Federal Court  Cour fédérale

Date: 20120105

Docket: IMM-3483-11

Citation: 2012 FC 17

Ottawa, Ontario, January 5, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PAULA GLENDA SYLVESTER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) and paragraph 72(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an officer of Citizenship and Immigration Canada (the officer), dated April 6, 2011, wherein the applicant's permanent residence application was refused (the decision). This conclusion was based on the officer's finding that there were insufficient humanitarian and compassionate (H&C) grounds

to warrant an exception allowing the applicant's permanent residence application to be made from within Canada.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to Citizenship and Immigration Canada (CIC) for redetermination by a different officer.

Background

[3] The applicant, Paula Glenda Sylvester, is a citizen of Grenada. As a child and young woman, she was physically and psychologically abused by her mother because she had been conceived by an interracial union between her mother, who identifies as being white, and a black man. The applicant's attempts to seek help from her father were denied because he claimed he had too many children (ten) to care for. The applicant was also sexually abused by an older cousin who threatened to kill her should she report the abuse to the police. Seeking to escape the abuse, the applicant fled to Canada, arriving as a visitor on July 18, 1990. Since fleeing Grenada, the applicant has never returned and has maintained no contact with her family there.

[4] Upon the applicant's arrival in Canada, she stayed in a rooming house. There her friend's uncle stole money from her and raped her. In fear of being deported, the applicant did not report this abuse.

[5] In 1997, the applicant was in a relationship with a man named Alfred Charles. The couple lived together between May and September 1997. On December 15, 1997, the couple's son Yannick

N'Kimie Charles was born. He is a citizen of both Canada (by birth) and Grenada (as a child born abroad to a Grenadian mother). Since birth, the applicant has been her son's primary caregiver. By court order, the applicant was granted full custody of her son in 2005. At the same time, Alfred Charles began paying court ordered support and having regular visits with his son.

[6] The applicant was employed as a cleaner from 1993 to 2005. In 2005, when her employer moved away, the applicant became unemployed and thereafter suffered from anxiety and depression. Since then, she had been in receipt of Ontario Works social assistance.

[7] Between 2001 and 2005, the applicant was enrolled as a part-time student at Parkdale Project Read; a community-based adult literacy program. Since her loss of employment in 2005, the applicant has been enrolled on a full-time basis in this program.

[8] In February 2005, the applicant filed a claim for refugee protection. In a decision dated July 21, 2005, the Refugee Protection Division (RPD) found that the applicant was not a Convention refugee or a person in need of protection. In coming to this determination, the RPD relied on the length of time (fifteen years) that the applicant had lived in Canada illegally, which it found suggested an absence of subjective fear of removal and the improving availability of state protection for abuse of women in Grenada. The RPD also acknowledged that:

> The [applicant] stated she no longer has reasons to fear her mother who is old now; she also acknowledged that perhaps her fear of her cousin is only in her head.

[9] Finally, the RPD stated that H&C considerations were not within its mandate. The applicant filed an application for leave for judicial review of this decision and it was denied on April 20, 2006.

[10] On June 11, 2004, the applicant filed an H&C application for an exemption from the requirement to file a permanent residence visa from outside Canada. On January 9, 2008, in response to a request for updated information on her circumstances, the applicant filed additional submissions. These latter submissions described the applicant's immigration history, economic establishment and community involvement in Canada and close relationship with her son. The submissions also cited documentary evidence on country conditions in support of the claim that the applicant would face unusual and undeserved hardship if returned to Grenada. This included evidence of widespread poverty, high rates of unemployment and lack of access to education. The submissions also stated that the impact of hurricanes in 2004 and 2005 on existing gender inequities would magnify the hardship faced by the applicant should she return to Grenada. Finally, a summary of the family violence that the applicant suffered at the hands of her mother and cousin when she lived in Grenada was also included.

