Federal Court  Cour fédérale

Date: 20120213

Docket: IMM-4062-11

Citation: 2012 FC 206

Ottawa, Ontario, February 13, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FENG CE SUN and KAI LAU SUN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of a designated Visa Officer at the Canadian Embassy in Beijing (Officer), dated 31 March 2011 (Decision). The Officer refused the Applicants' request for a Humanitarian and Compassionate (H&C) exemption under subsection 25(1) of the Act from paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (Regulations).

BACKGROUND

[2] The Principal Applicant, Feng Ce Sun, is a citizen of the People's Republic of China (PRC). He is seventeen years old and currently lives with his mother, grandmother, grandfather, uncle, aunt, cousin, and younger brother in the PRC. The Secondary Applicant, Kai Lau Sun, is the Principal Applicant's biological father and currently lives in Oakville, Ontario. He has been a Canadian citizen since 24 August 1994.

[3] The Secondary Applicant came to Canada as a permanent resident in 1999. At that time, he did not know that he and the Principal Applicant were father and son. Because he was unaware of his relationship to the Principal Applicant, the Secondary Applicant did not declare the Principal Applicant on his application for permanent residence.

[4] The Secondary Applicant had conducted an affair with the Principal Applicant's mother in the past, which ended in 1993 when she married another man. Shortly after her marriage, she conceived. In November 2009, the Principal Applicant's mother contacted the Secondary Applicant and told him they had a son together. At that time, the Principal Applicant was fifteen years old. At first, the Secondary Applicant refused to believe he had a son, but a DNA test in June 2010 confirmed their relationship. The Secondary Applicant accepted the Principal Applicant as his son and began to build a relationship with him. In 2010, the Secondary Applicant spent several months in the PRC visiting the Principal Applicant. During that period, they spent time together on weekends and during the Principal Applicant's vacation from school. While he was visiting the PRC, the Secondary Applicant bought the Principal Applicant clothing and gave him 70,000 Yuan – approximately $11,000.

[5] On 25 January 2011, the Secondary Applicant applied to sponsor the Principal Applicant to Canada as a member of the family class under subsection 12(1) of the Act, section 116 of the Regulations, and paragraph 117(1)(*d*) of the Regulations (Sponsorship Application). After the Sponsorship Application was paper screened by the Immigration Section at the Beijing Embassy, both Applicants were convoked for interviews with the Officer. The Officer conducted both interviews on 31 March 2011; she interviewed the Principal Applicant first, and then interviewed the Secondary Applicant. After she interviewed the Secondary Applicant, the Officer gave him her Decision orally. She said that she was not satisfied that H&C considerations existed in the Applicants' case which warranted an exemption. The Officer also sent the Applicants a letter on 31 March 2011.

DECISION UNDER REVIEW

[6] The Decision consists of the letter sent to the Applicants on 31 March 2011 (Refusal Letter) and the CAIPS notes on the Applicants' file.

[7] In the Refusal Letter, the Officer reviewed paragraph 117(9)(*d*) of the Regulations, which reads as follows:

117 […] (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme 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	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident

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.	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.
[…]	[…]

[8] The Officer noted that the Secondary Applicant had not declared the Principal Applicant on his application for permanent residence in 1999; the Principal Applicant was not examined at that time. The Officer found that the Principal Applicant was excluded from the family class by paragraph 117(9)(*d*) of the Regulations.

[9] The CAIPS notes indicate that, at the interview, the Secondary Applicant said that he did not know about the Principal Applicant until 2009, which was why he did not declare the Principal Applicant on his application. The Officer found that the Secondary Applicant's reasons for wanting to be reunited with the Principal Applicant were reasons which did not go beyond any parent's wish to be reunited with a child. She found that these reasons could have been foreseen when paragraph 117(9)(*d*) was enacted.

