Federal Court  Cour fédérale

Date: 20140627

Docket: IMM-2401-13

Citation: 2014 FC 629

Ottawa, Ontario, June 27, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DANIEL GAMEZ BLAS
ROSA MARIA MAR ALVARADO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of a Senior Immigration Officer [Officer] dated March 11, 2013 [Decision], which refused the Applicants' application for an exemption on

humanitarian and compassionate grounds under s. 25(1) of the Act from the requirement to apply for a permanent resident visa from outside of Canada [H&C Application].

BACKGROUND

[2] The Applicants are common law spouses and citizens of Mexico. The male Applicant [Mr. Blas] first came to Canada in June 2009 because he was threatened by an individual who was involved in improper monetary transactions in his family's business. The female Applicant [Ms. Alvarado] visited him in July 2009 and August 2010, and then came to Canada permanently in December 2010 after she too began to receive threats. They have a Canadian-born daughter, Isabella, who was almost two years old at the time of the Decision. The Applicants filed a claim for refugee protection in January 2012, which has yet to be determined, and submitted their H&C Application on June 14, 2012. They claimed they would face hardship in Mexico based on individual threats and country conditions that include pervasive violence and poverty, and that it is in the best interests of their daughter to remain in Canada where she is shielded from this violence and poverty.

[3] The Applicants come from prosperous families in Mexico and hold university degrees. They say they had a good life in Mexico before their problems began. Mr. Blas began working in his family's steel foundry business in 2007, and discovered financial improprieties. He confronted the individual involved and was threatened by him. Things escalated to the point that Mr. Blas relocated first to his parents' home, and then to his girlfriend's parents' home, but he felt he was putting their lives in danger and eventually fled to Canada. He says he tried to get

help from the authorities in Mexico but could not get a satisfactory response because of high levels of police corruption.

[4] While these events form part of the H&C Application, that Application was based mainly upon the hardship the Applicants would experience from general country conditions in Mexico, where they say widespread violence and poverty and the corruption of police and security forces pose "significant dangers to anyone currently living in that country." The Applicants submitted excerpts from 283 articles and reports addressing these country conditions. They emphasized that if they are required to return to Mexico, their Canadian-born daughter will have to go with them, and will be exposed to fear and violence that she would never experience in Canada, her country of nationality. They say her interests are best served by remaining in Canada, along with her parents.

[5] Mr. Blas worked as a casual labourer during his first two years in Canada, and had been working as a house painter for about a year at the time of the H&C Application. He obtained a work permit in May 2012. Ms. Alvarado cares for their daughter at home. The family are involved in their community, and submitted letters from friends and co-workers providing positive character references and expressions of support.

[6] The Officer considered all of these factors and determined that a visa exemption allowing the Applicants to apply for permanent residence from within Canada was not justified based on humanitarian and compassionate grounds.

DECISION UNDER REVIEW

[7] The Officer began by considering the Applicants' establishment in Canada, noting that Mr. Blas is employed, they have friends who provided positive character references, and they attend church. The Officer observed that "[i]t appears they have made efforts to integrate into Canada and become self supporting." Apart from a letter from a co-worker confirming Mr. Blas' employment, the Applicants submitted little information about their financial situation, and the Officer noted that "I cannot give positive consideration to Daniel having worked without permission for the two years before he received a work permit." The Officer concluded that the Applicants were "a young family who have made some efforts to settle into their community and become established," but ultimately did not find that they had "attained an exceptional degree of establishment, or are integrated to an extent such that leaving Canada would cause them to suffer unusual and underserved or disproportionate hardship."

[8] The Officer next considered the best interests of the Applicants' child. The Officer observed that, given her young age, she would likely "adapt to living with her parents and extended family in Mexico without great difficulty," and would have little difficulty learning Spanish as it was the first language of her parents. The Officer observed that the Applicants "have a strong network of family and friends to draw on for support as they re-adjust to life in Mexico, and this will be of significant benefit for the well-being of their daughter." While acknowledging that the employment situation in the Applicants' home state in Mexico is "dismal," the Officer noted that they have university degrees and solid job experience and had been able to support themselves financially in the past in Mexico. The Officer concluded that

"though it will not be easy, they will manage given their personal resources and circumstances, to obtain employment and support themselves and their child upon return to Mexico." The Officer proceeded to make the following conclusions and observations regarding the best interests of the Applicants' daughter:

> I have considered the factor put forth by the applicants that [their daughter] may experience a better standard of life in Canada than in Mexico. This may or may not be accurate, but is not a sole determinative factor for an H&C application. The evidence before me in this case does not support a finding that the basic amenities for this child will not be met in Mexico. I am mindful that [she] is a Canadian citizen. However, at this very young age her best interests are to remain with her parents, wherever they are. In the future she will have the option through Canadian citizenship, to return as a student or adult.
>
> With respect to the risk of harm in Mexico that is alleged for [the child] and this family as a result of the allegations of risk due to the corrupt individual involved in Daniel's family business, or due to general country conditions, I refer to the section immediately below where I have analyzed the concerns raised in this application. I have concluded that the Mexican government provides adequate state protection. I also note that no probative evidence has been provided to demonstrate that the aggressor in this case continues to pursue the applicants in Mexico.
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> Taking all the information provided into careful consideration, I find therefore that accompanying her parents to Mexico would not seriously compromise [the child's] best interests.