[11] In a letter dated March 17, 2008, the applicant filed additional submissions to support her H&C application. This consisted of a letter from Dr. Ellen Fantus, a registered psychologist, assessing the applicant's son. Dr. Fantus acknowledged the close relationship between mother and son, stating that the applicant was not only a parent but also her son's best friend. The applicant's son was having some social problems at school, leading to declining grades, and the psychologist recommended that he attend a summer camp program and social skill groups in the community.

[12] In response to a request for an additional update on the applicant's current situation, the applicant filed further submissions in a letter dated February 9, 2010. These submissions stated that the H&C grounds outlined in the previous letter of January 2008 still existed and largely reiterated the applicant's case history, social establishment in Canada and factors related to links with family members.

[13] On October 27, 2010, the applicant submitted an application for a pre-removal risk assessment (PRRA).

Officer's Decision

[14] In a letter dated April 6, 2011, the officer denied the applicant's permanent residence application from within Canada on H&C grounds.

[15] In the notes to file that form part of the decision, the officer noted the number of materials in the assessment that were considered, including the:

- request for exemption from the permanent resident visa requirement;
- supplementary submissions made up to November 12, 2010;
- H&C submissions and cases;
- PRRA application and submissions;
- RPD's reasons for decision; and
- documentary evidence obtained from independent research.

[16] The officer acknowledged that a positive H&C decision is an exceptional response to a particular set of circumstances and that the onus is on the applicant to satisfy the officer that her personal circumstances, including the best interests of any affected children, are such that the hardship of having to obtain a permanent resident visa from outside Canada would be unusual or underserved or disproportionate.

[17] Turning to the risk factors, the officer noted that the same allegations of risk were put forth in both the applicant's refugee claim and her PRRA application. The officer also highlighted the lower threshold in H&C assessments as opposed to PRRAs. The officer then acknowledged the risk factors on which the applicant's H&C application was based, namely: hardship or sanctions upon return to Grenada, establishment in Canada and best interests of her son.

[18] The first risk factor was based on the applicant's claims that if returned to Grenada she would face hardship at the hands of her cousin who had abused her and molested her for many years and had threatened to kill her if she went to the police. This was allegedly her reason for coming to Canada in 1990 and for later filing a refugee claim to the RPD in 2005. After briefly reviewing the RPD's finding, the officer reviewed documentary country evidence on Grenada and found that individual rights are protected, the State is attempting to, and has somewhat succeeded in, improving the situation of violence against women and Grenada is a democratic country with a functioning judiciary and police. The state has also begun addressing corruption. The officer found insufficient evidence of the applicant being targeted or threatened and insufficient evidence that she would not be able to obtain state protection should she seek it.

[19] Turning to the question of establishment, the officer acknowledged that the applicant had been in Canada for approximately 20 years. Between 1993 and 2005, she was employed as a cleaner. When her employer moved away in 2005, the loss of her job caused her some stress and she has since been receiving social assistance. However, as no medical evidence was submitted and as the country evidence showed that facilities were available for mental health patients in Grenada, the officer found that the applicant would not suffer hardship if required to deal with her medical conditions in Grenada.

[20] The officer noted that the applicant had enrolled as a full-time student in the Project Read literacy program and was developing reading, writing, computer technology and other skills. In addition, the applicant was involved in her community with her church and associated committees. The officer acknowledged the applicant's good civil record, but noted that no evidence was submitted on her fiscal management in Canada. In summary, as her prolonged stay in Canada had been within her control, the officer found insufficient evidence to support a finding that the applicant was so integrated into Canadian society that departure would cause unusual or undeserved or disproportionate hardship.

[21] With respect to the best interests of the child, the officer acknowledged the evidence that the applicant's Canadian-born son was well-established in his school in Ontario. However, although not determinative, the officer noted that no progress reports or reference letters from his teachers had been provided. Further, although evidence of a visit with a registered psychologist was submitted, the officer noted that there was no evidence that the child received ongoing counselling. The psychologist's report mentioned that the child had a stepbrother living in Ohio; however, no

evidence was submitted to suggest that the siblings maintained a relationship. In addition, the evidence suggested that the child had only recently begun having a real relationship with his father.