[10] At the interview, the Principal Applicant had said that he lived with his mother and grandmother in the PRC and that both of them were unemployed. He had also said that they took care of his grandfather, who was ill, and that the family was in a difficult financial situation. He further said that his uncle, aunt, and cousin lived in the same house with them, and that he shared a room with his brother and cousin. The Officer noted that the Principal Applicant was seventeen years old, almost an adult, and was bright and energetic. She found that he appeared to be well taken

care of by his family in the PRC, did well in school, and had been receiving financial support from the Secondary Applicant. The Officer also found that the main reason why it was difficult for the Secondary Applicant to be united with the Principal Applicant in the PRC was that the Secondary Applicant had business in Canada.

[11] In the CAIPS notes, the Officer wrote that, although the Secondary Applicant had visited the Principal Applicant in the PRC for nearly six months, the Applicants had not spent much time together. She found that the Secondary Applicant had not made much of an effort to take care of the Principal Applicant on a daily basis. In his interview, the Secondary Applicant had said that he spent almost a whole month with the Principal Applicant, including a trip to Dalian – a city on the southern coast of the PRC – and that they had attended a spring festival together. The Secondary Applicant had also said at the interview that, if the Sponsorship Application were successful, he and the Principal Applicant would get an apartment together in the PRC, which would make it easier for him to be involved in the Principal Applicant's life. The Officer said that it was not clear why the Secondary Applicant's decision to get an apartment with the Principal Applicant depended on the outcome of the Sponsorship Application.

Conclusion

[12] The Officer concluded that, based on the information in the Sponsorship Application and taking into account the Principal Applicant's best interests, she was not satisfied that an H&C exemption was warranted. Without an exemption, the Principal Applicant was permanently excluded from the family class under paragraph 117(9)(*d*) of the Regulations. After reviewing subsection 11(1) of the Act, the Officer concluded that she was not satisfied that the Principal

Applicant was not inadmissible or that he met the requirements of the Act. She therefore refused to issue him a permanent resident visa.

ISSUES

[13] The Applicants raise the following issues in this case:

- **a.** Whether the Officer's reasons are adequate;
- **b.** Whether the Decision is reasonable;
- **c.** Whether the Officer was alert, alive, and sensitive to the Principal Applicant's interests.

STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 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.

[15] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of

possible outcomes." The first issue in this case, whether the Officer provided adequate reasons, is to be analysed along with the reasonableness of the Decision as a whole.

[16] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39, the Supreme Court of Canada held that, when reviewing an H&C decision, "considerable deference should be accorded to immigration Officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language" (paragraph 62). Justice Michael Phelan followed this approach in *Thandal v Canada (Minister of Citizenship and Immigration)* 2008 FC 489, at paragraph 7. The Federal Court of Appeal found at paragraph 18 of *Kisana v Canada (Minister of Citizenship and Immigration)* 2009 FCA 189 that the standard of review on H&C determinations is reasonableness. The standard of review on the second issue is reasonableness.

[17] In *Hawthorne v Canada (Minister of Citizenship and Immigration)* 2002 FCA 475, the Federal Court of Appeal held at paragraph 6 that

> the officer's task [in an H&C determination] is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

[18] Further, the Federal Court of Appeal held in *Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 at paragraph 12 that, once an officer has identified and defined the best interests of the child, it is up to her to determine what weight those interests must be given in the circumstances. Where the best interests of a child lie is a question of fact which, following

Dunsmuir, above, at paragraph 53, will attract a standard of reasonableness. The standard of review on the third issue is reasonableness.

[19] 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 *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 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."

STATUTORY PROVISIONS

[20] The following provisions of the Act are applicable in this proceeding:

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;
…	**…**
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	**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.

and meets the requirements of this Act.	
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
…	**…**
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.

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

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117.** (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

…	…
(*b*) a dependent child of the sponsor;	*b*) ses enfants à charge;
…	…
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme 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.