[9] The Officer then turned to the risk of harm to the Applicants due to country conditions in Mexico and the previous threats they had received, and whether this would result in unusual and undeserved or disproportionate hardship if the Applicants returned to Mexico. The Officer observed that "[w]hile S.96 and S.97 factors may not be considered in this application as per [s. 25(1.3) of the Act], elements related to hardship stemming from adverse country conditions which directly affect the applicants must be taken into account." The Officer noted the

submissions of the Applicants' counsel that they had a fear of returning to Mexico based largely on the generalized violence that exists there, which in their view was "sufficient for a finding of undue, undeserved, and disproportionate hardship" because "individuals should not have to live in a country where their lives are put in danger on a daily basis because of events completely outside their control." The Officer found that the Applicants were not likely to face a risk of harm from the individual who was involved in Daniel's family business, as their fear was largely based on generalized violence and they had not provided "probative evidence of ongoing threats" posed by that individual. The Officer considered it to be "of note" that the "letters written by their parents do not mention past problems that Daniel experienced with the corrupt businessman". The Officer made the following observations and conclusions regarding country conditions in Mexico and how they were likely to impact the Applicants:

> The information that the applicants have provided, along with other publicly available sources of information that I consulted and cite below, indicate that the Mexican government is making concerted efforts to combat organized crime and drug trafficking, and this has resulted in significantly increased levels of violent crime throughout the country. These conditions, along with difficult economic conditions, affect all Mexican citizens. I also considered the applicants' personal circumstances, and note that they have demonstrated that they have significant personal resources to draw upon. Their parents and extended families are well established in their home state, and constitute a support network. Daniel's family has significant business interests. Both applicants are university educated with solid career experience. I do not doubt that the applicants will experience some degree of hardship re-adjusting to Mexico and coping with conditions there, after their absence. I do not find however, based on all the information before me, that the hardship they may experience would constitute unusual and undeserved or disproportionate hardship.

[10] The Officer noted that the Applicants bore the burden of demonstrating that if they were to leave Canada to make their application for permanent residence, they would suffer unusual

and undeserved or disproportionate hardship, and found that they had not met this burden. The Officer stated that the H&C process is not designed to eliminate hardship for applicants, but rather to provide relief from disproportionate or unusual and undeserved hardship. In the Officer's view, the elements presented in the case, "individually and globally," were insufficient to establish that the Applicants would experience such hardship if the exemption was denied.

ISSUES

[11] The Applicants raise the following issues for the Court's consideration in this case:

a. Did the Officer exceed his or her jurisdiction by engaging in an analysis of factors that fall within the definitions found in ss. 96 and 97 of the Act?

b. Did the officer apply the wrong test in assessing whether the Applicants would face hardships if required to return to Mexico, in particular by failing to assess the hardships they would face arising from Mexico's adverse conditions?

c. Did the Officer fail to properly apply s. 25(1) of the Act as it relates to the best interests of the children?

STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review

analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48 [*Agraira*].

[13] The parties do not agree on the appropriate standard or standards of review to be applied in this case. The Respondent says that the issues that arise here are questions of mixed fact and law that should be considered on the standard of reasonableness, emphasizing that H&C decisions are highly discretionary: *Lemus v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1274 at para 14; *Bichari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 127 at paras 25-26; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108 at para 13. The Applicants, by contrast, argue that the first two issues stated above relate to errors of law, and that "with respect to errors in legal analysis, the standard of review is correctness."

[14] I do not agree that questions of law, or purported "errors in legal analysis", are always reviewable on a standard of correctness. Rather, as the Supreme Court of Canada recently reiterated in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 21-22 [*McLean*]:

> [21] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court has repeatedly underscored that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54). Recently, in an attempt to further simplify matters, this Court held that an administrative decision maker's interpretation of its home or closely-connected statutes "should be presumed to be a question of statutory interpretation subject to deference on judicial review" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34).
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> [22] The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. First, this Court has long recognized that certain categories of questions — even when they involve the

> interpretation of a home statute — warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16)…
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> [Footnotes omitted]

[15] Up to now, there has been a preponderance of authority from this Court holding that a standard of correctness applies to the issue of whether an officer applied the proper legal test in making an H&C decision under s. 25(1) of the Act: see *Guxholli v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1267 at para 18; *Alcin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1242 at para 35. Some have noted a tension between this position and the presumption of reasonableness review noted above (see *Diabate v Canada (Minister of Citizenship and Immigration)*, 2013 FC 129)[*Diabate*], and others have concluded on that basis that a standard of reasonableness should now apply (see *Tarafder v Canada (Minister of Citizenship and Immigration)*, 2013 FC 817).

