Federal Court  Cour fédérale

**Date: 20171221**

**Docket: IMM-2690-17**

**Citation: 2017 FC 1185**

**Ottawa, Ontario, December 21, 2017**

**PRESENT: The Honourable Mr. Justice Grammond**

**BETWEEN:**

**ANANTHAN SIVALINGAM**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] For the reasons that follow, I am granting the application for judicial review brought by the Applicant, Ananthan Sivalingam, in respect of a denial of his application for relief based on humanitarian and compassionate grounds.

## I. Background and Decision under Review

[2] Mr. Sivalingam is a citizen of Sri Lanka of Tamil origin who became a permanent resident of Canada in 2003, when he was 12 years old. He has a wife and two-year old son who are both Canadian citizens.

[3] Between 2008 and 2013, Mr. Sivalingam committed several criminal offences, including assault causing bodily harm, credit card theft, driving while impaired and obstructing a peace officer. He was never given jail time, but received a combination of conditional sentences, probation, fines, and community service. Nevertheless, some of the offences he committed carry a maximum penalty of ten years' imprisonment. Mr. Sivalingam therefore became inadmissible as a result of "serious criminality," under section 36(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

[4] Mr. Sivalingam applied under section 25 of IRPA for relief based on humanitarian and compassionate [H&C] considerations.

[5] The immigration officer [Officer] who considered Mr. Sivalingam's H&C application examined several relevant factors, including Mr. Sivalingam's employment record, relationship with his family in Canada, the best interests of his two-year old child, and the hardship he would suffer if returned to Sri Lanka. The Officer assigned weight to each of those factors, and concluded that: (i) Mr. Sivalingam had not met his burden of proving his establishment in Canada, (ii) brought "little proof" with respect to whether his son's best interests would be

compromised without H&C relief, and (iii) had not demonstrated that the situation in Sri Lanka would affect him "more personally". Finally, the Officer reviewed Mr. Sivalingam's criminal record and gave it "strong negative weight."

[6] Mr. Sivalingam's H&C application was denied on January 26, 2017 [Decision], and he now seeks judicial review of that denial.

## II. Analysis

[7] An H&C decision is discretionary. The decision-maker must weigh several relevant factors, but there is no rigid formula that determines the outcome. This Court reviews H&C decisions on a standard of reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 51, [2015] 3 SCR 909 at para. 44). My role is not to assess the relevant factors or to exercise the decision-maker's discretion anew, but to verify that the decision-maker turned his or her mind to the relevant factors and gave them due consideration. I must also ensure that the Decision is based on a defensible interpretation of the applicable legal principles and a reasonable assessment of the evidence.

[8] Mr. Sivalingam argues that the Decision is unreasonable because the Officer failed to take into account the evidence regarding his rehabilitation, his level of establishment in Canada, the hardship he would suffer if removed to Sri Lanka and the best interests of his child. I agree. For the reasons that follow, the Decision is unreasonable and cannot stand.

A. *Criminal History*

[9] First, the Officer's analysis unreasonably focused on the grounds that resulted in Mr. Sivalingam's inadmissibility. In doing so, the Officer did not give effect to the purpose of section 25 of IRPA, which is to allow for the mitigation of "the rigidity of the law in an appropriate case" (*Kanthasamy* at para 19). An interpretation of section 25 that focuses unduly on the reason that made the applicant inadmissible under a provision of IRPA reinforces, rather than mitigates, the rigidity of the law and defeats the purpose of section 25 (*Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 at para. 29). The interpretation of a statutory provision may be unreasonable if it defeats the purpose of the legislature in enacting the provision: *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 SCR 427, at para 42.

[10] Moreover, the Officer overlooked several important aspects of Mr. Sivalingam's criminal history, including that he was never sentenced to jail. The Officer also had a psychologist's report, dated February 15, 2016, that concluded that Mr. Sivalingam's risk of reoffending was "low to moderate." Although the Officer did not "question the diagnosis of the expert," the Officer failed to engage with the expert's conclusions regarding rehabilitation, as with much of the other evidence of rehabilitation. Instead, the Decision focuses exclusively on Mr. Sivalingam's past criminal record, entirely discounting his rehabilitation and future prospects.

[11] Mr. Sivalingam is caught by section 36(1) for technical reasons. A person engages in "serious criminality" when committing an offence punishable by at least ten years' imprisonment or when actually sentenced to more than six months. Two of the offences committed by Mr.

Sivalingam, assault causing bodily harm and credit card theft, carry a maximum sentence of ten years, but no minimum. This is a very wide range. However, by imposing conditional sentences, the judges who dealt with Mr. Sivalingam indicated that his conduct lay on the low end of the scale of gravity covered by those offences. As Chief Justice Lamer once noted, "[t]he conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders" (*R v Proulx,* 2000 SCC 5, [2000] 1 SCR 61 at para 21).