ARGUMENTS

The Applicants

The Reasons are Inadequate

[22] The Applicants argue that the reasons they were given do not allow them to understand why the Officer denied their request for an H&C exemption. They do not know why the grounds they advanced were not sufficient to merit an exemption from paragraph 117(9)(*d*) of the Regulations. In *Via Rail Inc v National Transportation Agency*, [2000] FCJ No. 1685 (FCA), the Federal Court of Appeal held at paragraph 22 that simply reciting submissions and conclusions is not enough to meet

the requirement for reasons. The Applicants say that, because the best interests of a child are implicated, it is not enough to simply list the ways that a child will be affected by the Decision (see *Guadeloupe v Canada (Minister of Citizenship and Immigration)* 2008 FC 1190).

[23] The Officer simply summarized the facts established by the Applicants' submissions and the interviews she conducted. She did not weigh the factors she was required to weigh and her reasons do not show that she was alert, alive, and sensitive to the Principal Applicant's interests as required by *Baker*, above, at paragraph 75.

The Decision is Unreasonable

[24] Under subsection 25(1) of the Act, the Respondent may grant an exemption from any provision of the Act or Regulations which, if it were applied in a particular case, would result in unusual and undeserved or disproportionate hardship. The Applicants say that the exclusion under paragraph 117(9)(*d*) of the Regulations was meant to capture only dishonest applicants. The Secondary Applicant was honest and candid in his application for permanent residence to the best of his knowledge at the time he applied. The Applicants point to *Baro v Canada (Minister of Citizenship and Immigration)* 2007 FC 1299 at paragraph 15, and argue that the Secondary Applicant's honest misrepresentation is of a kind which should generally be granted an exemption. They say that the only avenue for them to be reunited in Canada is an H&C exemption under subsection 25(1) of the Act.

[25] One of the purposes of the Act, as established by paragraph 3(1)(*d*), is to see families reunited in Canada. In this case, the Officer did not consider whether this objective of the Act would be best served by granting or denying the Applicants' request for an H&C exemption. Because she

ignored the overall scheme of the Act, the Decision is unreasonable. The Applicants rely on *De Guzman v Canada (Minister of Citizenship and Immigration)* 2005 FCA 436, and also point to *Yu v Canada (Minister of Citizenship and Immigration)* 2006 FC 956, where Justice Michel Shore said at paragraphs 1 and 31 that

> The anatomy of humanitarian and compassionate grounds is based on exceptional criteria in a differently constituted framework. That framework is established to examine extenuating circumstances. It is Canada's unique response to the fragility of the human condition.
>
> […]
>
> The purpose of the Immigration legislation is to assist immigration, not hinder it by setting obstacles (*Hajariwala v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 79, [1988] F.C.J. No. 1021 (QL)). Furthermore, paragraph 3(1)(*d*) of IRPA, recognizing the fragility of the human condition in the separation of family members, clearly states that one of the objectives of the Act is to see that families are reunited in Canada.

The Decision was Based on an Error of Fact

[26] In the Refusal Letter, the Officer wrote that "your sponsor stated that the main reason why it is difficult for him to return to China [*sic*] to reunite with you is because he has business in Canada." Although the Secondary Applicant's business in Canada was a factor, it was not the only factor which made it difficult for him to be with the Principal Applicant in the PRC; the Secondary Applicant also had significant family obligations in Canada, which he pointed out in his submissions. When she looked only at the Secondary Applicant's business in Canada, the Officer fundamentally misapprehended the nature of the H&C request. This renders the Decision unreasonable.

The Officer made Improper Inferences

[27] The Applicants say that the Officer inferred that the Secondary Applicant can continue to give the Principal Applicant financial support from the fact that he has given the Principal Applicant money in the past. The Officer appears to believe that the Secondary Applicant's financial support will address the financial difficulties faced by the Principal Applicant and his family in the PRC. In their submissions to the Officer, the Applicants said that the Secondary Applicant is concerned that the money given to the Principal Applicant goes to care for his grandparents and not directly to him. The Officer's inference that the Principal Applicant will continue to receive financial support is flawed because neither of the Applicants has control over where the money goes.