[22] The officer acknowledged the applicant's submissions that the child would be deprived of a meaningful relationship with his father if sent to Grenada and conversely be deprived of a meaningful relationship with his mother if she was sent back while her son remained in Canada with his father. However, the officer noted Grenada's commitment to children's rights and welfare, free education and English being one of the official languages. Further, as a citizen of both Canada and Grenada, the officer found that there was no legal obstacle to the child residing in Grenada. Therefore, although it is in the best interests of most children to remain with the parents, the officer found that it would be a parental decision as to which parent the child would remain with. Based on the evidence, the officer did not find that there would be a significant negative impact on the child if the applicant relocated to Grenada.

[23] Finally, the officer found that although the applicant had been away from her home country since 1990, the fact that she was a citizen, had family there and that her new skills were transferable to Grenada, supported a finding that she would be able to re-establish there.

[24] In summary, the officer highlighted that the H&C process is not designed to eliminate all hardship. It is designed to provide relief from unusual, undeserved or disproportionate hardship. Although a return to Grenada might cause hardship, the officer was not persuaded on the evidence before it that the ensuing hardship would be unusual, undeserved or disproportionate.

Issues

[25] The applicant submits the following points at issue:

1. Whether the officer ignored evidence and failed to have regard to the totality of the evidence?

2. Whether the officer failed to conduct an adequate assessment of the best interests of the child directly impacted by the decision?

3. Whether the officer applied the wrong test when assessing risk and/or hardship in the applicant's H&C application?

[26] I would phrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer ignore evidence in assessing the H&C application?

3. Did the officer conduct an inadequate analysis of the best interests of the child impacted by the decision?

4. Did the officer apply the wrong test in assessing risk or hardship?

Applicant's Written Submissions

[27] The applicant submits that the officer failed to conduct any assessment of two of the primary hardship factors put forward in her application, namely, the abuse suffered by the applicant at the hands of her mother; and the impact that Hurricane Ivan, which struck in 2004, and subsequent hurricanes in 2005 would have on her attempts to reintegrate into life in Grenada.

[28] The officer's lack of analysis of the mother's abuse was especially egregious as it directly contradicted the officer's finding that the applicant would be able to rely on support from her family if returned to Grenada. The applicant submits that this was patently unreasonable. The applicant also submits that the officer failed to consider the country evidence that the destruction caused by the hurricanes had created a specific gendered impact that marginalized Grenadian women and their children both socially and economically.

[29] Based on the officer's findings, the applicant submits that a reasonable inference can be drawn that these hardship factors were ignored by the officer. This failure to deal with primary submissions, which were supported by several references on the record, is a reviewable error.

[30] The applicant also submits that the officer did not conduct an adequate analysis of the best interests of the applicant's son by applying the wrong test and making unreasonable findings in light of the evidence.

[31] The applicant submits that the jurisprudence requires an officer to be "alert, alive and sensitive" to, and not minimize the best interests of a child who may be adversely affected by their decision. This is a separate analysis from considering whether there is an "unusual, undeserved or disproportionate hardship". Therefore, the officer erred in his decision by considering whether the child would suffer "unusual, undeserved or disproportionate hardship". Rather, the officer should have considered whether removal would be in his best interest and how these interests relate to other hardship factors assessed in the application.

[32] The applicant also submits that the officer made unreasonable findings based on the evidence before it. These findings demonstrate that the officer was not alert, alive and sensitive to the best interests of the child. The applicant submits that there was no evidence to suggest that the child would remain in Canada should his mother be removed. Rather, all the evidence, including the fact that the mother had sole custody as well as the reported dependence of the son on his mother, indicated that he would leave Canada with his mother if she was removed. There would therefore not be any parental decision, as stated by the officer, as it was certain that the child would stay with his mother. As the officer failed to realize this, the officer did not consider the financial repercussions of the mother and child being removed to Grenada. This would include both the economic difficulties caused by the aftermath of the recent hurricanes and the loss of court ordered support payments from the father due to a lack of enforcement mechanism for an Ontario court decision in Grenada.