[16] In a pair of recent decisions dealing with s. 25 of the Act – and in particular with the proper interpretation of the recently added s. 25(1.3) – the Federal Court of Appeal has confirmed that a standard of reasonableness applies when reviewing an officer's interpretation and application of s. 25 of the Act: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy*] and *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114. Justice Stratas writing for the Court in *Kanthasamy* observed that the Supreme Court applied a standard of reasonableness to an officer's decision under the Act in *Agraira*, above, and there was no basis to distinguish *Agraira* in the case at hand (at para 30). Thus, it is now

clear that a standard of reasonableness applies to an officer's interpretation of s. 25 of the Act and the test to be applied in giving effect to it.

[17] However, two additional points need to be made with respect to how the standard of reasonableness is to be applied in these circumstances.

[18] First, as the Court of Appeal recognized in *Kanthasamy*, above, at paras 82-83, the range of reasonable and acceptable outcomes available to the decision-maker varies from case to case. This includes the range of reasonable interpretations of a statutory provision, which can be narrow or broad: see *McLean*, above, at paras 37-41; *Mills v Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para 22; *Canada (Attorney General) v Abraham*, 2012 FCA 266 at paras 37-50; *Canada (Attorney General) v Canadian Human Rights Commission (sub nom First Nations Child and Family Caring Society of Canada v Canada (Attorney General))*, 2013 FCA 75 at paras 13-14 [*Canadian Human Rights Commission*]; *Pictou Landing Band Council v Canada (Attorney General)*, 2014 FCA 21 at para 26. Where the reasonableness standard applies, the Court will "defer to *any* reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist": *McLean*, above, at para 40. However, it is clear that prior case law on a particular issue is to be considered, and can narrow the range of reasonable outcomes: *Canadian Human Rights Commission*, above, at paras 14-19; *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 95.

[19] This Court, informed by the approach put forward in a Citizenship and Immigration Canada (CIC) policy manual (*Inland Processing Manual, Chapter IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* [IP5 manual]), has found repeatedly that the proper standard for assessing hardship under s. 25(1) of the Act is whether the applicant will experience hardship that is either unusual and undeserved, or disproportionate: see for example *Diabate*, above, at para 36; *Shah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1269 at para 73 [*Shah*]; *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11; *Aboudaia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1169 at paras 12, 17; *Rebaï v Canada (Minister of Citizenship and Immigration)*, 2008 FC 24 at paras 7-10. An officer has considerable discretion when applying that threshold, and is not limited to any particular list of factors (*Kanthasamy*, above, at paras 42, 50-55), but the jurisprudence seems to indicate that it is not open to an officer to choose a different threshold. The Court of Appeal, which had not previously endorsed this test in explicit terms, confirmed in *Kanthasamy* that "this is the appropriate standard to be applied under subsection 25(1)" (at para 47). It follows that a decision that departs from this standard risks being found to be unreasonable.

[20] Likewise, certain legal principles to be applied when assessing the best interests of a child directly affected by an H&C decision are firmly established by the jurisprudence, including that the threshold of unusual and undeserved or disproportionate hardship has no application to this factor: see *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 at paras 59-64 [*Sinniah*]; *Arulraj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 529 at para 14 [*Arulraj*]; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002

FCA 475 at para 9 [*Hawthorne*]. A departure from this principle also risks being found to be unreasonable.

[21] The second point to be noted arises from the Court of Appeal's observation in *Kanthasamy*, above, that the framework provided for in the Act for certifying legal questions of general importance has implications for the status of the resulting answers. While noting that *Agraira*, above, could be taken to imply a different approach, Justice Stratas wrote for the unanimous Court of Appeal:

> [32] This Court has consistently taken the view that where a certified question asks a question of statutory interpretation, this Court must provide the definitive interpretation without deferring to the administrative decision-maker. Then, this Court must assess whether there are grounds to set aside the outcome reached by the administrative decision-maker on the facts and the law…
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> […]
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> [36] In this Court, providing the definitive answer to a certified question on a point of statutory interpretation is the functional equivalent of engaging in correctness review. But this is merely an artefact of having a certified question put to us. It is not a comment on the standard of review of Ministers' interpretations of statutory provisions generally.
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> [Emphasis added]

[22] It seems clear that the resulting "definitive interpretation" is meant to be binding on administrative decision-makers faced with the same issue in the future, and binding on this Court.

[23] In *Kanthasamy*, the Court provided a definitive interpretation on certain matters pertaining to the new s. 25(1.3), which is also at issue in this case. To the extent that *Kanthasamy*

is directly on point, it reduces to one the number of reasonable interpretations of s. 25(1.3). To the extent that novel issues arise, greater deference to the interpretation offered (or implied) by the officer will be appropriate, in keeping with the principles articulated in *McLean*, above. There, the Supreme Court observed that "the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker" (at para 33). The Court elaborated on this point at para 40:

> Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute ([*Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557], at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

[24] The decision-maker must still adopt an interpretation and approach that is reasonable, intelligible, and reconcilable with the language of the statute, but provided these criteria are met, the Court must defer.