[28] The Officer also inferred that, if he had truly wanted to support his son, the Secondary Applicant would have had the Principal Applicant live with him while he visited the PRC in 2010. The Officer drew this inference without taking into account that: when the Secondary Applicant visited the PRC, the Applicants had only recently met; the Principal Applicant attends school from 6:30AM to 9:30PM on weekdays; and the Applicants spent time together on weekends and during vacations. The Officer did not mention these facts, even though the Secondary Applicant repeatedly referred to them in his interview with her.

Conclusion

[29] The Decision does not show that the Officer was sensitive to or understood the Principal Applicant's interests. The Officer also did not appreciate the Applicants' position and how paragraph 117(9)(*d*) of the Regulations would actually affect them. If she had not made the errors

the Applicants have alleged, the Officer would have concluded that there were sufficient grounds to grant their request for an H&C exemption.

The Respondent

[30] The Respondent notes that the Secondary Applicant only learned of the Principal Applicant's existence when the Principal Applicant was seventeen years old. He also notes that the Principal Applicant is well taken care of in the PRC with the financial assistance of his father, and the financial assistance the Secondary Applicant provides addresses the financial difficulties which prompted the Principal Applicant's mother to inform the Secondary Applicant about their son.

The Reasons are Adequate

[31] The Officer's reasons show that she considered and weighed all the evidence and relevant factors, so they are adequate.

Paragraph 117(9)(*d*) is to have Strict Application

[32] The Respondent refers to *Adjani v Canada (Minister of Citizenship and Immigration)* 2008 FC 32 where Justice Edmond Blanchard had the following to say, at paragraphs 22 to 25, on paragraph 117(9)(*d*) of the Regulations:

> Parliament has the right to adopt immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. This it has done by enacting the IRPA: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paragraph 27. The IRPA and Regulations made pursuant to paragraphs 14(2)(*b*) and (*d*) thereof, set out a regulatory scheme that essentially controls the admission of foreign nationals to Canada (*Canada (Minister of*

Citizenship and Immigration) v. de Guzman, [2004] F.C.J. No. 1557, 2004 FC 1276 at paragraph 35).

Family reunification and the best interest of children are recognized as valid purposes under the IRPA and are to be considered when relevant. The legislation also has other purposes, one of which is the maintenance of the integrity of the Canadian refugee protection system. The Federal Court of Appeal had to consider whether paragraph 117 (9)(d) of the regulations was *ultra vires* the IRPA in *Azizi v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 2041, 2005 FCA 406. Justice Rothstein, writing for the majority stated the following at paragraphs 28-29 of his reasons:

> [28] Paragraph 117(9)(*d*) does not bar family reunification. It simply provides that non-accompanying family members who have not been examined for a reason other than a decision by a visa officer will not be admitted as members of the family class. A humanitarian and compassionate application under section 25 of the IRPA may be made for Mr. Azizi's dependants or they may apply to be admitted under another category in the IRPA.
>
> [29] Mr. Azizi says these are undesirable alternatives. It is true that they are less desirable from his point of view than had his dependants been considered to be members of the family class. But it was Mr. Azizi's misrepresentation that has caused the problem. He is the author of this misfortune. He cannot claim that paragraph 117(9)(*d*) is *ultra vires* simply because he has run afoul of it. (My emphasis)

The Court of Appeal has therefore decided that the impugned regulation is not *ultra vires* the IRPA particularly in cases where there is a misrepresentation to immigration authorities. Here, however, the Applicant did not know of his son's existence at the time of his application for permanent residence. He cannot, therefore, be said to have concealed this information or to have misrepresented his circumstances. In my view, it matters not whether non-disclosure is deliberate or not. The regulation is clear, paragraph 117(9)(*d*) makes no distinction as to the reason for which a non-accompanying family member of the sponsor was not disclosed in his application for permanent residence. What matters, is the absence of examination by an officer that necessarily flows from the non-disclosure. This interpretation is consistent with the