[33] The applicant submits that the Officer erred in law by applying the wrong test when assessing risk in her H&C application. Rather than assessing the risk according to the tests under section 96 and 97 of the Act, the officer should have conducted a broader, more holistic assessment, with regard to public policy considerations and the best interests of any child impacted by the decision. However, in the decision, the applicant submits that the officer made very similar findings to those made in her assessment on risk in the PRRA decision. This was problematic because, unlike a PRRA application or a refugee claim, state protection is not intended to be a determinative factor in an H&C application. The applicant submits that the officer should have assessed whether it would be undue emotional hardship to force the applicant to re-enter an environment wherein she was previously repeatedly abused and would potentially have to seek redress from the authorities to

avoid further assaults. In the decision, the officer failed to question whether, despite the existence of protection from harm, the applicant's circumstances on removal nonetheless warranted H&C relief.

Respondents' Written Submissions

[34] The respondents submit that there is no right or wrong answer to an H&C application. As long as the officer applies the proper principles and considers and assesses all of the evidence, including evidence pertaining to the best interest of the child, the decision should not be set aside. The appropriate standard of review for H&C decisions is reasonableness.

[35] The respondents highlight basic principles that they submit must be considered in assessing the officer's decision. First, no one is entitled to a positive H&C decision. These decisions are highly discretionary and as long as the officer fairly considers the relevant evidence and makes a reasoned decision, the decision cannot be faulted. Further, the Minister's discretionary power to grant an exemption on H&C grounds from the requirement that permanent resident applications be filed from abroad is an exceptional remedy.

[36] The respondents also submit that the H&C process is not designed to eliminate any kind of hardship but rather to provide applicants relief from unusual and undeserved or disproportionate hardship. Applicants bear the burden of satisfying the high threshold of demonstrating that they would suffer such hardship if required to apply from abroad. The hardship must be greater than that which would arise from having to leave after having been in place for a period of time.

[37] The respondents submit that the CIC manual entitled “Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds” (IP5) provides that positive H&C applications may be granted to applicants who remain in Canada without status if this is due to circumstances beyond their control. However, an applicant that remains in Canada illegally is not considered in either IP5 or established jurisprudence as a person doing so due to circumstances beyond their control. Finally, an officer’s reasons should be read as a whole, not microscopically so as to find errors therein.

[38] Turning to the case at bar, the respondents submit that the officer did appropriately consider and weigh all of the information pertaining to the applicant and her son. This included both the evidence favouring the applicant’s position and also an acknowledgment by the officer that the following evidence was missing:

Medical evidence, including evidence of treatment, to support her claims that she suffered from mental illness;

Documentary evidence, such as bank accounts or tax information, to support her assertion that she was financially stable; and

Evidence, such as progress reports or letters from teachers, to support her assertion that her son was well integrated in his school.

[39] The respondents also submit that the applicant’s argument that the officer failed to consider both her abusive mother and the aftermath of the hurricanes is without merit. These issues were not put forth as primary hardship factors in the applicant’s submissions from January 2008 or February 2010. These latter submissions spoke more generally about the difficulty of returning to Grenada

after being away for twenty years and the possibility of having to face the applicant's mother and cousin.

[40] The respondents submit that the officer considered the evidence and submissions, including the previous decision by the RPD which acknowledged the applicant's previous testimony that she no longer had reason to fear her mother. The respondents also submit that it was open for the officer not to consider that the abuse suffered by the applicant as a child was indicative that she would suffer undue, undeserved or disproportionate hardship should she return as an adult. Finally, Hurricane Ivan occurred in 2004, many years before the 2011 decision and this factor was also not highlighted as particularly important in the applicant's submissions. The officer therefore did not err in not specifically addressing the hurricane or its aftermath on the country.

