Federal Court  Cour fédérale

Date: 20111101

Docket: IMM-626-11

Citation: 2011 FC 1243

Ottawa, Ontario, November 1, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SALIM TAFADZWA ZINGANO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Designated Immigration Officer (Officer) at the High Commission of Canada in Pretoria, South Africa, dated 16 November 2010 (Decision). In the Decision, the Officer refused the Applicant's application for a humanitarian and compassionate (H&C) exemption from the operation of paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (Regulations) under subsection 25(1) of the Act and denied the Applicant permanent resident status.

BACKGROUND

[2] The Applicant is an eighteen-year-old citizen of Zimbabwe. His sponsor and litigation guardian is his father, Lameck Zingano, a Canadian citizen (Sponsor). The Sponsor's wife, the Applicant's step-mother, was the Co-sponsor on his application for permanent residence (Co-sponsor). The Applicant currently lives in Zimbabwe with his paternal grandmother.

[3] In 1999, the Sponsor left Zimbabwe to study in the Netherlands. He met the Co-sponsor online in 2000 and that year they met in person in the United States. They were married in 2001. After the Co-sponsor had her first child by the Sponsor, the Co-sponsor sponsored the Sponsor as a member of the family class. The Sponsor was granted permanent resident status in Canada in 2002 and became a Canadian citizen in September 2005.

[4] The Sponsor did not list the Applicant as his son on his application for permanent residence though the Applicant was nearly ten years old at that time. This would later ground the denial of a Temporary Resident Visa (TRV) and the Permanent Resident Visa. The Applicant was not examined as part of the Sponsor's permanent residence application in 2002. Since 2003, the Sponsor has sent money to his family members in Zimbabwe. Since 2005, he has made regular phone calls to Zimbabwe to speak with the Applicant. The Sponsor visited Zimbabwe from December 2006 to January 2007.

[5] In 2007, the Applicant was interviewed by Citizenship and Immigration Canada (CIC) staff in Harare, Zimbabwe in relation to his application for a TRV. At this time, he said that he had contact information for his biological mother, who was living in Mozambique.

[6] In 2006, the Sponsor made his first application to sponsor the Applicant as a member of the family class. This application was denied because the Applicant is permanently excluded from the family class by paragraph 117(9)(*d*) of the Regulations. No appeal of that decision was taken, nor was an application for judicial review filed. The Sponsor applied for a TRV for the Applicant in 2007, which was also denied. In 2008, the Sponsor again applied for permanent resident status on behalf of the Applicant. When this application was denied, again because of the operation of paragraph 117(9)(*d*), the Applicant requested an H&C exemption under subsection 25(1) of the Act. This application was referred to the High Commission in Pretoria for processing.

[7] The Officer assessed the H&C application on 16 November 2010. On that date, she refused the application for an exemption based on her conclusion that the H&C considerations were not sufficiently compelling to justify granting the Applicant an exemption from paragraph 117(9)(*d*) of the Regulations. The Applicant was notified by letter dated 16 November 2010.

DECISION UNDER REVIEW

[8] The Decision in this case consists of the Officer's letter of 16 November 2010 and the CAIPS notes on the file.

[9] The Officer first noted that the Applicant was permanently excluded from the family class under paragraph 117(9)(*d*) of the Regulations because the Sponsor did not declare him on his 2002 Application. The Applicant was permanently excluded "regardless of the reasons why the Sponsor never declared him." The Officer found that the Sponsor's explanation as to why he had not included the Applicant were not credible, though the reasons why he was not included on the 2002 Application did not change the fact that the Applicant was permanently excluded.

[10] The Officer denied the H&C exemption under subsection 25(1) because she did not "find the [humanitarian and compassionate] considerations put forward on this case sufficiently compelling to justify granting [the Applicant] an exemption from any applicable criteria or obligation under the Act." The Sponsor had based his submissions in support of the H&C application on the political instability in Zimbabwe, the lack of adequate health care, and the poor educational opportunities available to the Applicant.

[11] The Officer found that the Applicant had not demonstrated a sufficiently close relationship with the Sponsor to justify an H&C exemption. She noted that the Sponsor had left the Applicant in Zimbabwe in 1999, when the Applicant was only five years old. She also found that the Sponsor had only visited the Applicant once in the ten years since he left Zimbabwe, from December 2006 to January 2007. She was concerned that there were no photos of the Sponsor and the Applicant together during this visit and she could not be certain that they had actually seen one another at that time.

[12] The Officer also found that there was no explanation as to why the Sponsor had waited until 2006 to file the first application for permanent resident status for the Applicant. She noted that the Sponsor had been granted permanent resident status and was thus able to sponsor the Applicant in 2002. She also found that the remittances the Sponsor sent to Zimbabwe beginning in May 2003 were small.

