Federal Court  Cour fédérale

Date: 20250108

Docket: IMM-5803-23

Citation: 2025 FC 47

Ottawa, Ontario, January 8, 2025

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SUNDAY ADEKUNLE MOSES ONIFADE
OMOLOLA OLUWAKEMI AYATIAN
MORIREOLUWA AYOMIDE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of the decision of a Senior Immigration Officer [the Officer] dated February 1, 2023, refusing their application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The Applicants are Sunday Adekunle Moses Onifade [Mr. Onifade], his spouse Omola Oluwakemi Ayatian [Ms. Ayatian], both citizens of Nigeria, and their American-born son, Morireoluwa Ayomide Onifade. The family also includes two children born in Canada after the family's arrival in Canada in 2018.

[3] For the reasons that follow, the Application is granted. The Officer's decision is thorough; the Officer did not err in applying an "incorrect test" to determine whether the H&C exemption was warranted, nor did the Officer ignore any of the relevant factors or evidence. The majority of the Applicants' arguments amount to a request to the Court to re-weigh the evidence. However, there is one error amounting to a serious shortcoming central to the decision, which calls for review: the Officer's conclusion with respect to the best interests of the eldest child. This conclusion is not justified or rational given the evidence that the Officer accepted about the lack of educational and other resources and supports for children with autism in Nigeria. Although the best interests of a child [BIOC] is only one factor to be considered in the H&C determination, it is an important factor, and therefore, the BIOC of the eldest child must be reconsidered as it may impact the cumulative assessment of all relevant H&C factors. The Court notes that reconsideration of the BIOC may not necessarily lead to a different result.

I. Background

[4] The Officer's decision notes the adult Applicants' travel history dating back to February 2016, including their visit to the United States [US], their return to Nigeria, and Ms. Ayatian's subsequent departure from Nigeria and arrival in the US in September 2016, followed by the birth of their son in the US in November 2016. Ms. Ayatian then returned to Nigeria in January

2017. Mr. Onifade travelled again to the US in June 2017. Ms. Ayatian and their son joined Mr. Onifade in the US on February 2, 2018. The family then crossed into Canada on February 12, 2018, at an irregular crossing and made a claim for refugee protection.

[5] In December 2018, the Refugee Protection Division [RPD] refused the Applicants' claim for refugee protection finding, among other things, that they had an Internal Flight Alternative [IFA] in Port Harcourt, Nigeria.

[6] In May 2019, the Refugee Appeal Division [RAD] dismissed the Applicants' appeal of the RPD decision.

[7] In August 2020, the Applicants submitted an application seeking permanent residence on H&C grounds pursuant to section 25 of the Act. In May 2021, their H&C application was refused. In April 2022, the Court granted the judicial review of the May 2021 H&C decision on the sole basis that the decision-maker had erred in not considering the best interest of their second child, born in Canada in November 2020, after the submission of their H&C application, noting that the Applicants had updated their submissions to reflect the child's birth.

[8] In November 2022 the Applicants' Pre-Removal Risk Assessment [PRRA] was refused noting that their IFA in Port Harcourt remained.

[9] The Applicants filed updated submissions for the reconsideration of their H&C application and continued to file additional material as the H&C application was in process and after the Officer's decision had been communicated to their counsel.

II. Decision Under Review

[10] The Officer's decision is an unprecedented 36 pages in length and responds to the many documents submitted by the Applicants, including several updated submissions, affidavits and letters of support from family and friends, medical assessments, behavioural and educational assessments, journal articles and the Applicants' narratives. An addendum to the decision addresses the additional submissions provided after the Officer's decision was communicated to counsel for the Applicants.

[11] The decision, while thorough, is repetitive and not well-organized; considerations regarding BIOC are peppered throughout the decision, as are other factors. The summary below attempts to group the relevant factors, the evidence considered and the Officer's conclusions in a more organized manner.

[12] The Officer notes the broad factors raised by the Applicants: their establishment in Canada; the best interests of the children [BIOC]; hardship arising from adverse country conditions in Nigeria; and, the mental health of Ms. Ayatian. The Officer also notes that in the updated submissions, the Applicants raised several additional hardships, including those based on forced rituals and female genital mutilation [FGM], as failed refugees returning from Canada, the stigma attached to children with autism in Nigeria, and threats from Mr. Onifade's father.

The additional documents submitted by the Applicants and addressed by the Officer in the addendum to the decision include travel advisories for Nigeria, a letter from the Applicants' church, Ms. Ayatian's certificate of completion from a home support program in November 2022, a letter from Dr. Brown regarding speech therapy for one of the children, and the Individual Educational Plan [IEP] for the eldest child.

A. *Establishment*

[13] The Officer found that the Applicants' level of establishment was modest and "atypical" for individuals who have lived in Canada for over four years, noting their limited community involvement and lack of strong ties to the country. The Officer acknowledged their full or part-time employment, supported by employment contracts from 2018, 2019, and 2022, tax assessments for 2018 and 2019, a T1 income tax form for 2021, bank statements and credit card statements. However, the Officer found the evidence of the Applicants' financial stability to be limited, noting that it was unclear how they have supported themselves, given the modest balances reflected in their documents.

[14] The Officer also considered family photos and letters of support, noting that these documents highlighted the Applicants' personal strengths, but did not provide substantial evidence of their integration into their community.

[15] The Officer concluded that the Applicants had not established themselves to a degree that their departure would result in significant hardship. The Officer noted that the Applicants were well-educated professionals with a history of successful employment in Nigeria and are familiar

with the language, culture, and society, and found that the evidence showed that they have the skills and resourcefulness necessary to re-establish themselves.

B. *BIOC*

[16] The Officer acknowledged the importance of the BIOC in H&C applications but emphasized that this is one of many factors to be evaluated.

[17] The Officer acknowledged that the eldest child was diagnosed with Autism Spectrum Disorder [ASD] at an early age, and that the early diagnosis had been beneficial for accessing early intervention such as speech and behavioral therapy. The Officer commended the adult Applicants' proactive approach in seeking early diagnosis and treatment for their eldest child, noting that they have ensured a supportive and loving environment for all their children.

[18] The Officer reviewed the evidence regarding the lack of adequate facilities and resources for children with ASD in Nigeria. For example, Dr. Adeyemi Akeem Akinloye [Dr. Akinloye], a medical doctor in Nigeria, highlighted the scarcity of specialized services, high costs, and the significant stigmatization faced by children with autism. The Officer noted that these challenges would pose serious obstacles to the eldest child's development and access to proper education and support.

[19] The Officer accepted that the Applicants' extended family in Canada provides some support to them, noting that there were limited details about the nature and extent of this assistance. The Officer also noted that the Applicant's narrative emphasized the stability and

progress achieved in Canada, where their eldest child has access to therapies and resources unavailable in Nigeria.

[20] The Officer considered medical and professional reports that emphasized the importance of the child's current environment for his development, underscoring that returning to Nigeria would adversely affect his well-being. The Officer found that removing the family from Canada would likely disrupt the child's progress and access to essential care, as well as sever bonds formed with extended family and peers.

[21] The Officer considered the letter from Dr. Akinloye, dated August, 5, 2022, recounting that the doctor had observed the eldest child virtually, and noting "remarkable improvements in his development". However, the Officer found the letter lacked specific medical details regarding how the child's physical health would be impacted in Nigeria. The Officer noted that Dr. Akinloye did not provide substantive evidence indicating that adequate medical care would be unavailable in Nigeria. The Officer found the letter to be highly subjective and strongly sympathetic to the Applicants, without sufficient objective evidence.

[22] The Officer also considered two reports from Registered Psychotherapist Natalie Riback regarding all three children, but noted that Ms. Riback had not assessed the children and her reports lacked objectivity and reliability, as they were heavily reliant on the mother's subjective accounts.

[23] The Officer acknowledged the narratives of the adult Applicants, which noted the importance of routine and familiar surroundings for their eldest child. The Officer also acknowledged the child's non-verbal tendencies. However, the Officer found that other evidence suggested that changes in routine, while disruptive, had not negatively impacted his development. The Officer found no evidence of regression or signs of adverse effects from the family's evolving dynamics in Canada.

[24] The Officer reviewed the 2022/2023 IEP for the eldest child noting that he had not been identified as an "exceptional pupil" under Ontario's *Education Act*, RSO 1990, c E.2, which would typically trigger special education support. The Officer suggested that the IEP was prepared at the parents' request, rather than based on expert educational recommendations. The Officer noted that the IEP involved being in a regular classroom with in-class support and a transition plan, but no follow-up reports or assessments were submitted to show progress or challenges in meeting the IEP goals.

[25] The Officer found no evidence that transitioning to a school in Nigeria would negatively affect the eldest child's development.

[26] The Officer noted that, although awareness of and support for ASD in Nigeria may not be as extensive as in Canada, the availability of services and support programs is growing, offering increasing opportunities for families affected by ASD.

[27] The Officer concluded that the eldest child's best interests would be served by remaining with his parents, who are committed to his well-being. The Officer also concluded that the child would continue to have access to education and medical care in Nigeria, and there was no evidence to suggest these systems would result in adverse outcomes.

[28] With respect to the two younger children, the Officer noted that there was little evidence of medical or developmental concerns.

[29] The Officer acknowledged that Nigeria's healthcare system is not at the same level as Canada's. However, there was no evidence to indicate that the children would lack access to necessary medical care or basic education, which is free and compulsory in Nigeria.

[30] Overall, the Officer concluded that the children's best interests would not be adversely affected by returning to Nigeria with their parents, where the family can continue to access education, healthcare, and support. The Officer noted that while remaining in Canada may offer short-term stability, the Applicants have consistently demonstrated their ability to provide love, support, education, and medical care for their children. The Officer found that there was no compelling evidence to suggest that living in Nigeria would harm the children's development or well-being.

C. *Adverse Country Conditions and Other Hardships*

[31] The Officer acknowledged the Applicants' concerns related to Mr. Onifade's father, which were part of a previously rejected asylum claim that concluded that an IFA existed for the Applicants in Port Harcourt.

[32] The Officer also noted that the Applicants' Pre-Removal Risk Assessment [PRRA], conducted in December 2021, determined that Port Harcourt remains a viable relocation option, and no new compelling evidence was provided to alter this assessment.

[33] The Officer considered Ms. Ayatian's mental health concerns, which were advanced as a barrier to her employment and adjustment in Nigeria. The Officer found that the evidence showed that she has successfully managed her mental health in Canada, balancing work and caregiving responsibilities without professional intervention, even after her eldest child's ASD diagnosis. The Officer noted that mental health services are available in Nigeria, including virtual consultations with professionals in Canada.

[34] The Officer found that significant progress had been made in Nigeria in raising awareness about ASD which responded to the Applicants' concerns about misconceptions, societal stigma surrounding ASD, discrimination, ostracism, and abuse.

[35] The Officer acknowledged that the Applicants may prefer to remain in Canada and would experience an adjustment period upon returning to Nigeria, but found that the evidence did not

support their claim that returning to Nigeria would cause insurmountable hardship. The Officer noted that personal preferences, loss of employment, or the desire to stay in a more familiar environment are not sufficient reasons for granting H&C relief.

[36] The Officer found that despite some emotional and logistical challenges, including concerns about the eldest child's ASD, the available evidence suggests that the family can access the necessary support and services in Nigeria.

D. *The Officer's Conclusion*

[37] The Officer stated that all the relevant facts and factors had been considered and a cumulative assessment of the evidence was conducted. The Officer reiterated that, although there will inevitably be some hardship in leaving Canada, this is not generally sufficient to warrant relief on H&C grounds. The Officer repeated several principles from the jurisprudence and interchangeably referred to the Applicants as him or her, suggesting that some of these passages were replicated from other similar decisions, although also relevant to the Applicants.

[38] The Officer concluded that the cumulative assessment and balancing of factors do not favour the Applicants and their personal circumstances do not justify an exemption from the requirements of the Act.

[39] After the October 2022 decision, the Officer reviewed additional documents submitted by the Applicants in August, November, and December 2022, but found that these did not provide sufficient evidence to change the decision. The Officer again concluded that there was no

indication that the Applicants could not pursue permanent residence in Canada through standard processes or that an exemption was warranted.

III. The Applicants' Submissions

[40] The Applicants challenge every aspect of the Officer's decision. Among other submissions, they argue that the Officer: failed to apply the correct test for assessing an H&C application; failed to consider all their evidence of establishment; failed to consider the BIOC of their children, in particular their eldest child; and, failed to consider the hardships of returning to Nigeria due to adverse country conditions, including high unemployment, the risk and hardship of FGM for their daughter, the risk and hardship of kidnapping of their children due to perceptions of being Canadian and with means, and the risk from Mr. Onifade's father, who they allege will kidnap them and subject them to rituals of the occult.

[41] First, the Applicants submit that the Officer applied an incorrect test and erred in stating that the H&C exemption is intended for exceptional situations.

[42] The Applicants submit that the Officer failed to apply the "test" for equitable relief set out in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] and failed to recognize the cumulative effects of the hardships they would suffer if returned to Nigeria.

[43] The Applicants submit that the Officer concluded that the children deserved to suffer hardship. They argue that the Officer acknowledged that the children would suffer hardship if returned, yet inconsistently found that their best interests did not justify the exemption.

[44] Second, the Applicants argue that the Officer failed to "properly assess" the evidence in support of the relevant H&C factors, including establishment, BIOC and hardship.

A. *Establishment*

[45] The Applicants argue that the Officer erred in assessing their financial stability, which shows their establishment. They submit that the Officer erroneously concluded that it was not clear how they have been supporting themselves. The Applicants point to their taxable income in 2019 and 2021 and letters from their employers to show their source of income.

[46] The Applicants also argue that the Officer's finding that there was limited evidence of their involvement or integration into the community ignores the many letters of support that describe how they have fully integrated.

B. *Hardship*

[47] The Applicants submit that it is obvious that they will face hardship upon return to Nigeria due to adverse country conditions, including security issues, unemployment and lack of access to services.

[48] The Applicants argue that the Officer erred in focussing on the low risk of FGM rather than assessing the hardship that would be suffered if their daughter was forced to undergo FGM.

[49] They also argue that many of the Officer's references to services available to them in Nigeria are not located in Port Harcourt, which is their IFA location. They contend that Port Harcourt is not safe for them in any event due to recent information about Mr. Onifade's father's ability to locate them in Port Harcourt.

[50] The Applicants further submit that the Officer relied on irrelevant considerations, including their relationship with their cousins and a reference to India rather than Nigeria.

C. *BIOC*

[51] The Applicants argue that it is obvious that it is in the best interest of their eldest child, who is autistic and who has spent five years in Canada, to remain in Canada where he has opportunities for treatment, therapy, education and a family support network—none of which exist in Nigeria.

[52] The Applicants note that although the Officer acknowledged the challenges for children with autism in Nigeria, including the inability to find treatment and therapy, and the high cost of such treatment and the stigma, the Officer then found that their early intervention was a benefit and that they could find programs in Nigeria. They note that their eldest son has limited verbal ability and needs alternative communication devices, ongoing speech therapy and other

accommodations and equipment, all of which are non-existent or limited in Nigeria, as the documentary evidence indicates.

[53] The Applicants also argue that the Officer discounted the IEP for their eldest child, based on speculating that it was prepared at the request of the Applicants.

IV. The Respondent's Submissions

[54] The Respondent notes the Applicants' immigration history and suggests that they are relying on their H&C application as an alternative means of remaining in Canada.

[55] The Respondent submits that the Officer did not overlook or misapprehend any evidence and applied the law to the facts. The Respondent argues that the Applicants have not pointed to any error in the Officer's decision, but rather seek a reweighing of the factors in support of their application for an exemption.

[56] The Respondent disputes that the Officer applied an incorrect test to the determination of the H&C application, and points to the principles in the jurisprudence, including that an H&C application calls for a global assessment of all relevant factors and that the exemption is exceptional or special relief.

A. *Establishment*

[57] With respect to the Applicants' establishment, the Respondent points to the Officer's acknowledgement that the adult Applicants worked full or part-time when work permits were granted; however, the Officer reasonably found that there was limited financial information.

[58] The Respondent disputes that the Officer erred by suggesting that only an exceptional level of establishment would warrant positive weight. The Respondent notes that the Officer assessed the Applicants' establishment with reference to their circumstances and their four and a half years spent in Canada, which is the appropriate approach (*Monslave v Canada (Citizenship and Immigration)*, 2022 FC 1253 at para 37).

B. *BIOC*

[59] With respect to the BIOC, the Respondent disputes that the Officer ignored the principle that children are not deserving of hardship, noting that the inevitable hardship of relocating is not sufficient to justify an H&C exemption. The Respondent notes that the Officer correctly noted that the BIOC do not outweigh all other factors in the H&C analysis.

[60] The Respondent submits that the Officer thoroughly assessed the BIOC of the eldest son, including the reports from doctors and the reports on the resources available to address the needs of autistic children in Nigeria. The Respondent submits that the Officer reasonably found there was limited evidence of the impact of removal on the eldest child.

[61] The Respondent further submits that the Officer canvassed all the relevant information regarding the needs of the eldest child and the options for children with ASD available in Nigeria, based on the country condition documents and those submitted by the Applicants. The Respondent acknowledges that the evidence is mixed, but the Officer attributed more weight to objective evidence than that of the reports which appeared to be more subjective. The Respondent submits that the Officer reasonably found that the IEP does not indicate that there would be an "adverse result for the child if his education were to continue in Nigeria…."

C. *Hardship*

[62] The Respondent submits that the Officer assessed all the submissions and evidence related to the alleged hardship of leaving Canada and returning to Nigeria, including educational gaps for their eldest son, high unemployment, availability of medical and mental health care, the risk of kidnapping of children in some parts of Nigeria, the practice of FGM in some parts of Nigeria, the crime rate and other adverse country conditions.

[63] The Respondent notes that some hardship is the normal consequence of returning and that the H&C exemption is not intended to redress the differences in the overall standard of living in Canada and the home country.

V. Standard of Review

[64] H&C decisions are discretionary decisions and are reviewed on the reasonableness standard (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC),

[1999] 2 SCR 817 at paras 57–62 [*Baker*]; *Kanthasamy* at para 44 ; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*]).

[65] *Vavilov* provides extensive guidance to the courts in reviewing a decision for reasonableness. In brief, the reviewing court must ensure that the decision bears the hallmarks of reasonableness: that the decision is justifiable, intelligible, and transparent (*Vavilov* at para 95). 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" (*Vavilov* at para 100).

[66] 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).

VI. H&C Applications: The Principles

A. *Section 25 is an exemption to the otherwise applicable requirements*

[67] Section 25 of the Act provides that an exemption from the criteria or obligations of the Act may be granted based on H&C considerations, "taking into account the best interests of a child directly affected". 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 their home country and seeking to immigrate to Canada in accordance with applicable eligibility criteria in the Act.

[68] The Applicants argue that the Officer failed to apply the correct "test" for determining their H&C application. The Court notes that although this terminology has been used in the jurisprudence, it is a misnomer to refer to a "test" in the sense that there are specific criteria that once met will warrant an H&C exemption. While the Applicants point to the "test" referred to in *Kanthasamy* at para 13, as derived from *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*]—"those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act"—and submit that their circumstances meet this "test", whether to grant this "special relief" and exemption from the requirements of the Act is guided by an assessment of all relevant factors. This is a subjective and contextual assessment. No single factor is determinative.

[69] Contrary to the Applicants' submissions that the Officer erred in characterizing this as exceptional relief, the exemption is by its very nature, "exceptional" or "special relief" (see for example, *Kanthasamy* at paras 13, 23).

[70] In *Kanthasamy,* the Supreme Court of Canada provided extensive guidance about how section 25 should be interpreted and applied. The Court emphasized 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. The Court also 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" [emphasis in original] (*Kanthasamy* at para 33; see also para 25).

[36] There has been extensive jurisprudence post-*Kanthasamy* interpreting and applying the Supreme Court's guidance.

[71] In *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at para 19, the Chief Justice addressed what is required to meet the *Chirwa* "test" to warrant an H&C exemption:

> 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 original.]

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

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

[73] There is ample support in the jurisprudence for the view that the H&C exemption is exceptional relief from the requirements of the Act. An exemption is by its very nature, an exception to the otherwise applicable requirements. However, other jurisprudence from this Court suggests that this characterization is not consistent with the purpose of section 25 and the principles established in *Kanthasamy*. For example, in *Henry-Okoisama v Canada (Citizenship and Immigration)*, 2024 FC 1160, Justice Ahmed cited the jurisprudence that has found that the exemption must align with the humanitarian and compassionate principles outlined in *Kanthasamy*. However, there is a distinction between the exceptional nature of the section 25 exemption and the issue of whether “exceptional circumstances” are required to warrant the exemption. In my view, *Kanthasamy* does not derogate from the principle that the exemption is exceptional or special relief. What will justify that relief, as noted in *Kanthasamy*, will vary from case to case and all relevant factors must be considered and weighed and must cumulatively support the granting of the exemption, which requires “more than a sympathetic case”.

B. *BIOC*

[74] The BIOC is an important factor in H&C applications where children are directly affected. The principles established in *Baker* continue to apply (*Kanthasamy* at paras 38, 39).

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

> … 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.]

[76] In *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 32 [*Hawthorne*], the Federal Court of Appeal held that a mere statement that the BIOC has been considered is insufficient:

> …[a]n officer cannot demonstrate that she has been "alert, alive and sensitive" to the best interests of an affected child simply by stating in the reasons for decision that she has taken into account the interests of a child of an H & C applicant (*Legault*, at para. 12). Rather, the interests of the child must be "well identified and defined" (*Legault*, at para. 12) and "examined ... with a great deal of attention" (*Legault*, at para. 31).

[77] The court also noted that determining the BIOC should be the decision-maker's starting point, as opposed to examining different scenarios and working backwards to compare their impact on the child (*Hawthorne* at paras 41, 43).

[78] The decision-maker is presumed to know that living in Canada would offer the child opportunities that they would not otherwise have (*Hawthorne* at para 5) and that to compare a better life in Canada to life in the home country cannot be determinative of a child's best interests as the outcome would almost always favour Canada (*Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292 at para 28; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 31; *Landazuri Moreno v Canada (Minister of Citizenship and Immigration)*, 2014 FC 481 at paras 36, 37).

[79] In *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*], Justice Russell reviewed the principles from the jurisprudence, including *Baker* and *Hawthorne*, and proposed a three-step approach as a guideline for decision-makers when assessing the BIOC (at para 63):

> When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
>
> [Emphasis in original.]

[80] This Court has summarized the *Kanthasamy* and the post-*Kanthasamy* jurisprudence in other recent cases including *Lewis-Asonye v Canada (Citizenship and Immigration)*, 2022 FC

1349 (relied on by the Applicant) and *Buitrago Rey v Canada (Citizenship and Immigration)*, 2021 FC 852. To reiterate, the *Kanthasamy* and the post-*Kanthasamy* jurisprudence provides the following guidance:

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

VII. The Officer did not err in their understanding of the law and jurisprudence regarding the H&C exemption

[81] The Officer did not apply an "incorrect test" nor did the Officer fail to apply a compassionate approach to the determination whether the exemption was justified.

[82] As noted in *Obiwale v Canada (Citizenship and Immigration)*, 2024 FC 1707 at para 31, "[a] compassionate approach requires a considered and sensitive assessment of an applicant's circumstances, but it does not require a particular outcome of the applicant's H&C application".

[83] Contrary to the Applicants' assertions, a full reading of the lengthy decision shows that the Officer was well aware of the principles from the jurisprudence and the purpose and scope of the H&C exemption. The Officer noted that they "completed a global assessment of all the factors presented by the applicant" based on a "cumulative assessment of the evidence submitted by the applicant". The Officer considered establishment, BIOC and hardship, which were the factors relied on by the Applicants.

[84] While the Applicants submit that several supporting letters were ignored, there is no requirement for the Officer to mention each piece of evidence. Moreover, the Officer explained at the outset:

> As a result of the extensive nature of the applicant's submissions, I note that each piece of evidence will not be mentioned individually in this assessment… Nevertheless, all submissions has [*sic*] been considered as part of this assessment.

[85] Also, contrary to the Applicants' argument, the Officer did not suggest that "exceptional circumstances" were required. The Officer merely noted that section 25 of the Act is exceptional in the sense of being an exemption and special relief. For example, the Officer noted, "[i]nvoking sections A25 and A25.1 is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada". The Officer further noted, "the purpose of invoking subsection 25(1) of the IRPA is not to compensate for the difference in a standard of living, but rather to allow for an exceptional response to a particular set of circumstances which are unforeseen by the IRPA and where humanitarian and compassionate grounds justify the granting of relief". As noted above, these principles reflect the jurisprudence.

[86] The Applicants' argument that the Officer failed to appreciate the equitable purpose of the H&C regime is premised on their assertion that the Officer believed that the Applicants "deserve the hardship they would face", and consequently, the Officer's decision was "insensitive and inhumane". However, nothing in the decision supports this assertion.

[87] As noted, to a great extent, the Applicants' arguments amount to a request for the Court to reweigh the evidence and factors.

[88] Officers tasked with making H&C determinations have expertise in assessing such applications. Reasonableness review starts from the premise that the Court should defer to their assessment unless there are "sufficiently serious shortcomings…. that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

VIII. The Officer did not err in assessing the Applicants' Establishment in Canada

[89] Contrary to the Applicants' argument, the Officer did not find that an exceptional level of establishment was required or that they had not demonstrated exceptional establishment. The Officer simply noted that the Applicants' establishment was modest and "atypical in relation to similarly situated individuals who have been in Canada for a comparable amount of time", noting that there was not much evidence of the family integrating into Canadian society or being active in their community, apart from the letters of support and the recently submitted letter from the pastor of a church. This does not suggest that the Officer was imposing a particular level of establishment or that only exceptional establishment will be a positive factor.

[90] The weight attached to establishment will depend on the particular circumstances of the Applicants. As this Court recently noted in *Zou v Canada (Citizenship and Immigration)*, 2024 FC 1645 at para 20:

> Officers do not apply a particular standard for establishment. Indeed, there is no measurement of establishment that could be applied as all applicants for an H&C exemption have different circumstances. Whether and how a single mother of several children demonstrates their establishment in Canada may differ greatly from whether and how a single man with no dependants in Canada demonstrates their establishment. The Officer is best placed to assess an applicant's establishment and to attribute the appropriate weight to that factor and to all other relevant factors given the many H&C applications that they determine. Moreover, establishment is one factor; even where an officer finds that an applicant has significant establishment in Canada, the Officer may not find that all the relevant considerations cumulatively warrant the exemption.

[91] The Officer considered the available evidence of establishment, including the adult Applicants' history of part-time and full-time employment and letters from their family and friends regarding their commitment to their children.

[92] Although the Applicants dispute the Officer's finding that it was not clear how they financially supported themselves, noting the amounts declared on their income tax in 2020 and 2021, by their own evidence, they did not have work permits at all relevant times. The Officer reasonably found that it was unclear how they were supporting themselves based on the limited financial information provided, as reflected on the record.

[93] The Officer therefore reasonably concluded that the Applicants' evidence does not show that they have become integrated into Canadian society to such an extent that their departure would cause hardship beyond what is anticipated by the Act.

IX. The Officer did not err in assessing hardship

[94] The Applicants' submissions regarding adverse country conditions and related hardships focused on FGM, security, unemployment, access to services and their concerns about Mr. Onifade's father. The Applicants do not point to any error in the Officer's assessment, but rather seek a reweighing of the various hardships they asserted and their cumulative effect.

[95] While country conditions are relevant, an applicant cannot simply assert that they will likely be subjected to the general country conditions without evidence of their own situation. Regardless, the Officer did not fail to assess the various hardships the Applicants alleged they would experience upon return to Nigeria.

[96] With respect to a lack of a support network, the Officer noted that Ms. Ayatian was already part of support groups in both Canada and Nigeria, which she could continue to maintain, including virtually.

[97] With respect to Ms. Ayatian's mental health, the Officer noted that although the psychotherapist's report suggests that she has symptoms of PTSD, anxiety and depression, there was no evidence that she had sought treatment in Canada or that she could not do so in Nigeria.

[98] With respect to FGM, the Officer did not conflate the risk of FGM with the hardship that would result, but reasonably found that it was not likely to occur, and consequently would not result in hardship. The Officer noted that FGM is illegal and although it may continue to be practised in some parts of Nigeria, parents can refuse FGM. Although the Applicants' assert that there is no evidence that they will be able to withstand familial and societal norms in Nigeria, such as FGM, the onus was on them to provide that evidence. The evidence on the record supports the Officer's finding that overall, the risk of FGM and resulting hardship is minimal.

[99] With respect to the Applicants' concerns about their safety and risk of kidnapping, the Officer acknowledged the high crime rate, but noted that the Applicants were aware of necessary public safety precautions and that their proposed location in Port Harcourt did not present significant risks. The Officer also found that they did not have the profile of those at risk of kidnapping and noted the Applicants' inconsistent evidence regarding the location of family members who the Applicants claimed would pose this risk to them.

[100] The Officer reasonably found that there was insufficient evidence to support the Applicants' assertion that they would suffer hardship from the stigma and discrimination of children with ASD, preferring the evidence of the growing awareness and acceptance of children with ASD.

[101] The Officer also found that there was no evidence to support the Applicants' claim that any necessary medical treatment for the children or the adult Applicants would be unavailable in Nigeria.

X. The Officer erred in the assessment of the BIOC of the eldest child

[102] As noted, the BIOC is an important factor in an H&C application where children are directly affected; the principles established in *Baker*, *Hawthorne* and *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 continue to apply (*Kanthasamy* at paras 38, 39).

[103] The Applicants' assertion that the Officer ignored the jurisprudence that establishes that children are not deserving of hardship overlooks the related jurisprudence, which acknowledges that there will inevitably be some hardship associated with leaving Canada. The Applicants' submission appears to be that any hardship for children should justify an H&C exemption; however, this is not the law. There is inherent hardship associated with the upheaval of returning to the home country after spending time awaiting immigration decisions in Canada and after making friends, starting school, and establishing routines. If this typical and predictable hardship warranted an H&C exemption, all such applications would be granted.

[104] The Officer accepted that there would be some hardship for the children as an inherent consequence of leaving Canada, noting that life in Canada may have more benefits, but such hardship, on its own, does not justify the exemption. Contrary to the Applicants' argument, this is not an inconsistent or erroneous finding.

[105] The Officer did not err in the assessment of the BIOC of the two Canadian-born children. The Officer noted that they are young and adaptable and, at the relevant time, were not of school age. Once again, very little evidence was submitted regarding their BIOC apart from general

submissions and letters stating that they liked to visit their cousins. There was no evidence that the two younger children could not access education or medical care as needed in Nigeria.

[106] Most of the Applicants' supporting documents focussed on their eldest child. The Officer considered all that evidence, including the reports of a pediatrician, speech therapist and behavioural therapist and the IEP. The Officer also conducted additional research regarding ASD and the availability of treatment in Nigeria.

[107] The Officer concluded that the eldest child's best interests would be served by remaining with his parents, because they are committed to his well-being, and returning to Nigeria. The Officer concluded that the eldest child would continue to have access to education and medical care in Nigeria, and that there was no evidence to suggest these systems would result in adverse outcomes for the child. The Officers findings of "no evidence" and "no compelling evidence" that living in Nigeria would harm the child's development are inconsistent with the Officer's other findings and with the evidence on the record, including the Officer's own research regarding available resources in Nigeria.

[108] This conclusion regarding the BIOC of the eldest child is the only error in the Officer's assessment of the H&C application that amounts to a serious shortcoming central to the decision.

[109] Given the extensive evidence regarding the unavailability of services, special education, special equipment and accommodation and other related services, including speech and behavioural therapy for children with autism in Nigeria, the Officer's conclusion that the eldest

child's best interests would be met by returning to Nigeria does not reflect an internally coherent or rational analysis.

[110] The Officer did not simply give more weight to evidence suggesting that education and health care in Nigeria would respond to the needs of the eldest child; that other evidence does not support the conclusion that the child's best interests would be met by returning to Nigeria.

[111] The Officer acknowledged the evidence regarding the scarcity of adequate facilities and resources for children with ASD in Nigeria, the high cost of the limited resources available and the stigmatization faced by children with autism. The Officer accepted that these challenges would pose serious obstacles to the child's development and access to proper education and support.

[112] The Officer also found that removing the family from Canada would likely disrupt the eldest child's progress and access to essential care, as well as sever bonds formed with extended family and peers.

[113] However, the Officer then discounted or misapprehended the reports from professionals, including doctors and therapists that noted the benefits of the existing supports and cautioned that the eldest child would regress in Nigeria, to find that other aspects of the same evidence suggested that changes in routine, while disruptive, had not negatively impacted his development. For example, the Officer found no evidence of regression in the eldest child or signs of adverse effects from the family's evolving dynamics in Canada, particularly the birth of

his two siblings. However, adjusting to the birth of two siblings is not comparable to adjusting to a lack of access to necessary services and supports for the eldest child's social and educational development.

[114] The Officer also found no evidence that transitioning to a school in Nigeria would negatively affect the child's development, despite the evidence that very few schools had special programs or the equipment needed, which had permitted the child to make progress in the school system in Ontario. This finding is also inconsistent with the Officer's finding that removing the child to Nigeria would disrupt his progress and access to essential care.

[115] The Officer accepted that the eldest child had communication and behavioural challenges, but assumed that the IEP, developed in Ontario in the context of the availability of services in Ontario, could be followed in Nigeria. Regardless of whether the IEP was developed at the request of the parents or the child's school, and while the IEP is a valuable resource, it addresses the child's special education needs for the time being—for Grade One—and not in the longer term and based on services in Ontario.

[116] The Officer was required to identify, define and examine the BIOC "with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39; citations omitted).

[117] The Officer's approach to assessing the BIOC of the eldest child does not follow the approach endorsed in the jurisprudence (e.g. *Williams*), to first identify the child's best interests and then to determine the extent to which their best interests would be affected if removed or if

they remained in Canada. The Officer began from the premise that the eldest child's best interests were to remain with his supporting family and return to Nigeria. However, this starting point overlooks that it is usually in the BIOC to remain together with their family and that there was never any suggestion that the family would not remain intact or supportive regardless of the outcome of the H&C application. More importantly, this finding overlooks that simply remaining with his family does not address his special needs as a child with ASD if removed from Canada.

[118] As the Officer noted, the Applicants have been resourceful in addressing the needs of their eldest child. However, the Officer appears to overlook that their resourcefulness depends on the availability of resources, including behavioural and speech therapy and educational assistants in the school system. The Officer's conclusion that the Applicants would continue to do their best to ensure that their eldest child receives all the support that he needs if they return to Nigeria misses the point that the evidence in the record is that the needed services will not be available, and if they were, they would be extremely expensive. The Officer's own thorough research revealed that there were a very limited number of speech therapists, and although there were some schools with special programs, these were few and far between.

[119] The Officer considered the letter from Dr. Bruno DiGravio, who noted that despite the adjustments to therapy during the COVID-19 pandemic period, "[t]here is little evidence to demonstrate that the child's condition has deteriorated using possibly other therapy methods". The Officer appears to interpret this as suggesting that the 1-1 supervision provided in the current school setting was not necessary. However, Dr. DiGravio noted that the child may have had the 1-1 supervision virtually during the COVID-19 period.

[120] Dr. DiGravio also noted that the eldest child's needs for "intensive behavioural therapies are simply not available in Nigeria at any price" and opined that "[w]ithout the therapy he receives in Canada, [the eldest child's] condition would deteriorate to a non-functional state".

[121] Dr. Akinloye emphasized that returning to Nigeria "would adversely affect his development in every aspect. His health would be affected, and his quality of life would be severely impacted negatively". Dr. Akinloye further noted that "[t]he level of support and resources needed to help them is simply not available here in Nigeria…"

[122] The speech language pathologist, Ms. Oxby, noted that "[r]esearch shows that intervention provided by a trained SLP helps individuals with autism develop greater communication skills than those who do not receive therapy from a trained professional (Sandbank et al., 2020). It would be detrimental to [the eldest child's] development to remove him from these services as they are so essential to his success".

[123] The Officer recognized the challenges:

> The evidence reflects that those diagnosed with ASD living in Nigeria face challenges to obtain access to treatment and different therapies. Cost for therapy can be daunting. "According to a report by educeleb, a nongovernmental organisation (NGO), there are only 1,177 full-fledged nurseries, primary and secondary special needs schools in the country presently. Of that number, Kano has 153, followed by Kaduna with 79 and Lagos with 75. States with the least number of such schools are Borno, Bayelsa, and Zamfara. Where these schools exist, most of them lack the basic infrastructure adapted for children with special needs.

[124] However, the Officer did not acknowledge that these scarce resources existed in a country of over 225 million people. The Officer focused on the potential for improvement rather than the current reality, noting:

> …However, it is gratifying to note that some conventional schools are beginning to bridge the gap by adopting inclusive learning to take care of children with special needs." While these numbers are relatively low and there is room for improvement Nigeria does have schools to cater to the needs of those diagnosed with ASD and efforts are being made to improve the situation.

[125] The potential for improvement does not respond to or compensate for the current lack of services, educational supports and other professional interventions that would not be available to the eldest child, who as a result, would likely regress, as Dr. DiGravio noted.

[126] The BIOC of the eldest child must, therefore, be reconsidered given that the Officer's conclusion minimized the BIOC, contrary to *Baker* at para 75, and given that the Officer's findings are inconsistent and are not supported by the evidence on the record. The Officer's conclusion does not reflect a rational chain of analysis. This amounts to a serious shortcoming that is central to the decision, although it is not possible to determine how a reassessment of the BIOC will affect the overall H&C determination, which is based on a cumulative or global assessment of all relevant factors.

[127] The Court also observes that some evidence on the record suggests that the Applicants regard the H&C application as an alternative immigration scheme—which it is not. As noted, many of the Applicants' submissions seek a reweighing of the evidence. Despite these observations, the Court cannot overlook the serious shortcoming in the Officer's BIOC analysis.

JUDGMENT in file IMM-5803-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted.
2. The Applicants' Application for Permanent Residence based on humanitarian and compassionate factors must be reconsidered by a different decision-maker.
3. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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