in Colombia (*Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*]).

[45] The Applicants dispute the Officer's findings, including that: they would not face a risk in Colombia; their son would not face any language barrier in Colombia; there is no evidence that their son would not be able to integrate into Colombian schools; they do not speak sufficient English to call 911 in the event of an emergency; and, the e-transfers received by the Applicants were loans.

[46] The Applicants submit that the Officer erred by ignoring the documents they submitted on March 25, 2019 to IRCC, which included:

- A letter from the female Applicant's employer, noting that she has worked as a residential cleaner since September 1, 2018;
- A letter from Nanostics Precision Health stating that the male Applicant has worked transporting samples once or twice per week at a pay rate of $300 per delivery since February 2019;
- A letter from a building centre stating that the male Applicant had been purchasing building supplies since March 26, 2018 for use in his work as a general contractor; and
- The male Applicant's 2018 Notice of Assessment.

[47] The Applicants submit that the Officer's findings—that the female Applicant was not employed, that they failed to provide notices of assessment, and that they did not show how they support themselves—are contradicted by this evidence. The Applicants acknowledge that these documents are not in the CTR, but submit that there is no explanation why the Officer did not consider them.

[48] With respect to the BIOC, the Applicants argue that *Kanthasamy* establishes that BIOC takes primacy in an H&C application. The Applicants submit that the Officer's BIOC analysis was flawed because the Officer never stated what was in their son's best interests, ignored the evidence and implicitly applied a "hardship" test.

[49] The Applicants argue that the Officer inconsistently accepted that returning to Colombia would disrupt their son's life, but found that they had not shown that their son could not adapt to a new schooling system. The Applicants also argue that the Officer speculated, without any evidence and despite their son's own stated preference to remain in Canada, that there would be an advantage in being reunited with his extended family in Colombia.

[50] With respect to hardship, the Applicants argue that the RPD and RAD found their allegations of threats to be credible. They argue that the Officer erred by not considering this risk as a hardship in returning to Colombia.

B. *The PRRA decision*

[51] The Applicants argue that the Officer erred by stating that the "sole objective" of a PRRA is the evaluation of new evidence. The Applicants contend that the Officer's statement is incorrect and renders the decision unreasonable.

[52] The Applicants also argue that the Officer erred by considering the new evidence in isolation rather than in the context of the threats made against the Applicants, which they set out in their refugee claim.

[53] The Applicants submit that the Officer erred by misapprehending the documentary evidence indicating that the general situation in Colombia has not changed since the RPD decision. The Applicants argue that this evidence shows that they continue to face a risk in Colombia. The Applicants again assert that the RPD and RAD did not doubt that they were threatened.

V. The Respondent's Submissions

A. *The H&C decision*

[54] The Respondent submits that the Officer reasonably found that the H&C exemption was not warranted based on the totality of the evidence before the Officer.

[55] With respect to the assessment of the Applicants' establishment in Canada, the Respondent submits that the Officer considered the relevant factors, as established in the jurisprudence, including consideration of stable employment, sound financial management, integration into the community, professional, linguistic or other studies to show integration, and civil record (see, for example, *Brar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 691 at para 63 [*Brar*]).

[56] The Respondent disputes that the Officer erroneously found that the Applicants could not speak sufficient English or that their son had a low proficiency in Spanish, noting that the Applicants' own evidence supports the findings. The Respondent submits that the Officer

reasonably concluded that the Applicants did not establish that they were self-sufficient, noting the absence of evidence to show sufficient income or the source of their income.

[57] The Respondent further submits that the Applicants did not establish that they were so integrated into Canadian society that their departure would cause hardship deserving of the exceptional and extraordinary H&C relief. Moreover, establishment alone is not a determinative factor in the H&C application.

[58] The Respondent submits that the Officer's assessment of the BIOC reflects the guidance in the jurisprudence. The Respondent notes that while BIOC must be given substantial weight, it is not determinative in an H&C application.