[13] The Officer also found that the Sponsor's family in Canada had not met the Applicant, nor had they made any effort to do so. Although, in the experience of the Officer, many other Zimbabweans had travelled to neighbouring countries to meet family from abroad – being driven to

do so by the political situation in Zimbabwe – the Sponsor's family had not done so. In the mind of the Officer, there was no excuse for the Canadian family not to have met the Applicant in person.

[14] The Officer found that, though the Sponsor said that the Applicant's biological mother was not available to support him, there was no evidence to show this. She noted that the Applicant had provided contact information for his biological mother when he was interviewed in relation to his TRV application in 2007.

[15] Finally, the Officer found that the best interests of the Applicant favoured his remaining in Zimbabwe with his paternal grandmother. The Applicant had known his grandmother his whole life, so it was better for him to stay with her, than to be with a family in Canada he had never met. Further, though the situation in Zimbabwe was not ideal, the Officer said that it had improved and was not an impediment to the Applicant remaining there in the care of his grandmother.

ISSUES

[16] The Applicant formally raises the following issues:

a. Whether the Officer unreasonably emphasized the Sponsor's non-disclosure of the Applicant in the 2002 Application;

b. Whether the Officer's conclusion that the Sponsor and Applicant did not have a close relationship was reasonable;

c. Whether the Officer's conclusion that the Applicant's had a suitable living situation in Zimbabwe was unreasonable.

[17] The Applicant also raises the following issue in his pleadings:

a. Whether the Applicant's right to procedural fairness was breached.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in his written argument:

Objectives — immigration	**Objet en matière d'immigration**
3. (1) The objectives of this Act with respect to immigration are	3**.** (1) En matière d'immigration, la présente loi a pour objet :
…	…
(*d*) to see that families are reunited in Canada;	*d*) de veiller à la réunification des familles au Canada;
…	**…**
Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi. Séjour pour motif d'ordre humanitaire à la demande de l'étranger
…	…

Humanitarian and compassionate Considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[19] The following provisions of the Regulations are applicable in this proceeding:

Family class	**Catégorie**
116. For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	**116.** Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
Excluded relationships	**Regroupement Familial**
117. (9) A foreign national shall not be considered a	**117.** (9) Ne sont pas considérées comme

member of the family class by virtue of their relationship to a sponsor if	appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
…	…
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No. 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] In *Baker v Canada*, [1999] 2 SCR 817 at paragraphs 61 and 62, the Supreme Court of Canada held that the standard of review with respect to H&C determinations was reasonableness *simpliciter*. This approach was followed by the Federal Court of Appeal in *Kisana v Canada (Minister of Citizenship and Immigration)* 2009 FCA 189. (See also *Lee v Canada (Minister of Citizenship and Immigration)* 2005 FC 413). Specifically with respect to the first issue, the Supreme

Court of Canada held in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 61 that it is not the function of the reviewing court to re-weigh the evidence before the decision-maker. This approach was followed by Justice Michel Shore in *Lupsa v Canada (Minister of Citizenship and Immigration)* 2009 FC 1054 at paragraph 4 where he held that "the Court cannot lightly interfere with the manner in which an immigration officer exercises his or her discretion and it is not for the Court to re-weigh the relevant fact-driven factors of the case." As the first three issues deal with the Officer's discretion on the H&C application, the standard of review with respect to these issues is reasonableness.

[22] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Khosa*, above, at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[23] With respect to the fourth issue, the Applicant raises both the opportunity to respond and the adequacy of reasons. Both of these issues raise questions of procedural fairness. (See *Malveda v Canada (Minister of Citizenship and Immigration)* 2008 FC 447, *Rafieyan v Canada (Minister of Citizenship and Immigration)* 2007 FC 727, and *Adil v Canada (Minister of Citizenship and Immigration)* 2010 FC 987). In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539, the Supreme Court of Canada held that the standard of review with respect to questions of procedural fairness is correctness. Further, the

Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review with respect to the fourth issue is correctness.

ARGUMENTS

The Applicant

The Applicant's Right to Procedural Fairness was Breached

The Applicant was Denied the Opportunity to Respond

[24] The Applicant argues that the conclusions the Officer reached were unreasonable because they were based on a breach of his right to procedural fairness. The Officer failed to ask him for explanations of the evidence that he presented or to fill in the holes in evidence on issues she was concerned about.

[25] The Applicant relies on *Hassani v Canada (Minister of Citizenship and Immigration)* 2006 FC 1283 for the proposition that an officer has a duty to seek clarification where her concerns do not emanate directly from a requirement of the Act. Where an officer does not seek clarification, as occurred in this case, the Applicant's right to procedural fairness will be breached through a denial of the right to respond.