[25] The Applicants argue that the interpretation of s. 25(1.3) raises a question of the jurisdictional lines between two or more competing specialized tribunals – namely, the Refugee Protection Division of the Immigration and Refugee Board [RPD] on the one hand and CIC on the other – and therefore requires review on a standard of correctness: see *Dunsmuir*, above, at paras 59, 61. I do not agree. The question here is not whether the RPD or CIC is to make the H&C decision, but what legal principles CIC is to apply in doing so. This is not a question of jurisdiction, but falls squarely within the category of statutory interpretation questions where a

presumption of deference applies, as described in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 34.

[26] As such, a standard of reasonableness applies to each of the issues outlined above.

[27] 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 para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 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

[28] The following provisions of the Act are applicable in these proceedings:

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	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.

[…]

Humanitarian and compassionate considerations — request of foreign national

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, 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.

[…]

Non-application of certain factors

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, 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.

[…]

Non-application de certains facteurs

(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de

person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

ARGUMENT

Applicant

[29] The Applicants argue that the Officer failed to properly consider the hardships they will face if they return to Mexico due to the negative country conditions that prevail there, and the detrimental effect these conditions will have on the best interests of their daughter.

[30] The Applicants say the Officer exceeded his or her jurisdiction by engaging in an analysis of factors that fall within the definitions found in ss. 96 and 97 of the Act, contrary to the direction set out in s. 25(1.3) of the Act. Specifically, they argue that the concept of state protection is integral to the analysis the RPD is required to carry out under ss. 96 and 97. Subsection 96(a) and subparagraph 97(1)(b)(ii) require the RPD to determine whether a person who faces personalized risks in their home country is able to seek state protection, and whether their country can provide such protection to them. As such, the Applicants argue, state protection is a factor that is taken into account in a s. 96 or s. 97 analysis, and is thus specifically excluded from consideration in an H&C decision by s. 25(1.3) of the Act, which states:

> (1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection

> 97(1) but must consider elements related to the hardships that affect the foreign national.
>
> [Emphasis added]

[31] The Applicants argue that state protection was a factor in the Officer's Decision to refuse their H&C Application, as revealed by the Officer's observations that:

> With respect to the risk of harm in Mexico that is alleged for [the child] and this family as a result of the allegations of risk due to the corrupt individual involved in Daniel's family business, or due to general country conditions, I refer to the section immediately below where I have analyzed the concerns raised in this application. I have concluded that the Mexican government provides adequate state protection.
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> […]
>
> The applicants have not provided probative evidence of ongoing threats posed by the individual who was involved in Daniel's family's business. There was little evidence provided regarding Daniel's dealing with authorities in Mexico on this matter, and no probative evidence that authorities were unwilling or unable to provide protection.
>
> [Emphasis added]

[32] The Applicants say that state protection is not a factor that was open to the Officer to consider in the context of an H&C analysis, and the Officer's consideration of that factor means that the Decision cannot stand.

[33] The Applicants also argue that the Officer erred in his or her analysis of the hardship they would face in Mexico. The true question of hardship that arises, they argue, is whether having to live each and every day facing constant dangers to one's life meets the threshold of "undue and undeserved or disproportionate hardship," and extensive independent country condition evidence

showed that the Applicants would face such adversities every day. They say the Officer erred by minimizing or dismissing this evidence, and did so by taking into consideration whether Mexico was in a position to protect its citizens and concluding that adequate state protection was available. In the Applicants' view, the idea of "state protection" in the midst of generalized adversities is completely illusory, as one cannot seek state protection from generalized violence and indiscriminate dangers.

[34] The Applicants point out that this Court held *in Walcott v Canada (Minister of Citizenship and Immigration)*, 2011 FC 415 that an applicant need not rebut the presumption of state protection in an H&C application:

> [63] The Officer limited her analysis to whether the Applicant had rebutted the presumption of state protection and had exhausted all avenues of protection prior to claiming H&C relief. In the circumstances of an H&C application, however, it is not necessary for an applicant to rebut a presumption of adequate state protection. What an applicant must show is that his or her circumstances warrant humanitarian and compassionate relief, regardless of any available state protection.
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> [Applicants' emphasis]

In the present case, the Applicants argue that the Officer had to determine whether the general adverse country conditions in Mexico are such that the Applicants would face hardships regardless of the availability of state protection.