[41] The respondents note that there is a presumption that a tribunal has considered all the documents filed before it, even where all the materials are not explicitly mentioned in the reasons. In this case, the respondents submit that the information on the abusive mother and hurricane were not of such important or central nature to the application that they necessitated specific mention by the officer.

[42] The respondents submit that the officer properly considered the best interests of the child and this led to a reasonable conclusion that the best interests did not warrant an exemption in this case. The respondents refer to jurisprudence which they say states that although the applicant and her son feel it would be in his best interests for the mother and son to stay together, this fact alone is not determinative of the issue. Further, the officer's use of "unusual, underserved or

disproportionate hardship" in this analysis did not constitute a reason to overturn the decision where the officer still properly considered and reflected upon the child's best interest.

[43] Finally, the respondents highlight the fact that the issue of best interests of the child is not determinative of H&C decisions. Once an officer has identified and defined the interests of the child, he or she must determine what weight to give it based on the circumstances of the case. In this case, the officer did not err by ignoring any relevant evidence or considering any irrelevant evidence.

[44] The respondents highlight the fact that the applicant relied on similar evidence and submissions in both her PRRA and H&C applications. It was therefore inevitable that there would be some overlap in the decisions on the analysis of this evidence. It is established jurisprudence that an officer may adopt factual findings from the PRRA decision to the analysis of an H&C application.

[45] In summary, the respondents submit that the applicant is essentially arguing that the officer could only have come to one correct answer in assessing the applicant's H&C application. However, H&C decisions are discretionary, and the respondents submit that the applicant has failed to demonstrate that the officer committed a reviewable error in its decision.

Applicant's Written Reply

[46] In reply, the applicant submits that contrary to the respondents' submissions, family abuse and the hardships associated with the hurricane aftermaths were emphasized as primary hardship factors in both her 2008 and 2010 submissions. The applicant notes that the respondents conceded that the officer did not consider the abuse she suffered in Grenada as her reason for coming to Canada. The failure to consider such an elemental aspect of the applicant's circumstances renders the officer's decision incomplete and unreasonable. Further, the applicant submits that the officer's finding that the applicant's transition back into Grenadian society would be eased by the presence of her family there is indicative of a complete lack of care in reviewing the file in light of the evidence of abuse at the hands of her family. The jurisprudence clearly provides that an officer cannot ignore evidence.

[47] With regards to the analysis of the best interests of the child, the applicant acknowledges that although particular words should not be determinative of the substance of the actual analysis, both the form and the substance of the officer's analysis on this factor were inadequate. Further, the officer had a duty to provide adequate and sufficient reasons on this point. However, in this case, the officer's analytical analysis on this factor was limited to the last two paragraphs of the section on best interests of the child in the decision. The other paragraphs were merely recitations of the evidence and the applicant's submissions. This was therefore not a reasoned analysis that demonstrated that the officer was alert, alive or sensitive to the child's interests.

Analysis and Decision

[48] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[49] It is established law that assessments of an immigration officer's decision on allowing an application for permanent residence from within Canada on H&C grounds is reviewable on a standard of reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] FCJ No 713 at paragraph 18; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193, [2009] FCJ No 1489 at paragraph 14; and *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717, [2010] FCJ No 868 at paragraph 13).

[50] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). As the Supreme Court held in *Khosa* above, "it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence" (at paragraph 59).

[51] With respect to the additional affidavit filed by the applicant, I am not prepared, based on the facts of this case, to consider it on this application for judicial review. The affidavit is not necessary and it was not before the officer making the decision. Generally speaking, the record for a judicial review application consists of the material before the officer.

[52] I propose to deal first with Issue 3.

[53] **Issue 3**

Did the officer conduct an inadequate analysis of the best interests of the child impacted by the decision?