[26] The CIC manual OP-4 *Processing of Applications under section 25 of IRPA* states under the heading "The 'Case to be Met'" that "it is good practice to clarify possible H&C grounds if these are not articulated." Further, *Baker*, above, shows that a high level of participatory rights is called

for where the interests of a child are at stake. The Applicant says that *Del Cid v Canada (Minister of Citizenship and Immigration)* 2006 FC 326 teaches that an officer should request further evidence where he or she perceives a lack of evidence for a submission with respect to the best interest of a child. Taken together, these authorities show that the Officer in this case was under a duty to inquire into the areas where she perceived a lack of evidence.

[27] The Applicant says he was denied the opportunity to respond in this manner when the Officer relied on the evidence that the Sponsor waited until 2006 before filing an application for permanent residence on his behalf. He says that this posed a question that the Sponsor had not anticipated and which did not emanate from a requirement of the Act. The Officer's duty to inquire was therefore engaged. She breached the Applicant's right to respond when she did not ask for clarification of the reasons for the delay. Had he been asked to explain the delay, the Sponsor says he would have explained that he received bad advice from an immigration consultant.

[28] The Applicant's right to respond was also breached when the Officer failed to put her concerns about the lack of visits to Zimbabwe to the Applicant or the Sponsor. Had she done so, the Sponsor was ready and willing to give further evidence of visits. He was precluded from doing so because he did not know that this was something the Officer was concerned about.

[29] The Officer also failed to put her concerns about the lack of pictures from the Sponsor's visit in December 2006 – January 2007 to Zimbabwe to the Applicant or the Sponsor. This denied the Applicant the opportunity to respond to the Officer's concerns. The Officer had a duty to put this to the Applicant as he could not reasonably foresee that the lack of pictures would be a concern. Counsel had advised the Sponsor that the focus of the inquiry was on demonstrating ongoing

support and contact, which he had attempted to do through evidence of visits, phone calls, and remittances to family in Zimbabwe.

[30] The Officer also failed to put to the Applicant's concerns about the sufficiency of the amounts remitted by the Sponsor to family members in Zimbabwe, which again denied the Applicant the opportunity to respond. Had the Officer done so, the Applicant says he would have explained that the amounts were actually quite large, given the rate of inflation Zimbabwe was experiencing at the time. Further, he would have shown that Zimbabwe had imposed restrictions on foreign remittances and, to compensate, the Sponsor had bought groceries for the Applicant on-line. He also would have shown that his expenses were low because he lives with his grandmother. The Applicant says the Officer's concern here was not well-founded and could have been resolved if she had asked the Applicant for an explanation.

[31] The Applicant was also denied the opportunity to respond when the Officer failed to put to him her concerns about the lack of a meeting between him and his Canadian step-family. Had she put this concern to him, he would have adduced evidence that the Sponsor was stateless until 2006, the airfare for the family was approximately $10,000, and that the family elected to send what resources they had available to the Applicant as remittances, rather than spending money on travel.

[32] Finally, the Officer failed to put her concerns about the Applicant's contact with his biological mother to him. Had she done so, he would have explained the situation to the Officer.

The Reasons Given Were Inadequate

[33] The Applicant also argues that his right to procedural fairness was breached when the Officer failed to provide adequate reasons. The reasons were inadequate because they did not disclose how the Officer concluded, in the face of evidence of political instability and deprivation in Zimbabwe, that the Applicant's living situation was adequate. The Officer failed to engage in a meaningful way with the evidence on the conditions in Zimbabwe. By not engaging with the evidence, the reasons provided by the Officer fell below the requirement that she be alert, alive, and sensitive to the best interests of the Applicant.

The Decision was Unreasonable.

The Officer's Finding That the Applicant and the Sponsor Did Not Have a Close Relationship was Unreasonable

[34] The Applicant argues that the Officer's conclusion about the relationship between him and the Sponsor was unreasonable on several grounds.

[35] First, the Officer failed to account for, or was in error concerning the evidence that was before her. The Applicant says that when she analyzed their relationship, the Officer did not take into account the phone calls and letters which had been exchanged between him and the Sponsor. Also, when she looked at the time between when the Sponsor was granted permanent residence and when he first applied for permanent residence on behalf of the Applicant, the Officer failed to take into account the evidence that the Sponsor would have led, had he been asked.

[36] Second, the Officer based her conclusion about the relationship on an erroneous conclusion that the Sponsor and the Applicant had not visited enough. This conclusion was based on the denial

of procedural fairness discussed above. Had the Applicant been given an opportunity to respond, the Sponsor would have given evidence of passport stamps and visas showing visits to the Applicant in 1999-2000 and 2008-2009. The Officer ignored this evidence, as well as evidence the Sponsor would have introduced which showed he could not have travelled to Zimbabwe. Had the Officer asked for an explanation, these concerns would have been addressed.

[37] Third, the Applicant says that the Officer's conclusion about his relationship with the Sponsor was in error because it ignored evidence of ongoing contact between them. This included evidence that the Sponsor has attempted to gain entry visas to Canada for the Applicant in 2006, 2007, and 2008. Further, the conclusions as to the strength of the relationship placed too much emphasis on the fact that there were no photos from the Sponsor's visit in December 2006. As the Applicant was denied the opportunity to respond, he did not have the opportunity to adduce evidence; to ignore the evidence that would have been adduced makes the Officer's conclusion unreasonable.

[38] Fourth, the conclusion that the relationship was not close enough was unreasonable because it was based on the unreasonable conclusion that the amounts of money the Sponsor remitted to Zimbabwe were relatively small. The Applicant says there was no evidence to support this conclusion, though he submitted a list of remittances in support of his application. This conclusion also ignored evidence in the Sponsor's letter which noted that the levels of inflation in Zimbabwe were very high.

[39] Fifth, the Officer's conclusion about the Applicant's relationship with the Sponsor unreasonably emphasized the fact that the Applicant had not met his Canadian step-family and that there would be no hardship from their continued separation. This conclusion ignores the deprivation

that both the Applicant and his step-family have suffered from his absence. This conclusion also ignores the affidavit evidence of the Sponsor and Co-Sponsor attesting to the hardship their continued separation would cause. Relying on *Pedro Enrique Juarez Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at page 305, the Applicant says that these affidavits were entitled to a presumption of truth. It was therefore unreasonable for the Officer to ignore them. For the Officer to conclude that the family would suffer no hardship does not fit with the Sponsor's repeated attempts to bring the Applicant to Canada. The Applicant says the Officer also ignored evidence of financial limitations on the family which prevented them from visiting him in Zimbabwe. This evidence included records of their income, the need to care for the children of the Sponsor and Co-sponsor in Canada, and affidavit evidence that the Sponsor was unable to work for a time because of health problems.

[40] In all the above ways, the Officer fundamentally misapprehended the strength of the ongoing relationship between the Applicant and his Sponsor in Canada by ignoring the evidence before her and failing to put her unanticipated concerns to the Applicant.

The Officer's Conclusion That The Applicant Had a Suitable Living Situation in Zimbabwe Was Unreasonable

[41] The Applicant also argues that the Officer's conclusion that he had a suitable living situation in Zimbabwe was unreasonable because it was based on conclusions that the country conditions in Zimbabwe had improved, that his biological mother was involved in his life, and that it was in his best interests to remain in Zimbabwe, all of which were unreasonable.

[42] The conclusion that country conditions in Zimbabwe had improved did not engage in any meaningful way with statements in the Sponsor's submissions in support of the H&C application about the unemployment rate, inflation, health care situation, and sanitation standards. This conclusion was also unreasonable because the Officer was not sufficiently alert, alive, or sensitive to the best interests of the Applicant.

[43] The only evidence on the role of his biological mother in his life that was before the Officer was the contact information for his mother which the Applicant provided at his interview for the 2007 application for a TRV. The Officer ignored affidavit evidence of the Sponsor that the Applicant's biological mother was not available to care for him. The Sponsor's affidavit is more recent than the contact information so it should have been preferred. Further, the Applicant has been living with his paternal grandmother. All the evidence points to his biological mother abandoning him. Rather than relying on the evidence that the Applicant could contact his biological mother, what should have mattered to the Officer was whether his mother was able and wiling to provide adequate care, which clearly she was not. The Applicant also says that the Officer imposed an impossibly high evidentiary burden – to prove his mother was not involved in his life – so this conclusion was unreasonable.

[44] The Applicant also says it was unreasonable for the Officer to conclude that it was in his best interests to remain in Zimbabwe with his extended family rather than live with his step-family in Canada who he has never met. This conclusion relied on the gross generalization that it its common in Zimbabwean culture for children to live with their grandparents. The Applicant notes that I said in *Ponniah v Canada (Minister of Citizenship and Immigration)* 2003 FC 1016 at paragraph 10 that "[assumptions] based on cultural generalizations, particularly those relating to

ancillary issues, are not relevant considerations." This cultural stereotype was not based on any evidence before the Officer and further, had she put this to him, the Applicant would have explained that neither the Sponsor nor his wife were Zimbabwean, so this generalization does not apply to them anyway.