[59] The Respondent argues that no objective evidence of the impact or consequences of removal on the Applicants' son was provided, only letters from the Applicant's son and his friends. The Respondent adds that a nine-year-old child's own preference is not objective. The Respondent submits that the Officer considered how it would be in the son's best interests to remain in Canada, including the pros and cons. The Officer reasonably considered that the Applicants had all their family in Colombia, the adult Applicants had been educated in Colombia, and there was no evidence that their son could not readapt upon return.

[60] The Respondent notes that the Applicants did not demonstrate how their son would be affected by any of the adverse country conditions they pointed to, for example, malnourishment, abuse, violation of his human rights or lack of access to education. The Respondent adds that the

Applicants did not leave Colombia due to any of the concerns they now raise regarding the best interest of their son.

[61] The Respondent notes that while it may be preferable to live in a country with a good standard of living or where the overall conditions are better, this does not dictate that every child can remain in Canada (*Osorio Diaz v Canada (Minister of Citizenship and Immigration)*, 2015 FC 373).

[62] The Respondent adds that the Applicants had not raised the allegations of risk set out in their refugee claim as allegations of hardship in their H&C application; nevertheless, the Officer considered the RPD and RAD's conclusions with respect to their alleged risk in Colombia and concluded that this need not be assessed.

B. *The PRRA decision*

[63] The Respondent submits that a PRRA application involves the assessment of whether new facts, evidence or risks have arisen since the refugee claim was refused that would give rise to the need for protection of the applicants (*Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909).

[64] The Respondent argues that the Applicants failed to meet their onus to adduce evidence to establish a new risk or a change in their personalized risk if they were to return to Colombia.

[65] The Respondent submits that the Officer reasonably determined that the article tendered by the Applicants as new evidence about micro-trafficking in drugs was not new information. The Respondent further submits that the country condition documents did not establish that there had been any change in the country conditions since the RPD's decision.

VI. The H&C Decision Is Reasonable

A. *Overview*

[66] On judicial review, the Court's role is to assess whether the decision-maker reached a reasonable decision based on the decision-maker's assessment of the evidence on the record and the application of the relevant statutory provisions and the jurisprudence.

[67] The Applicants appear to request that the Court make new findings of fact and re-weigh the evidence that was before the Officer. This is not the role of the Court. Officers tasked with making these discretionary decisions have expertise and the Court should defer to their assessments unless there are "sufficiently serious shortcomings in the decision" (*Vavilov* at para 100).

[68] In the present case, the Officer reasonably exercised their discretion in accordance with the jurisprudence and found that the H&C exemption was not justified based on the evidence provided by the Applicants in support of their H&C application, submitted in April 2018. The Officer thoroughly considered the jurisprudence, the evidence and the submissions of the Applicants with respect to the relevant H&C factors. The Officer's reasons are not held to a

standard of perfection. Read as a whole, the Officer's decision shows a coherent and rational chain of analysis and the outcome is justified by the facts and the law.

VII. The jurisprudence

[69] The Applicants take issue with the characterization of an H&C exemption as exceptional, arguing that, although by its nature it provides an exception to the requirements of the Act, it should not be considered rare or otherwise exceptional. The Applicants' position suggests that an H&C application is an alternative immigration stream, which is contrary to the Supreme Court of Canada's clear statement in *Kanthasamy.*

[70] Section 25 of the Act provides that an exemption from the criteria or obligations of the Act may be granted on the basis of H&C considerations, "taking into account the best interests of a child directly affected". This is discretionary relief. In the present case, the exemption, if granted, would permit the Applicants to apply for permanent residence while remaining in Canada rather than returning to Colombia and seeking to immigrate to Canada in accordance with applicable eligibility criteria in the Act. As noted below, the jurisprudence confirms that the exemption is indeed "exceptional", although it is not impossible to obtain.

[71] In *Kanthasamy,* the Supreme Court of Canada provided extensive guidance about how section 25 should be interpreted and applied.

[72] The Supreme Court of Canada 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 "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" [emphasis added] (*Kanthasamy* at para 13).

[73] While this appears to be a subjective and generous basis to grant the exemption, the Supreme Court of Canada added, at para 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.

