Federal Court  Cour fédérale

Date: 20170116

Docket: IMM-1278-16

Citation: 2017 FC 54

Ottawa, Ontario, January 16, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RAJESH BABU KARUNANITHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision by an officer [the Officer] of Immigration, Refugees, and Citizenship Canada [IRCC] denying the Applicant's application for a permanent resident visa as a skilled worker. This refusal was based on the Applicant being inadmissible on the grounds of an inadmissible family member, because the Applicant had not arranged a medical examination of his son.

[2] As explained in greater detail below, this application is allowed, because the Officer failed to analyze the substance of the Applicant's Divorce Order to assess whether the rights and obligations conferred therein amounted to the Applicant having custody of his son.

II. Background

[3] The Applicant, Rajesh Babu Karunanithi, is a citizen of India who was married to Indhu Kasirajan in December 2002 and had a son, Smaran Rajesh, born on April 4, 2004. He and his wife separated during the pregnancy, and Smaran was born after Ms. Kasirajan had moved out of their matrimonial home. Since the birth of Mr. Karunanithi's son, he has lived with his mother, and Mr. Karunanithi has had limited contact with his son. In July 2011 the couple were divorced by mutual consent in India and were issued a Divorce Order from the Family Court in Chennai.

[4] In January 2012, Mr. Karunanithi came to Canada to take up employment as a Computer Systems Analyst. His ex-wife and son did not accompany him. Based on his continuous employment, Mr. Karunanithi created an online Express Entry profile and was issued an invitation by IRCC to apply for permanent residence as a federal skilled worker.

[5] On August 28, 2015, Mr. Karunanithi submitted his application for permanent residence, and on January 25, 2016 he received a letter from IRCC requesting proof that his son had undergone a medical examination or, if this was not possible, a letter and supporting documents explaining the circumstances. Mr. Karunanithi provided a response on January 28, 2016 which included a letter detailing his family circumstances and his understanding that the failure to have his non-accompanying dependent medically examined meant that he would not be able to

sponsor him in the future. He also provided a copy of the Divorce Order from the Family Court, which outlines the custody and other arrangements for his son.

[6] In particular, the Divorce Order specifies that the child shall be in the custody of Ms. Kasirajan and that Mr. Karunanithi has visitation rights of at least two hours per month. Mr. Karunanithi is also required to pay maintenance for the child until he reaches the age of majority, and Ms. Kasirajan controls the operation of the financial account for their son. Mr. Karunanithi is allowed to give gifts to his son voluntarily on specific occasions such as birthdays and festival days.

[7] In a decision dated March 11, 2016, the Officer determined that Mr. Karunanithi did not meet the requirements for immigration to Canada, because of the inadmissibility of his son. The decision referenced s.30(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], which requires foreign nationals and their family members, whether unaccompanied or not, to submit to a medical examination, and s.42(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], which provides that a foreign national is inadmissible on grounds of an inadmissible family member if their accompanying family member or, in prescribed circumstances, their non-accompanying family member, is inadmissible.

[8] The Officer found that Mr. Karunanithi had not provided the medical results for his dependant son and that he failed to provide evidence that the mother has sole custody of his dependant, or that he made all reasonable efforts to have him examined. The Officer stated that it

was not enough for Mr. Karunanithi to state that his dependant is not coming to Canada or that the mother refuses to get him medically examined.

[9] The Officer noted that the onus is on an applicant to provide sufficient supporting evidence to satisfy an immigration officer that he/she is prevented from being able to have a dependent medically examined and to show that he/she has undertaken all reasonable efforts to do so. The Officer also stated that Mr. Karunanithi could have sought relief through the court system, given his legal rights and obligations towards his dependant.

[10] In the Global Case Management System [GCMS] Notes forming part of the reasons for the decision, the Officer observed that the Divorce Petition does not mention that the mother has sole custody and that, apart from his declaration, Mr. Karunanithi had failed to provide supporting documents to show that he had tried to get his son examined. Given Mr. Karunanithi's contact with his ex-wife and visitation rights with his son, the Officer was not satisfied that Mr. Karunanithi had made all reasonable efforts to try and get the child medically examined. The Officer therefore determined that Mr. Karunanithi did not meet the requirements of the Act and the Regulations and refused his application for a permanent residence visa.