[35] The Applicants argue that generalized adverse country conditions, including what are sometimes termed "generalized risks," must be considered in assessing hardship in the context of an H&C decision. They point to Justice Hughes' analysis in *Caliskan v Canada (Minister of*

Citizenship and Immigration), 2012 FC 1190 [*Caliskan*] as indicating the approach that must be taken when assessing hardship in light of the modifications introduced by s. 25(1.3). The issue in *Caliskan* was the nature of risk, if any, that was to be assessed in the context of an H&C decision in light of s. 25(1.3), and whether the distinction between generalized and personalized risk had any relevance. Justice Hughes held that s. 96 is limited to a review of the risk of persecution for a Convention ground, and that a consideration of generalized risk is explicitly excluded from the ambit of s. 97 of the Act: see *Caliskan*, above, at paras 11, 13. He considered the guidance provided by the IP5 manual, which includes the following:

> **5.16. H&C and hardship: Factors in the country of origin to be considered**
>
> While [section 96 and 97] factors may not be considered, the decision-maker must take into account elements related to the hardships that affect the foreign national. Some examples of what those "hardships" may include are:
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> - lack of critical of medical/healthcare;
> - discrimination which does not amount to persecution;
> - adverse country conditions that have a direct negative impact on the applicant.

[36] With respect to what risks if any were to be considered in the H&C decision, Justice Hughes observed that:

> [15] …The guidelines quoted previously are little more than vague; they indicate that an Officer is to consider, for instance, "adverse country conditions that have a direct negative impact on the applicant".
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> […]
>
> [18] This case is a good example of "personalized" or "generalized" risk. The applicant sought refugee protection and was denied that protection. It was determined by the Refugee

> Protection Division that he had not demonstrated "personalized" risk. Now the matter comes on an H&C application for determination. Must the H&C Officer accept the finding that there was no "personalized" risk. Must the Officer assume, by default, that there (sic) generalized risk was established? Must the Applicant demonstrate that there is a generalized risk? Should the Officer ignore risk altogether, whether personalized or generalized?
>
> [19] We are left with what is, in effect, the sort of semantic exercise, in which lawyers delight in engaging, and into which the Courts are too often drawn. I believe that the true answer to the interpretation of the amended provisions of section 25 of IRPA lies in drawing back from the constraints of lingo such as "personalized" or "generalized" and focusing on the intent of that provision.
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> […]
>
> [22] I conclude that the Guidelines got it right in construing how the amended provisions of section 25 of IRPA are to be interpreted. We are to abandon the old lingo and jurisprudence respecting personalized and generalized risk and focus upon the hardship to the individual. Included within the broader exercise in considering such hardship is consideration of "adverse country conditions that have a direct negative impact on the applicant".
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> [Applicants' emphasis]

[37] The Applicants take this to mean that all "adverse country conditions that have a negative impact on the applicant" must be considered. They argue that this affirms the case authority that existed prior to the addition of s. 25(1.3) to the Act, which held that generalized adverse country conditions must be considered in the H&C context, but must be assessed through the lens of hardship, rather than that of risk as in a Pre-Removal Risk Assessment: see *Paul v Canada (Minister of Citizenship and Immigration)*, 2011 FC 135 at para 32.

[38] The Applicants argue that the Officer erred in the present case by failing entirely to give any consideration to whether they would face hardships because of the general adverse country conditions present in Mexico, which are no less adverse because of what the state may be attempting to do. They say the Officer improperly focused on the observation that they did not present probative evidence to support a risk of harm from previous aggressors, whereas their application was based primarily on the hardships they would suffer due to adverse country conditions. Requiring them to present evidence that they would be personally targeted enters the realm of factors considered in ss. 96 and 97, the Applicants argue, and it is clear that the Officer did not turn his or her mind to considering the adverse country conditions as a reason for hardship. They point to Justice Mandamin's analysis in *Shah*, above, as being applicable to the present case:

> [72] The Officer set aside all of the country conditions and dismissed relevant facts indicative of hardship by incorrectly applying a standard which required the Applicant to show that she would be personally targeted or threatened. This Court has determined such an approach to be incorrect and reviewable: see *Sahota v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 651, [2007] FCJ 882 [*Sahota*]; *Sha'er*, supra.
>
> [73] I find the Officer applied a higher standard than appropriate for H&C decisions by incorrectly requiring the Applicant to establish a personal risk beyond that faced by other individuals in Trinidad. The test of risk causing unusual, undeserved or disproportionate hardship is not limited to personal risks to an Applicant's life or safety, and the Officer failed to properly consider whether the overall problem of criminality constituted unusual and undeserved, or disproportionate hardship in the circumstances. This constitutes a reviewable error: *Aboudaia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1169 at para 17, *Rebaï*, supra; *Sahota*, supra; *Sha'er*, supra.
>
> [Applicants' emphasis]

[39] Where the evidence discloses that serious insecurity and poverty are nationwide issues, the Applicants argue, it is not sufficient to dismiss this evidence altogether, regardless of the availability of state protection.