[45] The conclusion that it was in the Applicant's best interests to remain with his extended family was also unreasonable because there was no evidence before the Officer as to who that extended family was or how they could support him. In *Ebonka v Canada (Minister of Citizenship and Immigration)* 2009 FC 80 at paragraph 25, Justice Michael Kelen held that it was unreasonable for an officer to rely on a relationship for which there is little evidence as proof that the applicant would not suffer hardship from separation from a relationship which is well established on the evidence. The Applicant says that his is such a case. Further, to hold that it is in the Applicant's best interests to remain in Zimbabwe does not accord with paragraph 3(1)(*a*) of the Act, which says that one of the objectives of the Act is the reuniting of families in Canada.

The Officer Unreasonably Emphasized the Sponsor's Non-Disclosure of the Applicant in his 2002 Application for Permanent Residence

[46] As noted above, the Applicant is permanently excluded from the family class by paragraph 117(9)(*d*) of the Regulations. He says that subsection 25(1) of the Act can be used to grant an exemption from paragraph 117(9)(*d*). Further, following *De Guzman v Canada (Minister of Citizenship and Immigration)* 2005 FCA 436, the Applicant says that, when considering an H&C exemption from that paragraph, the Officer must assess all H&C factors, including the best interests of the child. He also notes that an officer considering such an application must be alert, alive, and sensitive to the best interests of the child.

[47] The Applicant says that it is an error for an officer assessing an H&C exemption from paragraph 117(9)(*d*) to place undue emphasis on the non-disclosure of a child over the H&C considerations or the paragraph 3(1)(*d*) objective of reuniting families in Canada. For this proposition, he relies on *David v Canada (Minister of Citizenship and Immigration)* 2007 FC 546, *Hurtado v Canada (Minister of Citizenship and Immigration)* 2007 FC 552, *Sultana v Canada (Minister of Citizenship and Immigration)* 2009 FC 533 and *Krauchanka v Canada (Minister of Citizenship and Immigration)* 2010 FC 209.

[48] The Applicant also says that the refusal of an H&C application is unreasonable where the non-disclosed child is not otherwise inadmissible to Canada. Where a non-disclosed child is not inadmissible, the non-disclosure is immaterial to the non-disclosing parent's application. In these cases, the policy rationale behind paragraph 117(9)(*d*) – ensuring that applicants do not later sponsor inadmissible family members – does not hold. An H&C exemption in this type of case is normally warranted and a denial of the application will normally be unreasonable.

[49] In his case, the Applicant was not inadmissible when the Sponsor applied for permanent residence in 2002. As such, an H&C exemption was warranted in his case and the denial of the same was unreasonable.

[50] The Officer's undue emphasis on the non-disclosure by the Sponsor of the Applicant is shown by her statement that "[The Applicant] remains permanently excluded from being sponsored as member of the family class regardless of the reasons why [the Sponsor] never declared him." The Applicant says the undue emphasis is also shown by the dismissive attitude that the Officer displayed toward the relationship between the Applicant and his father and his circumstances in Zimbabwe, borne out by the unreasonableness of her conclusions on those issues.

The Respondent

[51] The Respondent says that the onus is on applicants in H&C applications to provide all relevant facts in support of their applications. In this case, the Officer provided the Applicant with all required procedural entitlements, considered all the facts that were before her, and drew reasonable conclusions from the evidence.

There Was no Breach of Procedural Fairness

[52] The Respondent says that the ultimate question, when examining the issue of procedural fairness, is whether the person subject to a decision had a meaningful opportunity to present his case. The Respondent argues that the Applicant's right to procedural fairness was not breached, as he had every opportunity to put evidence before the Officer, yet chose not to do so. Here, the onus was clearly on the Applicant to demonstrate that an H&C exemption was warranted in his case.

[53] Relying on *Kisana*, above, the Respondent says that there was no duty on the Officer to highlight the weaknesses in the Applicant's case. There was no duty to point out the holes in the evidence concerning the relationship between the Applicant and his Canadian step-family; the Applicant had all the evidence in his hands. It was for the Applicant to draw a clear picture of the relationship and there was nothing to prevent the Applicant from submitting additional material to be considered by the Officer. The Respondent says, based on *Owusu v Canada (Minister of Citizenship and Immigration)* 2004 FCA 38 that, where an applicant fails to present his case, as occurred here, he does so at his own peril.

The Officer Did Not Improperly Emphasize the Sponsor's Non-Disclosure of the Applicant in 2002

[54] The Officer did not unreasonably overemphasize the non-disclosure of the Applicant by the Sponsor in his 2002 application for permanent residence. Non-disclosure of a child is a relevant policy consideration in an H&C application, so it was proper for the Officer to consider it in her analysis. For this proposition, the Respondent relies on *Li v Canada (Minister of Citizenship and Immigration)* 2006 FC 1292.