III. Issues

[11] The Applicant articulates the following issues to be addressed by the Court:

A. Whether the Officer erred by fettering discretion in importing the requirement for "sole custody";

B. Whether the Officer made an unreasonable determination with respect to the Divorce Order;

C. Whether the Officer was unreasonable in making a speculative finding that the Applicant could obtain relief through the court system.

[12] The Respondent, the Minister of Citizenship and Immigration [the Minister], submits that this application raises only one issue, whether the Officer's decision was reasonable.

[13] As discussed below, the issues as articulated by the Applicant are not all governed by the same standard of review. As such, I adopt the Applicant's articulation of the issues as the better framework for analysis of the parties' arguments.

IV. Standard of Review

[14] Mr. Karunanithi submits that issues surrounding fettering of discretion are reviewable on a correctness standard (see Thamotharem v. Canada (Minister of Citizenship & Immigration), 2007 FCA 198, at para 33 [Thamotharem]) and that, otherwise, decisions by IRCC officers refusing permanent residence applications based on the assessment of custodial documentation or efforts to arrange medical examination are reviewable on a standard of reasonableness (see *Rojas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1303).

[15] In her recent decision in *Gordon v Canada*, 2016 FC 643, at paras 25-28, Justice Mactavish explained that some confusion surrounds the standard of review applicable to alleged fettering of discretion. Traditionally, the fettering of discretion has been seen as a matter of

procedural fairness, reviewable on the standard of correctness (see Thamotharem*). However*, the Federal Court of Appeal has posited that post-Dunsmuir, the fettering of discretion should be reviewed on the reasonableness standard, as it is a kind of substantive error. The Federal Court of Appeal also stated that the fettering of discretion is always outside the range of possible, acceptable outcomes, and is therefore per se unreasonable (see Stemijon Investments Ltd. v. Canada (Attorney General), 2011 FCA 299 [*Stemijon Investments*], at paras 23-25). As such, Justice Mactavish held, at para 28, that the fettering of discretion is a reviewable error under either standard of review, and will result in the decision being quashed (see JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue, 2013 FCA 250 at paras 71-73; *Stemijon Investments*, at para 23).

[16] I adopt this approach to the standard of review applicable to the issue surrounding fettering of discretion, and I agree with the Applicant's position, with which the Minister concurs, that the Officer's decision is otherwise reviewable on a standard of reasonableness.

V. Analysis

A. *Legislation*

[17] The legislative and regulatory provisions relevant to this application are the following:

Immigration and Refugee Protection Act, SC 2001, c 27

Application before entering into Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for	**11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les

any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

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.

Obligation — answer truthfully

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

Obligation du demandeur

16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

Obligation — appear for examination

(1.1) A person who makes an application must, on request of an officer, appear for an examination.

Obligation de se soumettre au contrôle

(1.1) L'auteur d'une demande au titre de la présente loi doit, à la demande de l'agent, se soumettre au contrôle.

Obligation — relevant evidence

(2) In the case of a foreign national,

(a) the relevant evidence referred to in subsection (1) includes photographic and fingerprint evidence; and

(b) subject to the regulations, the foreign national must submit to a medical examination.

Éléments de prévue

(2) S'agissant de l'étranger, les éléments de preuve pertinents visent notamment la photographie et la dactyloscopie et, sous réserve des règlements, il est tenu de se soumettre à une visite médicale.