[12] Thus, it was unreasonable for the Officer to ascribe the most significant weight to the factor giving rise to Mr. Sivalingam's inadmissibility, while not engaging with the other dimensions of Mr. Sivalingam's criminal history, in particular the mitigating considerations relating to his offences, including sentencing and rehabilitation.

B. *Establishment*

[13] I agree with Mr. Sivalingam that it was unreasonable for the Officer to conclude that Mr. Sivalingam's level of establishment in Canada is not "above and beyond or extraordinary to what is expected of a person coming to Canada." Other decisions of this Court have held that it is unreasonable to require, without more explanation, an "extraordinary" level of establishment (*Chandidas v Canada (Citizenship and Immigration),* 2013 FC 258, [2014] 3 FCR 639 at para 80; *Ndlovu v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at para 14). Indeed, "establishment" is reviewed to assess whether the applicant deserves H&C relief, not an award for a special contribution to society.

[14] The Officer apparently assessed Mr. Sivalingam's establishment in Canada as if he were a person whose claim for refugee status is unsuccessful. In doing so, the Officer overlooked the fact that Mr. Sivalingam came to Canada as a child, became a permanent resident and has spent more than half of his life in this country. From the perspective of personal and social development, Mr. Sivalingam's fifteen years in Canada are far more significant than his initial twelve years in Sri Lanka.

[15] It was thus unreasonable to conclude that Mr. Sivalingam has not "met the burden of proof to demonstrate a significant establishment in Canada." To make such a finding is to cut off from consideration a large component of Mr. Sivalingam's life experience, contrary to the Supreme Court's direction to the effect that "officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy*, at para 25).

C. *Hardship*

[16] I am satisfied that the Officer unreasonably discounted the hardship that Mr. Sivalingam would face if removed to Sri Lanka. He has not lived in that country since he was 12 years old. Although he may have memories of his childhood there, these memories are focused on the persecution that his family endured before his father was granted refugee status in Canada. He has been in Canada for the last 15 years. He does not speak Sinhalese. Although he speaks Tamil, he does not read or write in that language. His close relatives are all in Canada. He has only distant relatives in Sri Lanka. To him, Sri Lanka has effectively become a foreign country. Most of the Officer's analysis in this regard is devoted to the general situation of Tamils in Sri

Lanka. He observed that persons who are returned to Sri Lanka may not necessarily face detention or police questioning and that the hostility towards Tamils has receded after the end of the civil war. Even though these factors may be relevant, the Officer's analysis obscured the consideration that Mr. Sivalingam would be removed to a country with which he has little current links.

D. *Best Interests of the Child*

[17] Finally, the Officer's analysis of the best interests of Mr. Sivalingam's two-year old child began from the presumption that Mr. Sivalingam would be removed, which this Court has held to be unreasonable (*Ondras v Canada (Citizenship and Immigration)*, 2017 FC 303 at para 11; *Yuan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 578 at para 29; *Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 at para 52; *Jimenez v Canada (Citizenship and Immigration)*, 2015 FC 527 at para 27; *Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at para 20). Similarly, the Officer failed to consider the common-sense presumption that it is in the best interests of a child to be raised by both parents, and the emotional consequences for the child of his father's removal to a foreign country. In fact, the Officer's analysis was centered on Mr. Sivalingam's wife's ability to support the child financially, either through obtaining employment or through other family members present in Canada. The Officer also assumed that the child's mother "would take care of him very well," thus discounting the role of the father in the support, raising and education of the child. This Court held that it is unreasonable to focus on the presence of an alternative care-giver (*Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516 at para 27).

[18] I also note that that the Officer unreasonably imposed a distinct burden of proof with respect to each H&C factor and effectively considered the factors as silos (*Abeleira v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008 at para 34). This is because, in *Kanthasamy*, the Supreme Court of Canada rejected the view that certain H&C concepts create separate thresholds that H&C applicants must overcome, and held that an H&C decision-maker must take into account all the relevant circumstances in deciding whether or not relief is warranted (*Kanthasamy* at paras 28, 33). By imposing distinct thresholds or "burdens of proof" on Mr. Sivalingam, the Officer unreasonably failed to consider the H&C factors globally, contrary to *Kanthasamy*. In particular, as a result of this "silo" approach, the Officer unreasonably failed to engage with the evidence that closely connected Mr. Sivalingam to Canada, instead of simply relying on that which distantly connected him to Sri Lanka.

[19] I conclude that the Decision is unreasonable. It will therefore be set aside and the matter sent back to a different officer for redetermination.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, the decision is set aside and the matter is sent back to a different Officer for a new determination. No question is certified.

"Sébastien Grammond"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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