[55] The Respondent says that the Officer's statement in the Decision that "the [Applicant] remains permanently excluded as a member of the family class regardless of the reasons why [the Sponsor] never declared him" is not a major part of her reasons. This is only one of a number of factors she considered. The Officer simply noted that the Sponsor's explanation was not convincing; this was not conclusive of the determination.

[56] The Respondent also says that the reasonableness of an H&C exemption from paragraph 117(9)(*d*) is independent of whether the non-disclosed child is inadmissible. The failure to declare dependants is a relevant policy consideration whether or not the non-disclosed dependants are admissible. In this case, the Officer properly considered the non-disclosure of the Applicant on the Sponsor's 2002 Application.

There Was no Error in Assessing the Relationship Between the Sponsor and the Applicant

[57] The Officer's conclusion that the relationship between the Applicant and the Sponsor was not sufficiently close to merit an H&C exemption was reasonable, as it was based on all the evidence that was before her. The relationship between the Applicant and the Sponsor was central to

the H&C determination in this case. When the Officer looked at the delay in applying for status for the Applicant, she was considering relevant evidence.

[58] The Applicant has attacked the reasonableness of the Officer's conclusion that the remittances sent by the Sponsor to Zimbabwe were relatively small, but there was evidence before her that the Sponsor and Co-sponsor had a combined household income of $130,000. She also had before her a list of the remittances sent by the Sponsor to Zimbabwe, none of which was more than $544.00. Further, though the Applicant could have provided further evidence on the remittances to the Officer, he cannot now attempt to do so on judicial review.

[59] The Respondent further says that it was open to the Officer to consider the lack of a visit by the Sponsor and the Canadian family to the Applicant in Zimbabwe in examining the relationships of the parties. The Officer addressed the fact that the Co-sponsor and her children had not visited the Applicant due to extenuating circumstances when she noted that the family could have met in a neighbouring country. In addition, the relatively high income of the family does not support the Applicant's contention that there were financial obstacles preventing the Canadian family from visiting the Applicant in Africa.

The Officer's Conclusion on the Applicant's Circumstances in Zimbabwe was Reasonable

[60] Finally, the Respondent argues that the Officer's conclusion with respect to the Applicant's situation in Zimbabwe was reasonable and was based on all the evidence before her. The Officer considered all the evidence before her and referred in the Decision to the Sponsor's submission on the economic situation, political instability, and the availability of education and medical care. The Officer was not required to compare the situation in Zimbabwe with that in Canada and "the fact

that [the Applicant] might be better off in Canada in terms of general comfort and future opportunities cannot, […], be conclusive in an H&C Decision that is intended to assess undue hardship." (*Vasquez v Canada (Minister of Citizenship and Immigration)* 2005 FC 91 at paragraph 43). The Respondent also says that it is not for the Court to examine whether the Officer gave this factor sufficient weight.

[61] Overall, the Officer adequately addressed the issue of hardship. She considered the length of time the Sponsor had been absent from the Applicant's life, the amount of contact between them, the size of the remittances from the Sponsor to Zimbabwe, and the Applicant's residence with his paternal grandmother. Following *Yue v Canada (Minister of Citizenship and Immigration)* 2006 FC 717, the Respondent says that these are the kinds of factors which have been found by this Court not to warrant judicial intervention.

ANALYSIS

[62] The Applicant complains that, if only the Officer had asked more questions or alerted him to concerns, he could have provided more information that would have fundamentally changed the picture of the relationship he had with his family in Canada. He says that it was procedurally unfair for the Officer not to have alerted him to concerns about his application and not to have given him an opportunity to address those concerns.

[63] I think that this complaint misconceives the nature of the process. As the Respondent points out, in the H&C context, the onus is on an applicant to demonstrate that an exemption is warranted and an officer is under no duty to highlight weaknesses in an application and request further submissions. See *Kisana*, above, at paragraph 45. Many of the issues raised by the Applicant in this

review application are no more than a request to the Court that the law be changed and the onus placed upon the Officer. This cannot be done. The facts to support the relationship were in the hands of the Applicant and his family. It was up to the Applicant to establish the nature of the relationship he had with his Canadian family. This required him to show how that relationship was nurtured and maintained, the nature of the emotional and psychological connection he had with his father, and any barriers they faced in making use of the resources available to them for communication, connection, and support.

[64] There were no limits on the information that the Applicant was able to adduce to substantiate the nature of the relationship, and he was at liberty to go on providing additional material at any time prior to the final decision. The Applicant and his family now wish they had provided the Officer with more material and they have attempted to lay before the Court what they could have said and done, blaming the Officer for not allowing them the opportunity to provide that information to him. This aspect of their application has to be dismissed. As the Court of Appeal has said, if an applicant fails to present a fulsome case, he or she does so at their peril. See *Owusu*, above, at paragraph 8.

[65] In *Owusu v Canada (Minister of Citizenship and Immigration)* 2003 FCT 94, Justice Frederick Gibson had the following to say on point at paragraph 11:

> The onus on an application for humanitarian or compassionate relief lies with the applicant. In *Prasad v. Canada (Minister of Citizenship and Immigration),* in the context of judicial review of a visa officer decision, Justice Muldoon wrote at paragraph 7:
>
> > The onus is on the applicant to satisfy the visa officer fully of all the positive ingredients in the applicant's application. It is not for the visa officer to wait and to offer the applicant a second, or several opportunities to satisfy the visa officer on

> necessary points which the applicant may have overlooked.

In *Patel v. Canada (Minister of Citizenship and Immigration),* Justice Heald, once again in the context of judicial review of a visa officer's decision, but dealing with the issue of humanitarian or compassionate grounds, wrote at paragraph 9:

> The applicant submits that he is entitled to have all relevant evidence considered on a humanitarian and compassionate application. I agree with that submission. However, the onus in this respect lies with the applicant. It is his responsibility to bring to the visa officer's attention any evidence relevant to humanitarian and compassionate considerations.

[66] I realize there are situations where an officer would have an obligation to make further inquiries and seek clarification. Justice Richard Mosley provided guidance on this issue at paragraph 24 of *Hassani*, above:

> Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan,* and in *John* and *Cornea* cited by the Court in *Rukmangathan*, above.

[67] On the facts of the present case, I do not believe that any such exception arises. Also, I do not think that any of the points relied upon by the Officer for her conclusions concerning the family relationship could not have been anticipated by the Applicant. The Federal Court of Appeal has established the basic principles applicable to a case such as this in *Kisana*, above:

> **33** Many of the factors which an officer is required to consider in determining an H&C application can be found in the guidelines issued to immigration officers by the Minister, to which Décary

J.A. refers in paragraph 7 of his Reasons in *Hawthorne*, *supra*, and which can be found at paragraph 30 of Evans J.A.'s concurring Reasons in that case. These factors include hardship arising from the geographical separation of family members. In examining this factor, the officer should consider: the effective links with family members, i.e. in terms of ongoing relationship as opposed to the simple biological fact of relationship; has there been any previous period of separation and, if so, for how long and why; the degree of psychological and emotional support in relation to other family members; options, if any, for the family to be reunited in another country; financial dependence, and; the particular circumstances of the children.

…

45 It is trite law that the content of procedural fairness is variable and contextual (see: *Baker*, *supra*, para. 21; and *Khan v. Canada (MCI)*, [2002] 2 F.C. 413). The ultimate question in each case is whether the person affected by a decision "had a meaningful opportunity to present their case fully and fairly" (see: *Baker*, *supra*, para. 30). In the context of H&C applications, it has been consistently held that the onus of establishing that an H&C exemption is warranted lies with an applicant; an officer is under no duty to highlight weaknesses in an application and to request further submissions (see, for example: *Thandal v. Canada (MCI)*, 2008 FC 489 at para. 9). In *Owusu*, *supra*, this Court held that an H&C officer was not under a positive obligation to make inquiries concerning the best interests of children in circumstances where the issue was raised only in an "oblique, cursory and obscure way" (at para. 9). The H&C submissions in that case consisted of a 7-page letter in which the only reference to the best interests of the children was contained in the sentence: "Should he be forced to return to Canada, [Mr. Owusu] will not have any way to support his family financially and he will have to live every day of his life in constant fear" (at para. 6).

…

56 There can be no doubt that the officer could have asked more questions in order to obtain additional information with regard to the twins' situation in India, but, as we shall see, she was under no duty to do so in this case. It may be that the pointed and narrow questions disclosed by the CAIPS notes probably did not constitute the most effective manner of obtaining information from these applicants, particularly in light of the lack of documentary evidence provided by them. However, the vacuum, if any, was

> created by the appellants' failure to assume their burden of proof. In these circumstances, the officer's poor interviewing techniques, if that be the case, are, in my view, insufficient to justify intervention on our part.

[68] Paragraph 33 of *Kisana* provides a checklist of what an H&C officer has to consider. The Officer in this case dealt with the matters referred to in this paragraph. Paragraph 33 also provides the Applicant with a checklist for what should be addressed in his application. The Applicant had legal advice in the preparation of his H&C application. The package of information provided to the Officer was not the information that has now been placed before this Court. I do not think the Officer can be faulted for not taking into account facts and explanations that were not placed before her.

[69] There are other aspects of the Applicant's arguments that are just not accurate when the Decision is read in its entirety. For example, there is really no indication, in my view, that the Officer improperly emphasized the Sponsor's failure to declare the Applicant in the Sponsor's earlier 2002 application. I think the Respondent is correct on this point.