[40] Finally, the Applicants argue that the Officer erred in his or her analysis of the best interests of their daughter, as the Officer did not provide any analysis of whether she would face hardships as a result of returning to such adverse country conditions. They say the Officer only considered the dangers associated with the Applicants' refugee claim – that is, the specific dangers that caused them to flee – and ignored the evidence of the general adverse country conditions and their effect on the Applicants' daughter. They point to the following portion of the Officers analysis as evidence of this error:

> With respect to the risk of harm in Mexico that is alleged for [the child] and this family as a result of the allegations of risk due to the corrupt individual involved in Daniel's family business, or due to general country conditions, I refer to the section immediately below where I have analyzed the concerns raised in this application. I have concluded that the Mexican government provides adequate state protection. I also note that no probative evidence has been provided to demonstrate that the aggressor in this case continues to pursue the applicants in Mexico.

[41] The Applicants cite *Sylvester v Canada (Minister of Citizenship and Immigration)*, 2012 FC 17 at paras 53 and 59 for the principles to be applied in assessing the best interests of children under s. 25(1): 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," "[t]he children's interests must be well identified and… defined and examined with a great deal of attention," and applicants are not required "to establish unusual, undeserved or disproportionate hardship in relation to the best interests of any affected child."

The Applicants argue that the Officer did not establish what was in the child's best interests, assess the degree to which her interests would be compromised by a negative H&C decision, or determine the weight to be given to that evidence, as set out in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at para 36. After recognizing that government efforts to combat organized crime have resulted in "significantly increased levels of violent crime throughout the country," the Officer failed entirely to consider whether a child returning to such conditions would face hardships.

[42] In doing so, the Applicants argue, the Officer failed to be "alert, alive and sensitive" to the child's best interests. The Applicants note that Justice Zinn in *Gaona v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1083 [*Gaona*] specifically addressed the approach to be taken when dealing with adverse country conditions in considering the best interests of children affected by an H&C decision, and they argue that his analysis in that case is applicable here as well:

> [10] The officer acknowledged that the evidence "demonstrates that corruption, violence and human rights violations are problems in Mexico." The officer states that "[t]hese are risks unfortunately faced by all people residing in Mexico." Accordingly, these would be risks faced by Pierre-Alexandre if he is removed. As such, the officer needed to examine them in order to be alert, alive and sensitive to this child's interests. The officer did not. He or she fails to deal with this child's interest as a Citizen of Canada in not being removed to such an environment. Accordingly, I find a failure to properly weigh this child's interests. Simply, the analysis of the impact on this child of his removal to Mexico is wanting and for that reason this application is allowed.

Respondent

[43] The Respondent argues that the Officer correctly assessed whether the hardships the Applicants might face in Mexico, including any hardships related to general country conditions and the high rates of violent crime there, would constitute unusual and undeserved or disproportionate hardship. The Respondent says the Officer made this assessment considering the personal situation of the adult Applicants and the best interests of their child, and that this was the correct approach.

[44] The Respondent emphasizes that the s. 25(1) exemption is not an alternate method of immigration to Canada, but rather an exceptional and discretionary remedy: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 15-20 [*Legault*]; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 20 [*Serda*]; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404 at paras 51-52. A decision not to recommend an exemption takes no right away from an individual: *Vidal v Canada (Minister of Employment and Immigration)*, (1991) 41 FTR 118; *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84 at para 57; *Legault*, above at paras 15-17; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at paras 29-31 [*Adams*]. An applicant is not entitled to a particular outcome, and there is a high threshold to meet when requesting an exemption. It is not enough to show that personal circumstances reveal the existence of some H&C grounds; it must be shown that "unusual and undeserved or disproportionate hardship" would be caused if the exemption is not granted. The person applying for an exemption has the onus of satisfying the Officer that, in his or her personal circumstances, undue hardship will result from the normal requirements, and the Officer has the jurisdiction to assess the relevant factors and determine the weight to be assigned: *Adams*, above, at paras 29-31; *Owusu v Canada*

(Minister of Citizenship and Immigration), 2003 FCT 94 at paras 11-12. Applicants have an obligation to demonstrate a link between the evidence of hardship being claimed and their personal circumstances. They cannot simply present the general situation prevailing in their country of origin, but must also demonstrate why this would lead to undue hardship for them personally: *Piard v Canada (Minister of Citizenship and Immigration)*, 2013 FC 170 at paras 18-19 [*Piard*].

[45] The Respondent says that a fair reading of the Decision shows that the Officer did not fail to assess the hardship the Applicants would face from general adverse country conditions. The Officer correctly found that the H&C Application fell within s. 25(1.3) of the Act, which prohibits the assessment of risk. Instead, the Officer properly assessed whether the hardships the Applicants might face in Mexico, including hardships related to general country conditions, would constitute undue hardship, and conducted a thorough and extensive examination of the Applicants' submissions on those country conditions. The Officer recognized that Mexico has a high crime rate, and that government efforts to combat drug trafficking and organized crime have caused an increase in violent crime. The Officer also recognized that the H&C Application was based "largely" on generalized violence in Mexico. However, the Applicants also indicated in their H&C submissions that Mr. Blas had been the target of threats. The Officer did not err by considering the risk of hardship arising from those threats, or in finding that there was no evidence the Applicants were likely to face a hardship related to them.