> findings of my Colleague, Justice Mosley in *Hong Mei Chen v. M.C.I.,* [2005] F.C.J. No. 852, 2005 FC 678, where the scope and effect of the impugned regulation were found not to be limited to cases of fraudulent non-disclosure. At paragraph 11 of his reasons, my learned colleague wrote, "... Whatever the motive, a failure to disclose which prevents the immigration officer from examining the dependent precludes future sponsorship of that person as a member of the family class."
>
> The provisions of paragraph 117(9)(*d*) of the Regulations are not inconsistent with the stated purposes and objectives of the IRPA. I am in agreement with the view expressed by Justice Kelen at paragraph 38 of his reasons in *de Guzman,* above, that "The objective of family reunification does not override, outweigh, supersede or trump the basic requirement that the immigration law must be respected, and administered in an orderly and fair manner." Further, in exceptional circumstances where humanitarian and compassionate factors are compelling, an applicant can seek, pursuant to s. 25(1) of the IRPA, a ministerial exemption to the statutory and regulatory requirements for admission to Canada. Such an application remains open to the Applicant. If successful, the Applicant could be reunited with his son. (*Chen,* above, at para. 18)

[33] The Respondent says that paragraph 117(9)(*d*) is not a bar to family reunification, but only operates to exclude applicants for permanent residence who have not been examined. The jurisprudence establishes that the reasons why an applicant has not been examined are unimportant and that 117(9)(*d*) operates as a strict bar to future sponsorship under the family class.

No Error of Fact or Improper Inferences

[34] The Respondent notes that H&C exemptions are exceptional and discretionary and are not designed to eliminate all hardship. Rather, they are directed at relieving unusual and undeserved or disproportionate hardship that may arise when applicants for permanent residence apply in the normal way. The Respondent says that the Applicants' submissions only amount to a disagreement with the Officer's conclusions and do not show actual errors of fact or improper inferences. He says

that the errors the Applicants have alleged arise from a microscopic reading of the Decision. Contrary to the Applicants' assertions, the Officer was aware of the Secondary Applicant's family and business obligations in Canada. The Applicants' disagreement with the Decision is not a proper ground for judicial review (see *Karanja v Canada (Minister of Citizenship and Immigration)* 2006 FC 574 at paragraph 8).

The Applicants' Reply

[35] The Applicants note that the Respondent has incorrectly stated in his argument that the Principal Applicant was seventeen years old when the Secondary Applicant found out they were father and son. The Principal Applicant was actually fifteen years old when this occurred. The Applicants say that age is important when considering what kind of relationship will develop between two people.

[36] Like the Officer, the Respondent has analysed the Applicants' relationship only in monetary terms. Although the Principal Applicant's mother may have contacted the Secondary Applicant about their son when she began to experience financial difficulties, this is irrelevant to the Applicants' relationship between the Applicants. The Applicants' actions show that their relationship was about more than monetary gain.

[37] Although he argues that the Officer's assessment of the Principal Applicant's best interests was reasonable, the Respondent has not given any examples of how she conducted this assessment. All the Officer did was to list the factors which were relevant to her analysis of the Principal Applicant's best interests, without actually balancing these factors.

[38] The Respondent has said that the Officer was aware of the Secondary Applicant's business and family obligations in Canada. Although the CAIPS notes show that the Secondary Applicant mentioned both of these obligations in his interview, the Applicants draw a distinction between recording answers and considering the facts they disclose. The Officer did not address the Secondary Applicant's family obligations in Canada, even though he raised them in his interview. Further, the Applicants say that the Respondent has not addressed the improper inferences they have alleged the Officer drew from the facts before her.

[39] The Applicants concede that the Principal Applicant is barred from the family class by paragraph 117(9)(*d*) of the Regulations. However, what this case is actually about is the Officer's treatment of their request for an H&C exemption. They say that not knowing about a child is an exceptional circumstance which was not meant to be caught by the paragraph 117(9)(*d*). Although theirs is a situation which seems to be appropriate for an H&C exemption, their request was refused based an unreasonable assessment and they were given inadequate reasons.

ANALYSIS

[40] In *Newfoundland and Labrador Nurses' Union*, above, at paragraphs 12 to 18, the Supreme Court of Canada recently provided guidance for dealing with the adequacy of reasons of administrative tribunals:

> It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That

> is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]
>
> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2004), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.

This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M.

Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the

> Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
>
> > When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[41] Allowing all the deference that the Supreme Court of Canada says is required, and looking at the whole context of the evidence, the Applicants' submissions and the process, I cannot determine the reasons why the Officer denied the requested exemption. I also cannot determine what the Officer took to be in the Principal Applicant's best interests. The Decision is nothing more than a recitation of facts with a conclusion tagged on. In what appears to be the summation paragraph of the Decision, the Officer simply lists factors related to the situation in the PRC. She does not mention any benefits of the Principal Applicant coming to Canada. In the end, we have no idea of what the Officer thinks the best interests of the Principal Applicant are and no analysis to support the conclusion. The Decision is unreasonable.

[42] It is well-established that an Officer must be "alert, alive and sensitive" to, and must not "minimize" the best interests of a child who may be adversely affected by their decision. See *Kolosovs v Canada (Minister of Citizenship and Immigration)* 2008 FC 165 at paragraph 8; *Baker*, above, at paragraphs 73 to 75; and *Owusu v Canada (Minister of Citizenship and Immigration)* 2004 FCA 38 at paragraph 5.

[43] This Court has also instructed that being "alert, alive and sensitive" to a child's best interests is a separate analysis from consideration of the threshold standards of "unusual, undeserved or disproportionate hardship". As Justice Robert Barnes said in *Shchegolevich v Canada (Minister of Citizenship and Immigration)* 2008 FC 527 at paragraph 12:

> It is clear that the Officer erred by requiring that Mr. Shchegolevich establish that the adverse effects of his removal upon his spouse and his stepson would be unusual, undeserved, or disproportionate. This standard is only to be applied to the assessment of hardship experienced by an applicant from having to apply for admission to Canada from overseas; it does not apply to the assessment of the best interests of a child affected by the removal of a parent.

[44] When assessing a child's best interests, an officer must establish: first what is in the child's best interest; second the degree to which the child's interests are compromised by one potential decision over another; and then, finally, in light of the foregoing assessment, determine the weight that this factor plays in the ultimate balancing of positive and negative factors assessed in the H&C application.

[45] There is no basic needs minimum which if met satisfies the best interests test. Furthermore, there is no hardship threshold such that if the circumstances of the child reach a certain point on that hardship scale only then will a child's best interests be so significantly negatively impacted as to warrant positive consideration. The question is not, "is the child suffering enough that his 'best interests are not being met'"? It is also not, "is the child surviving where he is?" The question at the initial stage of the assessment is, "what is in the child's best interests?"

[46] In *Baker*, Justice Claire L'Heureux-Dubé held that:

> for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be

> alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [emphasis added]

[47] In *Kolosovs*, above, at paragraph 12, Justice Douglas Campbell described what it means to be "sensitive" to the best interests of children in the following terms:

> It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. 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. [emphasis added]

[48] The Decision in the present case shows no awareness of what is required in any such analysis, so it is unreasonable and incomprehensible, and must be returned for reconsideration.

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

JUDGMENT

THIS COURT'S JUDGMENT is that

1. 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.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mario D. Bellissimo	APPLICANTS
Knatidja Moloo-Alam	RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group Ormston, Bellissimo, Rotenberg Barristers & Solicitors Toronto, Ontario	APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	RESPONDENT