[74] The Court explained that what will warrant relief under section 25 varies depending on the facts and context of each case. The significant aspects of *Kanthasamy* are the 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" (at para 33; see also para 25) [emphasis in original].

[75] In *Liang v Canada (Minister of Citizenship and Immigration)*, 2017 FC 287, at para 23, Justice Strickland captured the essence of an H&C exemption, noting that it would, among other things, relieve an applicant from having to leave Canada to apply for permanent residence "through the normal channels". Justice Strickland emphasized that "[a]n H&C exemption is an exceptional and discretionary remedy" and that "the onus of establishing that an H&C exemption is warranted lies with the applicant".

[76] In *Huang v Canada (Minister of Citizenship and Immigration)*, 2019 FC 265, at para 17 [*Huang*], the Chief Justice also emphasized that section 25 provides "exceptional relief" from the ordinary operation of the Act.

[77] In *Shackleford v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1313 at para 16 [*Shackleford*], Justice Roy expanded on the principle that an H&C exemption is exceptional, noting:

> [16] The *Kanthasamy* decision does not depart from the requirement to treat the remedy that is the H&C exemption as being exceptional and discretionary. This is not new. It has been part of the *Act*, and its predecessors, since 1966-67 (see *Kanthasamy*, para 12). As was said in *Semana v Canada (The Minister of Citizenship and Immigration)*, 2016 FC 1082, at para 15: "This relief exists outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently, and it acts as a sort of safety valve available for exceptional cases. Such an exemption is not an "alternative immigration stream or an appeal mechanism" for failed asylum or permanent residence claimants". 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.

[78] With respect to what may warrant relief, in *Shackleford*, at para 15, Justice Roy noted that the *Chirwa* description, endorsed in *Kanthasamy*, signals that hardship remains a consideration and a degree of severity to the misfortunes of the applicants should be demonstrated:

> [15] There is in fact a description of what constitutes humanitarian and compassionate considerations which gives the measure of what constitutes the threshold for section 25(1) applications. The point is driven home when one considers the description presented

> in *Kanthasamy* that is seen as being appropriate to attract H&C considerations. What is offered through section 25(1) is an "equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another': Chirwa, at p. 350" (*Kanthasamy*, para 21). It is difficult to see how the desire to relieve the misfortunes of another does not imply a form of hardship suffered by someone. In fact, the misfortunes are such that they arouse, they provoke the desire to relieve them, which signals also a degree of severity.

[79] In *Huang*, the Chief Justice also explained what is required to meet the *Chirwa* "test" for the consideration of H&C applications, at paras 18–19:

> [18] To meet this [*Chirwa*] test, it is not sufficient to simply establish the existence or likely existence of misfortunes, relative to Canadian citizens and permanent residents of Canada. This is something that one would expect could be readily established by most persons facing removal to, or currently living in, a country where living standards are significantly below those in Canada. As the Supreme Court of Canada has recognized, "[t]here will inevitably be some hardship associated with being required to leave Canada": *Kanthasamy*, above, at para 23. Similarly, there will inevitably be some hardship associated with being an unsuccessful applicant for H&C relief from outside Canada.
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> [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].

[80] The Chief Justice summarised the point, at para 20 of *Huang*, noting "that applicants for such [H&C] relief must demonstrate the existence of misfortunes or other circumstances that are

exceptional, relative to other applicants who apply for permanent residence from within Canada or abroad" *[emphasis in the original]*.

[81] With respect to the BIOC, which is an important factor in an H&C application where children are directly affected, the principles established in *Baker* continue to apply (*Kanthasamy* at paras 38–39).

[82] In *Baker* at para 75, the Supreme Court of Canada noted:

> The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable [emphasis added].

[83] The jurisprudence has noted that the general approach is to identify the child's best interests; determine the degree to which those interests would be compromised by one decision over the other; and, finally, to determine the weight that should be attached to the BIOC in the overall H&C application (*Egwuonwu v Canada (Minister of Citizenship and Immigration)*, 2020 FC 231 at para 64).

[84] The jurisprudence also establishes that the fact that Canada may be a better place to live than the country of origin does not determine that it is in the child's best interest to remain in Canada, nor does a positive BIOC necessarily result in an H&C exemption. As noted by Justice de Montigny, as he then was, in *Landazuri Moreno v Canada (Minister of Citizenship and Immigration)*, 2014 FC 481 at paras 36–37 [*Landazuri Moreno*], more is required:

> [36] It is not enough to simply describe general conditions which are worse in the country of removal than conditions in Canada. The Applicant must show that he and the children would likely be subject to these conditions personally. As I wrote in *Serda* at para 31:
>
> > Finally, the Applicants have argued that conditions in Argentina are dismal and not good for raising children. They cited statistics from the documentation, which were also considered by the H&C Officer, to show that Canada is a more desirable place to live in general. But the fact that Canada is a more desirable place to live is not determinative on an H&C application (…); if it were otherwise, the huge majority of people living illegally in Canada would have to be granted permanent resident status for Humanitarian and Compassionate reasons. This is certainly not what Parliament intended in adopting section 25 of the *Immigration and Refugee Protection Act*.
>
> [37] In the absence of any personalized evidence to the contrary, the Officer could reasonably conclude that the best interests of the children were to remain in the care of their parents, and that the hardships associated with relocation could reasonably be expected to be minimal given their young ages. There was no evidence that the children would not be able to access health care and education in Columbia [*sic*] or Mexico, and it was certainly not sufficient to show that Canada is a more favourable country to live than the country of origin of their parents. It is also to be presumed that the Officer considered the report submitted by the Applicant, even though he did not specifically address it [emphasis added].

[85] With respect to consideration of the child's own views, the Chief Justice noted in *Huang*, at para 24, that the assessment of the BIOC "must be highly contextual and must be responsive to

each child's particular age, capacity, needs and maturity". The Chief Justice added, at para 25, that the views of the child should be given "due weight" based on the age and maturity of the child.

[86] The post-*Kanthasamy* jurisprudence confirms the following principles, among others:

- An H&C exemption is discretionary and exceptional relief;
- Reviewing courts must not substitute their discretion for that of the Officer;
- While undue, undeserved and disproportionate hardship is not required, hardship can be considered;
- Some hardship is the normal consequence of removal and, on its own, does not support 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;
- The BIOC is an important consideration but is not necessarily determinative of an H&C application; and
- All relevant factors must be considered and weighed.

As Justice Roy noted in *Shackleford*, more than a sympathetic case is required.

[87] I have applied the principles from the jurisprudence in my review of the Officer's decision.

A. *The March 2019 documents were not part of the Applicants' H&C submissions*

[88] The documents provided by the Applicants in March 2019 were not part of the evidence submitted with the H&C Application and, as acknowledged by the Applicants, are not in the CTR.

[89] The letter sent by IRCC in March 2019 to the Applicants requested further documents regarding the admissibility to Canada requirements, which related to medical, criminality,

security, financial and identity assessments of each applicant. The letter noted that by providing the requested documents at that time (i.e., before their H&C application was determined), the Applicants "have the potential to speed up the finalization of [their] application and granting of permanent residence to [them] (and the family members included) should [their] request for exemption(s) be approved". The letter requested that the Applicants provide proof of medical examinations, in a prescribed form, police certificates, passports, the permanent residence fee and financial information, noting that

> "[y]our application for permanent residence could be refused if you are not self-supporting, that is, in receipt of social assistance or welfare benefits, either directly or indirectly and you have not been granted an exemption from the requirements to be self-supporting. Please provide our office with a copy of a recent letter of employment, a recent paystub or reasons why you are not working."

[90] The male Applicant attests that the Applicants provided the requested documents and he attached the documents to his affidavit filed in this Application.

[91] In their cover letter to IRCC, dated March 25, 2019, the Applicants noted that the male Applicant had an additional part-time job, which began in February 2019, and that the female applicant had been working since September 2018. The documents submitted included a 2018 Notice of Assessment for the male Applicant, which indicated an income of approximately $21,000 for 2018.

[92] I find that the documents requested by IRCC in March 2019 were only for the purpose described in the letter: to expedite the processing of the permanent resident visa in the event that the H&C exemption were granted. The letter was not a request to update or improve their H&C

submissions. The Applicants were required to provide a complete H&C application supported with sufficient evidence at the time they filed the application in April 2018. To permit applicants to continually update their H&C submissions as time goes on would make it impossible for an immigration officer to finally determine an H&C application. It is reasonable to expect that the longer a foreign national remains in Canada awaiting the processing of their H&C application (assuming that they have not been removed in the interim), the greater their opportunity to establish themselves, for example, with stable employment, greater financial stability, training or education, which could strengthen an H&C application. It is possible that this is the case for the Applicants, who may have more firmly established themselves while their H&C application remained to be processed, given that they have resided in Canada while their application awaited determination. However, the Applicants applied for their H&C exemption in April 2018 and their circumstances and the evidence they submitted at that time provide the basis for the Officer's decision.

[93] The information provided in March 2019 related to the Applicants' circumstances after they filed their H&C application. This showed that the female Applicant only began to work in September 2018, five months after the H&C application was filed. The male Applicant's part-time or occasional medical delivery job only began in February 2019, one month before the IRCC letter and ten months after the H&C application was filed. The letter from the building centre notes that the male Applicant began to purchase building supplies on March 26, 2018, which is only two weeks before the H&C application was filed. The 2018 Notice of Assessment only showed an income of approximately $21,000. No Notices of Assessment were filed in support of the H&C application in April 2018.

[94] I appreciate that the March 2019 letter from IRCC may have given the Applicants the impression that they could provide additional information, other than that specifically requested, and that this information would supplement their H&C submissions. To avoid raising false hope, IRCC should consider including more cautionary language in such letters to clearly explain that the H&C application is determined on the basis of the submissions made at the time of the application, unless there are specific exceptions.

B. *The Officer's assessment and conclusions regarding the Applicants' establishment are reasonable*

[95] As noted in *Brar* at para 63, several indicia of establishment should be considered by an Officer assessing an H&C application. These indicia, confirmed in the jurisprudence, including *Kanthasamy*, are consistent with the guidelines for H&C officers, which are set out in Operational Manuals and also publicly available on the IRCC website. The Officer's decision reflects that these indicia were considered.

[96] The most recent guide for H&C applicants, also publicly available, dated June 2021, sets out a range of factors, including those relevant to establishment, and notes that an H&C application is not limited to these factors. The guide for applicants also notes the factors related to the BIOC, including the child's age, establishment in Canada, conditions in the country of origin that could impact the child, the medical needs of the child, the child's education and the child's gender. The guide notes that the BIOC do not outweigh all other factors; rather, they are only one of many important factors to be considered. In addition, the guide notes that the

applicant must provide specific information and supporting documents to demonstrate how the child would be affected.

[97] The Officer did not err in not attaching weight to establishment or to the adverse country conditions. Although, in accordance with *Kanthasamy*, all relevant H&C considerations should be given weight, and it is unusual for "zero" weight to be attributed to an H&C factor, it is the overall assessment, which considers, weighs and balances all the factors together, that determines whether the exemption is justified. While some officers may, for example, refer to "some", "low", "minimal" or "significant" weight to various factors, it is the relative weight and the overall assessment that governs. In the present case, the Officer certainly considered establishment and did attach a weight — albeit no weight. Moreover, it is not the Court's role to re-weigh the evidence.

[98] The Officer did not ignore or misapprehend the evidence or make findings that were inconsistent with the evidence on the record.

[99] The Applicants' opposition to the Officer's finding that they could not speak English is unwarranted, as their own application stated that they could not speak English or French and required a Spanish interpreter. The Officer was not expected to surmise that they could speak English because some of their personal documents were submitted in English.

[100] The Officer's findings regarding the Applicants' financial establishment are based on the evidence presented. There was no evidence of stable employment or income sufficient to support

the family. The evidence of the male Applicant showed only sporadic work and deposits from unknown sources. The female Applicant had no employment.

[101] Contrary to the Applicants' submission, the Officer did not find that the e-transfers to the male Applicant were loans. The Officer's finding was only that there was no evidence of the source of this revenue and it was not of a sufficient amount to support the family.

[102] The only other evidence of establishment was that they had friends in Canada and had adapted well.

[103] I do not agree that the Officer's assessment of establishment mirrors the analysis found to be problematic by the Court in *Lauture* at para 26. The Officer did not use the Applicants' ability to adapt in Canada against them to find that they could re-establish in Colombia. The Officer assessed establishment and attributed no weight. Similarly, the Officer attributed no weight to adverse country conditions, asserted as hardship. In addition, the facts differ significantly from those in *Lauture*, where the officer found that the applicants had "remarkable establishment".

[104] The Officer noted that the Applicants had not raised the risks alleged at their refugee protection hearing as hardships. Although the Officer noted the RPD and RAD decisions, the hardships assessed by the Officer were derived from the general country conditions. The Officer reasonably found that the Applicants had not met their onus to show how any of the country conditions would personally affect them. The inevitable hardship of relocating to the country of origin is not a hardship sufficient to justify H&C relief.

C. *The assessment of the best interests of the Applicants' son was reasonable*

[105] As noted above, the approach to a BIOC analysis in the context of an H&C application is generally to identify what is in the child's best interests; determine the degree to which the child's best interests would be compromised by one decision over the other; and, finally, to determine the weight that should be attached to the BIOC in the overall H&C application. In *Kanthasamy*, at para 39, the Supreme Court noted that the best interests of the child should be examined with careful attention "in light of all the evidence".

[106] In the present case, the Officer cannot be faulted for not beginning with the identification of the Applicants' son's best interests because there was no objective evidence submitted about his best interests. The submissions were based on general country condition references and the letters describing the son's wish to remain.

[107] The Officer adapted the analysis of the BIOC to the extent possible based on the evidence and the submissions. The Officer considered the pros and cons of the Applicants' nine-year-old son remaining in Canada, where he has lived for three years, or returning to Colombia.

[108] With respect to the Applicants' submission that their son would face a language barrier at school due to his lack of Spanish proficiency and would need to re-start school due to differences in the curriculum, the Officer's finding that their son could speak Spanish and attend a Spanish school is not speculative. There was also no evidence that there were no bilingual schools in Colombia, in the event that the Applicants' son wanted to continue his education in both

languages. The Officer reasonably found that there was no evidence that the he could not be educated in Colombia, although the system may be different from Canada.

[109] The Officer also considered that the Applicants' son had adapted upon arriving in Canada and could reasonably be expected to readapt upon returning to Colombia, where his extended family resides. This was not speculation, but based on the Applicants' own submissions and the lack of any evidence that he would be unable to adapt. The Officer noted the son's age, his wish to remain in Canada, and the letters from friends that also wish him to remain. However, a child's preference is not objective evidence and is not determinative.

[110] The Applicants' submissions about the best interests of their son are based primarily on his own wishes and their submission that Canada is a better place for him to live and be educated. The jurisprudence has established that the fact that Canada may be a preferable place to live is not enough to justify a positive BIOC assessment or determine an H&C exemption.

[111] In addition, as in *Landazuri Moreno*, there is no evidence of how the Applicants' son would be personally affected by the adverse country conditions asserted by the Applicants, including malnourishment, violation of his human rights or access to education. The son's wish and the Applicants' submission that it is preferable for their son to remain in Canada are simply not enough—as the Officer reasonably found.

[112] Contrary to the Applicants' submission, the Officer did not implicitly apply any hardship test in considering the BIOC. Rather, the Officer specifically noted the principle set out in

Kanthasamy that no child is deserving of hardship. However, the normal hardship associated with removal from Canada is inevitable and does not justify finding that the BIOC are paramount or trump other considerations. The Officer's finding is only that a return to Colombia would present some "difficulties", but these were not insurmountable given the child's adaptability, the ongoing role of his parents and his family in Colombia.