[46] The Respondent says the Officer carefully considered the evidence relating to crime and poverty in Mexico, and reasonably concluded that those conditions were insufficient to warrant a

positive H&C decision given the recourse available to the Applicants. In short, the Officer found that the Applicants had not demonstrated that they were entitled to a s. 25 exemption because their personal circumstances would be so impacted by the general country conditions that they would suffer unusual, underserved or disproportionate hardship: *Piard*, above. The Applicants' argument boils down to a request that the Court reweigh the evidence, the Respondents argue, which is not the purpose of judicial review.

[47] With respect to establishment, the Respondent says the Officer did not disregard the Applicants' efforts to settle into their community, but reasonably found that there was insufficient evidence to demonstrate that they were so established that applying for permanent residence from abroad would result in unusual or disproportionate hardship. The test is not the worthiness of the applicant or the extent of establishment, but whether undue hardship will result from the normal requirements: *Davoudifar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 316 at paras 24-25. Choosing to remain in Canada while pursuing legal options, while permitted, does not necessarily accrue time in an applicant's favour: *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 at para 15; *Serda*, above, at paras 19-24; *Legault*, above, at para 19.

[48] The Respondent argues that the Decision falls within the range of possible, acceptable outcomes defensible on the law and the facts of the Applicants' circumstances: *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paras 24-28. The Court must consider not only the Officer's reasoning, but also the decision reached in evaluating the reasonableness of the Officer's analysis. Even if the Officer's reasons do not adequately explain why the

Applicants' level of establishment was insufficient to warrant an H&C exemption, which the Respondent denies, the Court must nevertheless be cautious about substituting its own view of the proper outcome by designating that alleged insufficiency of reasons to be fateful: *Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490 at paras 5, 13; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]. The Respondent says the Applicants' argument requests the Court to search for minute alleged errors in the reasons, rather than understanding the chain of reasoning as a whole, which is not a proper approach: *Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151 at para 15; *Rachewiski v Canada (Minister of Citizenship and Immigration)*, 2010 FC 244.

[49] The Respondent also argues that the Officer adequately considered the best interests of the Applicants' Canadian-born child; however, the best interests of a child affected by an H&C decision is but one consideration to be taken into account in coming to that decision. The Respondent says the Applicants' best interests submissions effectively amount to the Canadian-born child having a more stable and secure life in Canada and being at risk of generalized crime and corruption in Mexico. The Officer considered these submissions and determined that the Applicants had a strong network of family and friends in Mexico and this network would also benefit their child. The Officer gave weight to the best interests of the Canadian-born child and found that the best interests of the child were to remain with the Applicants even if they had to return to Mexico and apply for permanent residence in the normal manner. The Officer conducted a reasonable assessment, and did not err in finding that the best interests of the child did not outweigh the other factors considered.

[50] The Respondent says that the Officer's hardship assessment considered what effect, if any, adverse country conditions in Mexico would have on the Applicants as well as their Canadian-born child, and found that the Applicants did not provide evidence that they would be directly negatively affected by general crime in Mexico.

[51] Moreover, the Respondent notes, while an important factor, the best interests of a child are not determinative of the H&C decision: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 37. The Officer was not obliged to give the best interests of the child more weight than other factors, as weight is to be decided according to the facts presented in each case. Here, there was evidence that the child was doing well in Canada, but the evidence did not reveal a direct negative impact on the child due to adverse country conditions in Mexico. The Officer weighed the evidence, and found that the best interests of the child did not outweigh the other factors. This weighing of the evidence was not unreasonable.

ANALYSIS

[52] The Applicants raise a number of issues for review, but I think the fundamental problem with the Decision is that the best interests analysis for Isabella lacks justification, transparency and intelligibility to such an extent that it renders the Decision unreasonable.

[53] I see nothing unreasonable about the best interests analysis until the Officer comes to consider the harm that Isabella might face in Mexico from the general violence that prevails there, which the Officer acknowledges. It has to be remembered that, in conducting a best interests analysis, the Officer is not concerned with whether the child will suffer unusual and

undeserved or disproportionate hardship if she returns to Mexico. The Officer is required to be alert, alive and sensitive to the child's interests and to determine where her best interests lie. This will then be a factor that must be weighed, together with establishment, hardship to her parents and public interest or public policy considerations in the final determination of whether an H&C exemption should be granted. See, for example, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 73-75 [*Baker*]; *Legault*, above, at paras 11-12 and 28; *Hawthorne*, above, at paras 4-9; *Sinniah*, above, at paras 57-63; *Arulraj*, above, at para 14; *Mangru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 779 at paras 24-28.

[54] In the present case, the Officer is very aware that, in determining Isabella's best interests he must take into account the acknowledged general violence and the associated risks that the child will face in Mexico. He finds that she is better off with her parents wherever they happen to be, but then singles out the violence factor in the following way:

> With respect to risk of harm in Mexico that is alleged for Isabella and this family as a result of the allegations of risk due to the corrupt individual involved in Daniel's family business, or due to general country conditions, I refer to the section immediately below where I have analysed the concerns raised in this application. I have concluded that the Mexican government provides adequate state protection. I also note that no probative evidence has been provided to demonstrate that the aggressor in this case continues to pursue the applicants in Mexico.

[55] As regards the risks that Isabella faces from general violence, the individual "aggressor" feared by her parents is not an issue.

[56] When we go to the "section immediately below" to find out what is said about Isabella's best interests as regards the general violence factor, we find, in fact, that nothing is said on this issue.

[57] The Officer assesses the situation as follows:

> The information the applicants have provided, along with other publicly available sources of information that I consulted and cite below, indicate that the Mexican government is making concerted efforts to combat organized crime and drug trafficking, and this has resulted in significantly increased levels of violent crime throughout the country. These conditions, along with difficult economic conditions, affect all Mexican citizens. I also considered the applicants' personal circumstances, and note they have demonstrated that they have significant personal resources to draw upon. Their parents and extended families are well established in their home state, and constitute a support network. Daniel's family has significant business interests. Both applicants are university educated with solid career experience. I do not doubt the applicants will experience some degree of hardship re-adjusting to Mexico and coping with conditions there, after their absence. I do not find however, based on all the information before me, that the hardship they may experience would constitute unusual and undeserved or disproportionate hardship.

[58] The interests of Isabella are not distinguished from those of her parents and are lost in the consideration of unusual and undeserved or disproportionate hardship.

[59] The Respondent says that the general adverse country conditions are taken into account, but the Officer was specifically asked to consider the hardship that Isabella will face in Mexico even if she is with her parents. Without addressing that issue, the Officer would not know what weight to give Isabella's best interests as against other factors: see *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 993 at para 24 [*Joseph*]. It isn't clear from the Decision

whether the Officer simply failed to follow through with the analysis of how Isabella will be impacted by the prevalence of violent crime in Mexico, or whether this factor was improperly folded into the unusual and undeserved or disproportionate hardship analysis. Either way, the Officer was not "alert, alive and sensitive" to Isabella's best interests and a reviewable error has occurred: see *Baker*, above, at para 75; *Legault*, above, at para 12.

[60] The Officer states that Isabella's best interests are to remain with her parents, but this merely states the obvious and misses the point. The point is to examine, in light of the fact that she obviously *will* remain with her parents, what impact their removal to Mexico will have on her given the violent conditions she will be exposed to there: see *Joseph*, above, at paras 20-24; *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258 at para 69; *Gaona*, above, at para 9.

[61] Nor does the passing and largely unexplained conclusion that "the Mexican government provides adequate state protection" reveal how Isabella's interests were considered. Unlike in the refugee protection or Pre-Removal Risk Assessment context, where the phrase "adequate state protection" has acquired some degree of definitive meaning in relation to s. 96 and s. 97 risks, it tells us nothing about the "likely degree of hardship to the child caused by the removal of the parent" (*Hawthorne*, above, at para 6) in the context of a s. 25(1) analysis. It is not a short-hand that allows an officer to forgo an attentive analysis of the effects of a negative decision on a child's best interests.

[62] Indeed, I find the facts of this case remarkably similar to *Gaona*, above, in that the Officer in this case recognized that there are rising levels of violent crime throughout Mexico, and that these conditions "affect all Mexican citizens," but then failed to provide any substantive analysis of how these realities would impact Isabella, contrary to the Court of Appeal's direction that "the officer's task 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" (*Hawthorne*, above, at para 6).

[63] Justice Zinn observed in *Gaona*, above, at para 10 that:

> The officer acknowledged that the evidence "demonstrates that corruption, violence and human rights violations are problems in Mexico." The officer states that "[t]hese are risks unfortunately faced by all people residing in Mexico." Accordingly, these would be risks faced by Pierre-Alexandre if he is removed. As such, the officer needed to examine them in order to be alert, alive and sensitive to this child's interests. The officer did not. He or she fails to deal with this child's interest as a Citizen of Canada in not being removed to such an environment. Accordingly, I find a failure to properly weigh this child's interests. Simply, the analysis of the impact on this child of his removal to Mexico is wanting and for that reason this application is allowed.

[64] The same reasoning applies with respect to Isabella in the present case.

[65] Reviewing the Decision as a whole in this regard, as per *Newfoundland Nurses*, above, I still cannot see that Isabella's best interest were considered at all in relation to the factor of general violence, and the general adverse conditions that exist in Mexico.

[66] Generally speaking, I think the rest of the Decision is fairly sound although it could be debated whether the Officer reasonably interpreted and applied s. 25.(1.3), the meaning of which has recently been clarified by the Court of Appeal as noted above. However, I do not think it is necessary to address this issue on these facts. The error with respect to the best interests analysis is so important that it requires the whole matter to be returned for reconsideration.

[67] 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.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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