Extensive jurisprudence has developed on the assessment of the best interests of children under subsection 25(1) of the Act. Decisions have been found to be unreasonable where the interests of children are minimized in a manner inconsistent with Canada's H&C tradition (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraphs 73 and 75). The assessment must be done carefully and sympathetically in a manner that demonstrates that the officer has been alert, alive and sensitive to the best interests of the affected children. It is not sufficient to merely state that the interests have been taken into account or to simply refer to the children's interests or to the relationships with the children involved (see *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 at paragraph 32). The children's interests must be well identified and must be defined and examined with a great deal of attention (see *Hawthorne* above, at paragraph 32; and *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] FCJ No 457 at paragraphs 12 and 31).

[54] The onus is on the applicant to provide evidence of the adverse effects on the children should the applicant leave. The officer must consider any such evidence submitted (see *Liniewska v Canada (Minister of Citizenship and Immigration)*, 2006 FC 591, [2006] FCJ No 779 at paragraph 20). Reasons of family reunification alone are not sufficient. Applicants must demonstrate that applying for permanent residency from abroad would expose them to unusual, undeserved or disproportionate hardship (see *Castillo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 409, [2009] FCJ No 543 at paragraph 21).

[55] Further, although an important factor, there is no *prima facie* presumption that the children's interests should prevail and outweigh other considerations (see *Legault* above, at paragraph 13; and *Okoloubu v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 326, [2008] FCJ No 1495 at paragraph 48). It is up to the officer to determine what weight to give the interests of the affected children (see *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285, [2011] FCJ No 1568 at paragraph 57). Finally, as stated by the Federal Court of Appeal in *Kisana* above, at paragraph 24: “an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result”.

[56] In this case, the applicant submits that the officer erred in its assessment of the best interests of the applicant’s Canadian-born son. In the decision, the officer acknowledged the applicant’s son’s establishment in school. However, the officer noted the following absences from the H&C application:

> No progress reports or reference letters from the son’s teachers;
>
> No evidence of ongoing counselling; and

No evidence of a maintained relationship with the son's stepbrother living in the United States.

[57] The officer also noted that the son and his father had only recently begun having a relationship. This relationship would likely suffer if the son was sent to Grenada; similarly, if the son stayed in Canada, his relationship with his mother would likely suffer. It would therefore necessitate a parental decision as to which parent the child would remain with. As the country evidence showed that the state was committed to free education and children's rights and welfare and the English language, the son's native tongue, was also an official language in Grenada, the officer did not find that the applicant's removal would be a significant negative impact on the child that would amount to unusual and underserved or disproportionate hardship.

[58] The applicant submits that the officer applied the wrong test in coming to its decision on this issue. Rather than considering whether the child would suffer "unusual, undeserved or disproportionate hardship", the officer should have considered whether removal would be in his best interest and how these interests relate to other hardship factors assessed in the H&C application. Conversely, the respondents submit that the fact that the applicant and her son felt that it would be in the best interests of the child that the son stay with his mother in Canada was not determinative of the issue. In addition, the officer's use of the words "unusual, undeserved or disproportionate hardship" did not constitute a reason to overturn the decision where the officer still properly considered and reflected upon the child's best interests.

[59] It is established jurisprudence that a “best interests” analysis does not require an applicant to establish unusual, undeserved or disproportionate hardship in relation to the best interests of any affected child (see *Sinniah* above, at paragraph 59; *Arulraj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 529, [2006] FCJ No 672 at paragraph 14; and *Hawthorne* above, at paragraph 9).

[60] As mentioned above, the “best interest analysis” requires an officer to demonstrate that he or she is alert, alive and sensitive to the best interests of the children under consideration. In *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, [2008] FCJ No 211, Mr. Justice Douglas Campbell described the meaning of this requirement.

[61] With regards to being alert, the officer “must demonstrate an awareness of the child’s best interests by noting the ways in which those interests are implicated” (see *Kolosovs* above, at paragraph 9). Examples of relevant factors include:

1. the age of the child;
2. the level of dependency between the child and the H&C applicant;
3. the degree of the child's establishment in Canada;
4. the child's links to the country in relation to which the H&C decision is being considered;
5. medical issues or special needs the child may have;
6. the impact to the child's education; and
7. matters related to the child's gender.