Inadmissible family member	**Inadmissibilité familiale**
42 (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	**42 (1)** Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :
(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible;	**a)** l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;

***Immigration and Refugee Protection Regulations,* SOR/2002-227**

Prescribed circumstances — family members	**Cas réglementaires : membres de la famille**
23 For the purposes of paragraph 42(1)(a) of the Act, the prescribed circumstances in which the foreign national is inadmissible on grounds of an inadmissible non-accompanying family member are that	**23** Pour l'application de l'alinéa 42(1)a) de la Loi, l'interdiction de territoire frappant le membre de la famille de l'étranger qui ne l'accompagne pas emporte interdiction de territoire de l'étranger pour inadmissibilité familiale si :
(a) the foreign national is a temporary resident or has made an application for temporary resident status, an application for a permanent resident visa or an application to remain in Canada as a temporary or permanent resident; and	**a)** l'étranger est un résident temporaire ou a fait une demande de statut de résident temporaire, de visa de résident permanent ou de séjour au Canada à titre de résident temporaire ou de résident permanent;

(b) the non-accompanying family member is

(i) the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact,

(ii) the common-law partner of the foreign national,

(iii) a dependent child of the foreign national and either the foreign national or an accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law.

b) le membre de la famille en cause est, selon le cas :

(i) l'époux de l'étranger, sauf si la relation entre celui-ci et l'étranger est terminée, en droit ou en fait,

(ii) le conjoint de fait de l'étranger,

(iii) l'enfant à charge de l'étranger, pourvu que celui-ci ou un membre de la famille qui accompagne celui-ci en ait la garde ou soit habilité à agir en son nom en vertu d'une ordonnance judiciaire ou d'un accord écrit ou par l'effet de la loi.

Exemptions from medical examination requirement

30 (1) For the purposes of paragraph 16(2)(b) of the Act, the following foreign nationals are exempt from the requirement to submit to a medical examination:

(a) foreign nationals other than

(i) subject to paragraph (g), foreign nationals

Visite médicale non requise

30 (1) Pour l'application du paragraphe 16(2) de la Loi, les étrangers ci-après ne sont pas tenus de se soumettre à la visite médicale :

a) tout étranger autre que les étrangers suivants:

i) sous réserve de l'alinéa g), l'étranger qui demande un visa

who are applying for a permanent resident visa or applying to remain in Canada as a permanent resident, as well as their family members, whether accompanying or not,	de résident permanent ou qui demande à séjourner au Canada à titre de résident permanent ainsi que les membres de sa famille, qu'ils l'accompagnent ou non,

[18] When a foreign national applies to enter Canada, s. 11(1) of the Act requires an examination and assessment by an immigration officer of the foreign national's admissibility. The combination of ss. 16(1), (1.1) and (2) of the Act requires a foreign national making such an application to submit to a medical examination. Section 30(1)(a)(i) of the Regulations in turn requires that family members of a foreign national applying for permanent residence submit to a medical examination, regardless of whether or not they are accompanying family members. The basis of this requirement is potential inadmissibility. Under s. 42(1)(a) of the Act, a foreign national is inadmissible if their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible. The prescribed circumstances, under which a foreign national is inadmissible as a result of the inadmissibility of a non-accompanying family member, are set out in s. 23 of the Regulations. The provision engaged in the present application is s. 23(b)(iii), pursuant to which the foreign national is inadmissible if the inadmissible non-accompanying family member is:

> **(iii)** a dependent child of the foreign national and either the foreign national or an accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law.

B. *Whether the Officer erred by fettering discretion in importing the requirement for "sole custody"*

[19] Mr. Karunanithi refers to the Officer's observation that the Divorce Order does not mention that the mother has sole custody of the child. He submits that the Officer's denial of his application was based on the guidelines found in the IRCC publication entitled "OP-24 Overseas Processing of Family Members of In-Canada Applicants for Permanent Residence" [OP-24]. Section 7.8 of OP-24 relates to the requirement for examination of dependants and states: "The exception to this requirement is separated or former spouses/common-law partners and children in the sole custody of another person, including the separated or former spouse/common-law partner."

[20] Mr. Karunanithi argues that neither the Act nor the Regulations expressly requires that a dependent child be in the "sole custody" of another person for the exception to inadmissibility to apply. Section 23 of the Regulations only requires that the foreign national not have custody or be empowered to act on behalf of the non-accompanying dependant child. Mr. Karunanithi submits that his Divorce Order clearly states that the child is in the custody of his mother and that he only has rights of visitation. He submits that the Officer acknowledges these facts but that the Officer's primary reason for dismissing the Divorce Order, as evidence that Mr. Karunanithi does not have custody of his dependant son or the power to act on his behalf, was that it does not mention that the mother has sole custody.

[21] Mr. Karunanithi's argument is that that the Officer thereby fettered his or her discretion, by applying these guidelines in OP-24 as if they were law, without considering the particular facts of the case. He relies on the jurisprudence in *Lee v Canada*, 2008 FC 1152, at para 29; *Thamotharem v Canada (MCI)*, 2007 FCA 198, at paras 62 and 78; and *Singh Bajwa v Canada*, 2012 FC 864, at paras 44-45.

[22] I disagree that the Officer's reasons demonstrate a fettering of discretion in reliance on the applicable guidelines. Rather, as argued by the Minister, the Officer's references to whether the mother has sole custody of the child represent a logical inference as to what Mr. Karunanithi was required to demonstrate in order to benefit from the exception to admissibility provided by s. 23(b)(iii) of the Regulations. A foreign national must demonstrate that he or she does not have custody of a dependent child. This would typically translate into a requirement to show that another person or persons, and solely that person or persons, have custody of the child. I therefore find that the Officer's analysis does not demonstrate a fettering of discretion through inappropriate reliance upon the guidelines in OP-24.

C. *Whether the Officer made an unreasonable determination with respect to the Divorce Order*

[23] Nevertheless, my decision to allow this application for judicial review turns on the Officer's analysis, or rather lack of analysis, as to whether the evidence demonstrates that Mr. Karunanithi's ex-wife has sole custody of their son, such that Mr. Karunanithi does not have custody.

[24] The Officer's letter dated March 11, 2016, which conveyed the decision refusing Mr. Karunanithi's application, states that the Applicant failed to provide evidence that the mother has sole custody of his dependent. The GCMS Notes provide the Officer's reasons for this conclusion. These reasons are the fact that the Divorce Order states that the child shall be in the custody of the mother and that Mr. Karunanithi shall have the right of visitation for at least one or two hours monthly at specific places indicated, as well as the fact that the Divorce Order does not mention that the mother has sole custody. The Officer mistakenly refers to this document as a Divorce Petition rather than a Divorce Order. I agree with the Minister that little turns on this factual error, as the reasons appear to recognize that the effect of the document is to confer legal rights and obligations. However, the reasons do not demonstrate any analysis of the effect of such rights and obligations in considering the question of who has custody of Mr. Karunanithi's son.

[25] The Minister relies upon the decision in *Alexander v. Canada (Solicitor General)*, 2005 FC 1147 [*Alexander*], at para 40, which described the meaning of "custody" as consisting of a bundle of rights and obligations and not necessarily requiring that the custodial parent reside with the child. Custody includes the right to physical care and control of a child, the right to control the child's place of residence, to discipline the child, to make decisions about the child's education, to raise the child in a particular religion or no religion, and to make decisions about medical care and treatment. The Minister acknowledges that *Alexander* was decided in a different context, in which the applicant argued that a superior court order granting her custody of her children would be contravened by her removal from Canada, resulting in an automatic stay of removal under s. 50(a) of the Act. However, the Minister relies on *Alexander* as support for

the position that the Officer's decision is reasonable because, even though Mr. Karunanithi does not have physical control of his son, he still has legal rights and obligations towards him.

[26] I accept that the analysis whether a parent has custody of a child may take into account various factors, including those identified in *Alexander*. However, my difficulty with the Officer's decision, that Mr. Karunanithi failed to provide evidence that his ex-wife has sole custody of his son, is the lack of any analysis of the terms of the Divorce Order. The Officer appears to rely heavily on the fact the Divorce Order does not expressly state that the mother has sole custody. While I have not found this analysis to represent a fettering of discretion based on the OP-24 guidelines, I do find that the Officer appears to have placed undue reliance on the fact that the Divorce Order does not use the term "sole custody".

[27] The Divorce Order does state that the "child shall be at the custody of the 2nd petitioner", referring to his mother, and makes no comparable reference to conferring custody upon Mr. Karunanithi. I do not necessarily conclude therefrom that the Divorce Order does provide sole custody to the mother, such that Mr. Karunanithi does not have custody and therefore benefits from the effect of s. 23(b)(iii) of the Regulations. I recognize that the Order does give him some rights. However, my conclusion is that the Officer was obliged to consider the terms of the Divorce Order and conduct an analysis as to whether the effect of the Order is that Mr. Karunanithi does not have custody. Particularly in the context of the Divorce Order referring to his ex-wife having custody, I find the lack of such an analysis to make the Officer's decision unreasonable.

[28] In reaching this conclusion, I have taken into account the parties' arguments as to the significance of the Officer's additional finding that Mr. Karunanithi had not made all reasonable efforts to have his son examined. Mr. Karunanithi's position is that he was required only to demonstrate that he does not have custody of his son and, if he satisfied this requirement, he was not obliged to seek recourse through the courts in India or otherwise make efforts to have his son submit to a medical examination. The Minister argues that s. 23(b)(iii) of the Regulations makes a foreign national inadmissible on the basis of an inadmissible non-accompanying child, not only where the foreign national has custody of the child but also where the foreign national is empowered to act on behalf of the child by virtue of a court order or written agreement or by operation of law.

[29] The question these arguments raise is whether the effect of the language in s. 23(b)(iii), related to empowerment to act on behalf of the child, is that a foreign national who demonstrates he or she does not have custody of a dependent child must also demonstrate a lack of empowerment to act on behalf of the child through other means. My conclusion is that s. 23(b)(iii) should not be interpreted in this manner, in the sense of creating a two-part test. Rather, s. 23(b)(iii) is focused upon a foreign national's control with respect to his or her child and recognizes that such control may take the form of a custody determination or alternatively may be conferred by a different sort of court order, by agreement or by operation of law.

[30] This interpretation is consistent with the jurisprudence to which the parties have referred the Court in this application. Both parties relied on the decision of Justice Strickland in *Ramara v Canada (Minister of Citizenship and Immigration)*, 2014 FC 60 [*Ramara*], which involved a set

of circumstances specific to the Philippines, the country of which the applicant in that case was a citizen. The applicant submitted a statutory declaration, in which she swore that her daughter was in the sole custody of her ex-husband. In finding that the immigration officer erred in refusing to accept the statutory declaration as evidence of the custody of the applicant's daughter, Justice Strickland noted the information available in a Citizenship and Immigration manual to the effect that formal custody arrangements are not easily attained in the Philippines, because legal separation and divorce are not available in that country.

[31] The significance of *Ramara* for the present application is derived from Justice Strickland's conclusion, at paragraph 30 of the decision, that once the statutory declaration was received, the officer no longer had any reason to require that the applicant's daughter be medically examined. It was therefore unreasonable for the officer to continue to demand proof of attempts to have her examined and to refuse to grant the exemption on the basis that she had failed to do so. This reasoning supports Mr. Karunanithi's position that he was required only to demonstrate that he does not have custody of his son and was not also required to demonstrate that he had made efforts to have his son submit to a medical examination.

[32] This conclusion, that s. 23(b)(iii) should not be interpreted as creating a two-part test, is consistent with the Court's description of the operation of that section in *Rojas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1303. At paragraph 15, Justice Zinn explained that s. 23(b)(iii) renders a foreign national inadmissible if, by virtue of a court order, a written agreement or the operation of law, he or she has custody of the non-accompanying dependent children and they are not confirmed to be admissible.

[33] I also note the following analysis by Justice Russell at paragraph 28 of *Donovan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 359 [*Donovan*]:

> The Applicant did not submit documentation to show that he did not have custody, **or** that he was not "empowered to act on behalf of that child by virtue of a court under order or written agreement or by operation of law" within the meaning of s. 23(b)(iii) of the Regulations. Hence, the Officer, correctly and reasonably decided that an examination of the son was required under s. 72(1)(e)(i) of the Regulations.
>
> (Emphasis added)

[34] The use of the disjunctive "or" in this paragraph again supports the conclusion that, if an applicant shows that he or she does not have custody of a dependent child, there is no additional obligation to demonstrate the absence of a court order, written agreement or applicable law which empowers the applicant to act on behalf of the child. My conclusion is that the Officer's finding, that Mr. Karunanithi had not made all reasonable efforts to have his son examined, does not relate to the requirements of s. 23(b)(iii) of the Regulations but rather to a residual discretion, which is referred to in both applicable guidelines and case law.

[35] For instance, in *Donovan*, notwithstanding that the applicant had not demonstrated the availability of an exemption under 23(b)(iii) of the Regulations, Justice Russell addressed the applicant's argument that the immigration officer should have afforded him the benefit of this discretionary power, because he had made all reasonable efforts to present his son for a medical examination. At paragraphs 29 to 31 of *Donovan*, the Court quoted from a manual entitled "Citizenship and Immigration IP8: Spouse or Common-Law Partner in Canada Class" which refers to officers deciding, on a case-by-case basis, whether to proceed with an application, even

if all family members have not been examined, where the applicant has done everything in their power to have their family members examined but has failed to do so. Justice Russel raises the question of the legality of this apparent discretionary power not to refuse an application for non-compliance, but notes that the validity of this power was not in issue before him.

[36] At the hearing of the present application, the Minister took the position that authority for this discretion was derived from s. 25(1) of the Act. Referring to the decision in *Anderson v Canada (Minister of Citizenship and Immigration)*, 2015 FC 495, where Justice Diner analysed at paragraph 21 whether the applicant had made sufficient efforts to demonstrate that medical examination of his children would not be feasible, the Minister identified s. 25(1) as the basis for this analysis. Mr. Karunanithi referred only to guidelines as the source of the discretion.

[37] As in *Donovan*, the Court is not called upon to decide the validity of this discretion in the case at hand. However, it is this discretion which appears to be the basis for the Officer's analysis as to whether Mr. Karunanithi had made all reasonable efforts to have his son medically examined. This is evident from the manner in which this portion of the decision is framed. The Officer states that Mr. Karunanithi failed to provide evidence that the mother has sole custody of his dependent **or** that he has made all reasonable efforts to have him examined. In this context, the use of the disjunctive "or" indicates that, even in the absence of what the Officer considered to be satisfactory evidence of custody, Mr. Karunanithi's application might have been successful if he had demonstrated reasonable efforts to have his son examined. This reads as the Officer considering the exercise of a discretion not to refuse the application for non-compliance.

[38] However, as noted in the above analysis of *Ramara*, if Mr. Karunanithi had demonstrated that he does not have custody of his son, he was not also required to demonstrate that he had made efforts to have his son submit to a medical examination. In other words, if he had met the statutory test for an exemption from the requirement to have his son examined, there would have been no need for the Officer to consider an exercise of discretion to allow the application to proceed. As such, the Officer's analysis of Mr. Karunanithi's efforts does not impact my decision to allow this application for judicial review. Having found above that the Officer erred, in failing to analyze whether the effect of the Divorce Order is that Mr. Karunanithi does not have custody, the decision must be set aside.

D. *Whether the Officer was unreasonable in making a speculative finding that the Applicant could obtain relief through the court system.*

[39] Having decided for the above reasons to allow this application for judicial review, it is unnecessary to consider this issue.

VI. Certified Questions

[40] Mr. Karunanithi proposed two questions for certification. Reformatted slightly, they are as follows:

A. In order to qualify for the exemption from medical inadmissibility and examination pursuant to s. 23(b)(iii) of the Regulations, does the foreign national have to demonstrate that the non-accompanying dependent child is in the sole custody of another person?

B. In order to qualify for the exemption from medical inadmissibility and examination pursuant to s. 23(b)(iii) of the Regulations, does the foreign national have to prove both that he or she does not have custody and that he or

> she has made reasonable efforts to have any non-accompanying dependent children medically examined?

[41] The Minister opposes certification, arguing that the answers to these questions are already provided by the applicable legislation and case law, such that they are not questions of serious importance. I agree with the Minister's position and, given that Mr. Karunanithi has prevailed in this application for judicial review, I decline to certify either of these questions.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred to a different immigration officer for reconsideration. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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