[70] It was open to the Officer to consider the failure of the Sponsor to properly declare the Applicant as it is one public policy factor to be considered in the H&C assessment. See *Li*, above, at paragraph 33 and *Kisana*, above, at paragraph 27.

[71] A review of the Decision concerning the assessment of H&C factors does not support the Applicant's allegation that the Officer overemphasized the Sponsor's failure to declare his son when the Sponsor landed in Canada.

[72] The Applicant's only example of the Officer placing "particular emphasis on the fact of the non-disclosure" was the statement that

> PA remains permanently excluded from being sponsored as a member of the family class, regardless of the reasons why sponsor never declared him…

[73] This statement does not form a major part of the Oficer' reasons concerning the H&C factors. Further, the Officer simply notes that the explanation for non-disclosure provided by the Sponsor is not convincing. This comment is one of many which review the evidence presented by the Applicant. It is not a conclusive statement on the strength of the H&C application and does not override the other factors, which determined the final result.

[74] Further, the fact of the Applicant's admissibility does not determine the reasonableness of the Officer's assessment of H&C factors. The failure to declare raises a public policy concern, regardless of the Applicant's status. See *Li*, above, *Yue*, above, and *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 156.

[75] That being said, there are some aspects of the Decision that this Court finds troubling, and I think they need to be examined to determine whether they render the Decision unreasonable. I am particularly concerned by the Officer's consideration of the best interests of the child (Applicant). It is obvious from the Decision that the Officer took into account the situation in Zimbabwe when dealing with this issue. Her final conclusions on point read as follows:

> While the situation in Zimbabwe is not ideal, it has improved. While PA's representative states that it is in PA's best interest to be with his father in CDA, I do not agree, as I believe that it is in PA's best interest to in fact be with his extended family in Zimbabwe who he knows and who has taken care of him most of his life rather than a

> family in CDA, who he has had limited contact with for most of his life with 3 members whom he had never even met in person.

[76] Counsel for the Respondent conceded to the Court that she knows of no evidence before the Officer that would support a conclusion that the situation in Zimbabwe has improved. Reviewing the record myself, it seems to me that the Officer's conclusions or statements about Zimbabwe are totally inaccurate and perverse. It is not only that the situation in Zimbabwe "is not ideal"; the reality is that it could not be worse. There is no evidence that it has improved or that improvement is likely anytime soon. The picture is one of increasing international concern over ever declining socio-economic conditions, a collapsing education system, and increasing violence.

[77] I realize that, in conducting an assessment of the situation of the Applicant, the Officer is not required to make a comparative analysis between the Applicant's situation in Zimbabwe and his potential situation in Canada. As I pointed out in *Vasquez*, above, at paragraph 43,

> The fact that the children might be better off in Canada in terms of general comfort and future opportunities cannot, in my view, be conclusive in an H&C Decision that is intended to assess undue hardship.

[78] I also realize that whether the Officer gave this factor sufficient weight is not for the Court to decide.

[79] What concerns me is that the Officer provides no basis for her conclusion that the situation in Zimbabwe has improved (and Respondent's counsel cannot point to any), and she appears to be unaware of the evidence before her that reveals the real situation in Zimbabwe.

[80] The Officer herself makes the situation in Zimbabwe a significant factor in her analysis and, of course, it ought to be when assessing the best interests of the Applicant. I think her incorrect

analysis of the situation is a highly material error that renders the Decision unreasonable. I cannot say that the Officer would have come to the same conclusion regarding the best interests of the Applicant if she had taken into account what the evidence does say about declining conditions in Zimbabwe and the prospects for the Applicant if he has to remain there. Consequently, I believe this matter requires reconsideration.

[81] I am also concerned by the Officer's assessment that "it is possible that [the Applicant] does have contact with his [biological] mother." The evidence from the Sponsor is clear that there is no such contact and there is nothing in the record to suggest this is not true. The fact that the Applicant may have had a contact address for his biological mother does not mean that she plays, or will play, any role in his life. If the Officer felt that the Sponsor could not be believed on this issue, then she should have interviewed him to test his credibility. Her failure to do this renders her suggestion that the biological mother could be available to the Applicant unreasonable. Once again, this renders the Decision unsafe regarding the Officer's analysis of the Applicant's best interests. The finding was highly material and there is no evidence to support the Officer's conclusion.

[82] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.
3. The Style of Cause is amended to show the Applicant as "Salim Tafadzwa Zingano by his litigation guardian Lameck Zingano".

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-626-11
STYLE OF CAUSE:	SALIM TAFADZWA ZINGANO - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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DATED:	November 1, 2011

APPEARANCES:

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