[113] As noted above, the jurisprudence establishes that the onus is on an applicant to establish that the H&C exemption is warranted with sufficient evidence, including evidence of the best interests of any child directly affected. The Officer reasonably found that the Applicants did not meet this onus.

[114] In conclusion, the Officer's assessment of each factor, overall assessment of all relevant H&C factors, and conclusion that the H&C exemption was not warranted are reasonable.

VIII. The PRRA Decision Is Reasonable

[115] Contrary to the Applicants' submission, the Officer does not require direction from this Court about the purpose of a PRRA or how to conduct a PRRA assessment. The Officer's assessment reflects the objective of a PRRA.

[116] A PRRA is not an opportunity for an applicant to reargue their original refugee claim or appeal the RPD's or RAD's rejection of their refugee claim. The purpose of the PRRA analysis is to determine whether an applicant's circumstances have changed since the RPD or RAD decision such that they would now be in need of refugee protection. As in other risk assessments,

a PRRA is forward looking. The focus of a PRRA is on evidence of risk that was not presented to the RPD, such as evidence showing a change in circumstances since the RPD hearing or evidence that was not reasonably available at the time of the hearing.

[117] The Applicants' submission that the Officer erred in stating the objective of a PRRA, which in their view tainted the Officer's analysis, is not supported by the Officer's reasons when read in context. As noted in *Vavilov*, the reasons are not held to a standard of perfection.

[118] The Officer stated,

> A PRRA application has for sole objective the evaluation of *new evidence* as per section 113(a) of IRPA following the RPD or RAD's decision and in order to determine if a person is at risk of persecution, at risk of torture, at risk for one's life, or at risk of cruel and unusual treatment or punishment following the negative decision. A PRRA is also not a place to appeal or review the RPD and/or RAD decisions, but to consider the present situation; and where new evidence is not established just by the date of the document but by whether the information is significant or significantly different than the information previously provided to the RPD or RAD. The date of the document is not what makes it *new evidence*.

[119] I do not find any error in the Officer's articulation or understanding of the purpose of a PRRA. The Applicants seek to pick apart fragments of a sentence and focus on the reference to the "sole objective" as assessing new evidence, without reading the words in context. The Officer is correct in stating that the purpose of the PRRA is to assess the current situation *vis-à-vis* risk. It is not an appeal or "do-over" of the refugee claim. In addition, new evidence must be relevant and linked to the Applicants' allegations and submissions.

[120] The Officer also correctly noted that the onus is on the Applicants to show how the "new evidence" meets the criteria of section 113(a) of the Act and how it relates to them. The Applicants did not do so. The article provided has little — if any — connection with the risk they alleged from unknown persons. The Officer's approach reflects the governing jurisprudence (see, for example, *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at paras 10–13).

[121] Once the Officer found that the article submitted by the Applicants was not new evidence, the Officer was not required to consider it at all. However, the Officer did so and reasonably concluded that it did not add anything to the assessment of risk conducted by the RPD and RAD.

[122] Although the Applicants assert that the RPD and RAD did not doubt that they were threatened, the RPD and RAD clearly found that the Applicants' allegations did not warrant refugee protection. In addition to finding that the Applicants had failed to rebut the presumption of state protection, the RPD and RAD also held that any risk they faced was not connected to Convention grounds and that they had not sufficiently established that they faced a risk to their lives or of cruel or unusual treatment or punishment. As a result, the fact that the country condition documents demonstrate that nothing has changed in Colombia since the RPD and RAD decisions does not support their claim that they face risk in Colombia from which they need protection.

[123] In conclusion, the Officer did not err in stating the purpose of the PRRA or in assessing the risks alleged by the Applicants, which were the same risks assessed by the RPD and RAD.

JUDGMENT in files IMM-121-20 and IMM-124-20

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review of the Officer's H&C decision (IMM-121-20) is dismissed.
2. The Application for Judicial Review of the Officer's PRRA decision (IMM-124-20) is dismissed.
3. There is no certified question in either IMM-121-20 or IMM-124-20.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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