[62] Mr. Justice Campbell described the meaning of being “alive to a child’s best interests” as the officer demonstrating “that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably determined” (see *Kolosovs* above, at paragraph 11).

[63] Finally, with regards to the “sensitivity” requirement, Mr. Justice Campbell explained (see *Kolosovs* above, at paragraph 12):

> […] To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief. […]

[64] Returning to the decision, it is notable that the officer draws little attention to the close relationship between the applicant and her son that was clearly expressed throughout the applicant’s H&C submissions. The officer does consider the child’s degree of establishment in Canada, limited links to Grenada, medical issues and impacts to his education. On these last two issues, the officer notes the lack of evidence, notably the lack of ongoing counselling and lack of progress reports or reference letters from the child’s teachers. Thus, the officer was somewhat alert to the child’s best interests.

[65] However, the decision is lacking in showing that the officer was alive to the child’s best interests. The evidence suggests that the child only recently began a real relationship with his father, and he continues to rely heavily for emotional support on his mother, described as his “best friend”, in the psychologist’s report. Aside from saying that the decision on where the child will live is a

parental decision, the officer does not delve into the child's best interests as they relate to this decision. In addition, the officer does not clearly articulate the suffering the child would face from a negative decision and his corresponding separation from either his father or perhaps more importantly, the applicant, his mother.

[66] In addition, as submitted by the applicant, the totality of the evidence suggested that if the applicant is deported, the child would leave Canada with her. Although the country evidence suggest stabilizing conditions in Grenada, the fact that the applicant had been abroad for twenty years, had not remained in contact with family, had acquired new skills in Canada but had not yet put them into practice (she remains a full-time student) and would likely face difficulties in obtaining continued parental support when outside Canada suggests that the applicant and her son would face significant economic difficulties in Grenada. In *Hawthorne* above, the officer's failure to consider the financial implications for the child of her mother's removal was found to be in part indicative of the officer's failure to be alert, alive and sensitive to the child's best interests (at paragraph 10).

[67] Finally, this case is distinguishable from *Pannu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356, [2006] FCJ No 1695. In *Pannu* above, the officer used similar language to this case, stating that (at paragraph 38):

> I also find that the applicant has not established that the general hardships of relocating and resettling to another country would have a significant negative impact to her daughter that would amount to unusual and undeserved or disproportionate hardship.

[68] However, the officer's decision in *Pannu* above, was upheld as the officer in that case found that the child would adapt to India given that she spoke Punjabi, had been attending Punjabi pre-school and had been exposed to Punjabi culture through her Sikh community in Surrey. No similar cultural ties were alleged in this case, rendering the applicant's son's ability to adjust to Grenada likely to be difficult.

[69] As such, I find that the officer did not adequately weigh the child's best interests in assessing the H&C application. This factor should have been properly assessed and then weighed against the other factors such as public policy considerations (see *Mangru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 779, [2011] FCJ No 978 at paragraph 27). This is similar to Mr. Justice Michael Phelan's finding in *Sahota v Canada (Minister of Citizenship and Immigration)*, 2011 FC 739, [2011] FCJ No 927 at paragraph 8:

> […] While the ultimate question in an H&C application is "disproportionate hardship", the "best interests" analysis operates as a separate consideration. The Officer's failure to keep the two issues distinct results in an unreasonable assessment of the children's best interests.

[70] I therefore find that the officer's assessment of the best interests of the affected child was unreasonable and the decision should be set aside for this reason.

[71] Because of my conclusion on Issue 3, I need not deal with the remaining issues.

[72] The application for judicial review is allowed and the matter is referred to a different officer for redetermination.

[73] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001 c 27

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.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
. . .	. . .
(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;	b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3483-11
STYLE OF CAUSE:	PAULA GLENDA SYLVESTER - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 13, 2011
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	January 5, 2012

APPEARANCES:

Geraldine Sadoway	FOR THE APPLICANT
Catherine Vasilaros	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Parkdale Community Legal Services Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS