Federal Court  Cour fédérale

Date: 20190213

Docket: IMM-2615-18

Citation: 2019 FC 187

Ottawa, Ontario, February 13, 2019

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

SIVANESAN NAGAMANY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Sivanesan Nagamany, is a citizen of Sri Lanka. He has now been in Canada for more than 16 years and, over that period, he has been unsuccessful in his various applications for refugee protection and permanent residence because of his past involvement in the Liberation Tigers of Tamil Eelan [LTTE], a terrorist organization in Sri Lanka.

[2] In July 2008, Mr. Nagamany applied for permanent resident status pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This provision gives the Minister of Citizenship and Immigration [Minister] discretion to exempt foreign nationals from the ordinary requirements of the IRPA if the Minister is of the opinion that such relief is justified by humanitarian and compassionate [H&C] considerations, including the best interests of any child directly affected. In May 2018, a senior decision-maker for Immigration, Refugees and Citizenship Canada [Officer] denied Mr. Nagamany's application, finding that he had failed to demonstrate that his personal circumstances justified granting a discretionary exemption based on H&C grounds and overcoming his inadmissibility in Canada due to his membership in a terrorist organization [H&C Decision].

[3] Mr. Nagamany now seeks judicial review of the H&C Decision. He claims that the decision is unreasonable. In support of his application, Mr. Nagamany submits that the Officer used the wrong test for deciding the H&C considerations and erred in the assessment of his establishment in Canada, of the best interest of the children [BIOC] involved and of the hardship he would face upon return to Sri Lanka. Mr. Nagamany also argues that the principles of *res judicata* or issue estoppel precluded the Officer from concluding to his inadmissibility on security grounds pursuant to paragraph 34(1)(f) of the IRPA and from re-assessing the H&C considerations. Finally, Mr. Nagamany invokes breaches of natural justice due to the long delay it took to render the H&C Decision and to unclear requests for updates made by the Officer. He asks that his case be sent back for redetermination by a different decision-maker and argues that the only appropriate remedy is for him to be granted his permanent residence on H&C grounds.

[4] For the reasons that follow, I will grant Mr. Nagamany's application for judicial review. Having considered the Officer's findings, the evidence before him and the applicable law, I find that the H&C Decision is unreasonable because the analysis conducted by the Officer ignored the teachings of the Supreme Court and is not supported by the evidence on the record. In the circumstances of this case, this is sufficient to push the decision outside the realm of possible, acceptable outcomes based on the facts and the law, and to justify this Court's intervention. I must, therefore, send the matter back for redetermination, in accordance with these reasons.

II. Background

A. *The factual context*

[5] Mr. Nagamany is a Tamil citizen of Sri Lanka. From 1986 to 1988 and from 1990 to 1995, he distributed flyers and sold Palmira wood for the Student Organization of Liberation Tigers [SOLT], an organization related to the LTTE. He alleges to have done so by fear of the LTTE, and to have suffered persecution by both the LTTE and the Sri Lankan authorities.

[6] In 1997, Mr. Nagamany flew to France and asked for refugee protection. His request was denied. In 2000, he was detained in Austria. He later returned to France where he lived until September 2002. In October 2002, he entered Canada through the United States and claimed refugee protection upon arrival. While waiting for his status to be regularized, Mr. Nagamany married, had two daughters, and bought a house in Canada. His wife and daughters are Canadian citizens. His oldest daughter, born in 2004, has been diagnosed with developmental problems similar to autism when she was young.

[7] Since he entered the country in 2002, Mr. Nagamany has had a long procedural history with the Canadian immigration authorities. In December 2004, the Refugee Protection Division [RPD] found that Mr. Nagamany was excluded from the definition of refugee under paragraph 1F(a) of the *United Nations Convention Relating to the Status of Refugees* [Convention] and refused his refugee claim, because of his complicity in crimes against humanity when he was involved in the SOLT/LTTE in Sri Lanka [RPD Decision]. In November 2005, this Court dismissed Mr. Nagamany's application for judicial review of the negative RPD Decision (*Nagamany v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1554 [*Nagamany*]).

[8] In March 2005, Mr. Nagamany applied for permanent residence in the spouse and common-law partner class, for which he was sponsored by his Canadian wife. In May 2008, Mr. Nagamany's application was refused, on the basis that he was inadmissible on grounds of crimes against humanity pursuant to paragraph 35(1)(a) of the IRPA. In June 2008, a Canada Border Services Agency [CBSA] report found Mr. Nagamany inadmissible under paragraph 35(1)(a).

[9] In July 2008, Mr. Nagamany applied again for permanent residence, this time based on H&C considerations, and he asked for an exemption from his inadmissibility [H&C Application]. This H&C Application was based on the BIOC and the non-violent aspect of Mr. Nagamany's participation in the SOLT/LTTE. Shortly thereafter, in November 2008, a Pre-Removal Risk Assessment [PRRA] officer completed a case summary of the H&C considerations related to Mr. Nagamany's file [PRRA Officer Assessment].

[10] In March 2015, almost seven (7) years after it was first initiated, Mr. Nagamany's H&C Application was denied. This Court however granted Mr. Nagamany's application for leave and judicial review of that refusal and, in December 2015, on the eve of the hearing of his application on the merits, the Minister agreed to return the matter for redetermination by a different immigration officer. In January 2016, Mr. Nagamany sent an update letter to the Canadian immigration authorities regarding his H&C Application. Since this letter claimed that a positive H&C decision had already been rendered by the PRRA officer in November 2008, the senior decision-maker in charge of the redetermination, Mr. Charles Lajoie, sent a letter to Mr. Nagamany, asking for clarifications and updates. An exchange of correspondence between Mr. Nagamany and Mr. Lajoie followed, in which Mr. Lajoie clarified his request and notably explained that he would now evaluate the possible inadmissibility of Mr. Nagamany under both paragraphs 35(1)(a) and 34(1)(f) of the IRPA.

[11] In May 2018, Mr. Lajoie issued the H&C Decision, in which he refused Mr. Nagamany's H&C Application.

B. *The H&C Decision*

[12] In his H&C Decision, Mr. Lajoie first assessed whether Mr. Nagamany was still inadmissible under paragraph 35(1)(a) of the IRPA and concluded that, in light of the Supreme Court decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, Mr. Nagamany no longer met the test for complicity under that provision. The Officer then considered paragraph 34(1)(f) of the IRPA relating to membership in an organization that engaged in reprehensible acts and concluded that Mr. Nagamany was inadmissible on security

grounds pursuant to that paragraph, given the links between the SOLT and the LTTE and the broad interpretation that must be given to the membership requirement contained in that provision.

[13] Turning to the H&C considerations, Mr. Lajoie noted the positive factors in favor of Mr. Nagamany, namely the facts that he works, owns a house and contributes to the Canadian society. The Officer however added that the interests of his children and the impact of being separated from his wife were the most important factors at stake. In his analysis, Mr. Lajoie pointed to various factors disfavoring Mr. Nagamany's H&C Application: there was no current information supporting the fact that his oldest daughter still had a health problem and needed specialized care; being separated from a parent was allowed by the immigration legislation and was a situation experienced by thousands of children across Canada; no information suggested that the growth and development of his daughters would be hindered to a sufficient degree by his departure; the family would remain able to communicate electronically; Mr. Nagamany and his wife had adequate financial means to overcome the consequences of a separation; and Mr. Nagamany would not be without resources in Sri Lanka since he owns land and a home.

[14] Finally, Mr. Lajoie proceeded to a risk analysis. He noted that the political situation in Sri Lanka had improved in recent years and that, despite the problems still encountered by the Tamil community, being a Tamil was not in itself sufficient to be at risk. Past involvement in the LTTE was a risk factor, but Mr. Lajoie concluded that Mr. Nagamany would not be at risk since his involvement in the SOLT/LTTE was not public knowledge in Sri Lanka, he was not currently wanted for any crime, he never was a soldier or superior in the LTTE's military forces, he was

not involved in political or human rights activities, and the Sri Lankan authorities were unaware of his presence and refugee application in Canada.

[15] In the end, Mr. Lajoie concluded that there were not sufficient H&C considerations to warrant an exemption from Mr. Nagamany's inadmissibility under paragraph 34(1)(f) of the IRPA.

C. *The standard of review*

[16] It is well settled that the applicable standard of review in analyzing a discretionary decision based on H&C applications under subsection 25(1) of the IRPA is reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 44; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at para 62; *Islam v Canada (Citizenship and Immigration)*, 2018 FC 560 at para 24; *Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 [*Bhatia*] at para 21; *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 [*Kaur*] at paras 24-25).

[17] When reviewing a decision on the standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and the decision-maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47). In conducting a reasonableness review of factual findings, deference is warranted and it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any

relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy FCA*] at para 99, rev'd on other grounds 2015 SCC 61). This is especially the case where expertise arises from the specialization of functions of administrative tribunals having familiarity with a particular legislative scheme (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*City of Edmonton*] at para 33). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 17).

[18] The standard of reasonableness requires to show deference to the decision-maker as it is "grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing" (*City of Edmonton* at para 33; *Dunsmuir* at paras 48-49). Under a reasonableness review, when a question of mixed fact and law falls squarely within the expertise of a decision-maker, "the reviewing court's task is to supervise the tribunal's approach in the context of the decision as a whole. Its role is not to impose an approach of its own choosing" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 57).

III. Analysis

[19] For the reasons that follow, I find that the H&C Decision is unreasonable as the Officer ignored the approach prescribed by the Supreme Court in *Kanthasamy* and his reasons do not

accord with the evidence before him. Given my conclusion, I do not have to deal with Mr. Nagamany's arguments that the H&C Decision should be invalidated on grounds of *res judicata* or breach of natural justice. However, in light of the extensive representations made by both parties on these issues, I pause a moment to make the following comments.

A. *No res judicata or procedural fairness issues arise from the H&C Decision*

[20] Mr. Nagamany claims *res judicata* or issue estoppel for two different reasons. First, he argues that the Officer could not find him inadmissible under paragraph 34(1)(f) of the IRPA, since previous decisions of the Canadian immigration authorities had only considered his inadmissibility under paragraph 35(1)(a). More specifically, he claims that the RPD Decision of December 2004 concluding that he was not a refugee under paragraph 1F(a) of the Convention led to the CBSA report that found him inadmissible under paragraph 35(1)(a), and that the May 2008 decision similarly only cites that provision of the IRPA. He contends that assessing his inadmissibility under paragraph 34(1)(f), when there were no new facts before the Officer, is unfair and violates the principles of *res judicata* or issue estoppel. Second, Mr. Nagamany submits that the PRRA Officer Assessment from November 2008 was a "decision" on the H&C Application he had submitted, and that there was therefore *res judicata* regarding the H&C considerations.

[21] I do not agree.

[22] *Res judicata* includes cause of action estoppel and issue estoppel (*Erdos v Canada (Citizenship and Immigration)*, 2005 FCA 419 [*Erdos*] at para 15; *Balasingham v Canada*

(Citizenship and Immigration), 2015 FC 456 at para 22). Cause of action estoppel prevents the re-litigation of the same cause of action that the same parties have already brought before a court or other decision-maker for a decision, while issue estoppel precludes the re-litigation of the same issue between the same parties, even though the issue arises in the context of a different cause of action (*Erdos* at paras 15-16). In this case, Mr. Nagamany only argues issue estoppel. As a first step to establish issue estoppel, three preconditions must be established (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paras 25, 33; *Timm v Canada*, 2014 FCA 8 at paras 22-23): (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised. Issue estoppel applies where the same issue has already been decided.

[23] There is no issue estoppel with respect to the inadmissibility findings on Mr. Nagamany as the various decisions do not relate to the same question. The issue before the RPD and the CBSA was inadmissibility under one provision of the IRPA (namely, paragraph 35(1)(a)), whereas the issue considered by the Officer in the H&C Decision was whether Mr. Nagamany could be inadmissible under a different provision (namely, paragraph 34(1)(f)). The two issues are not the same. At no point did the RPD Decision or the May 8, 2008 decision discuss paragraph 34(1)(f). Mr. Lajoie indeed noted that the fact that the CBSA or the Minister had not yet initiated an inadmissibility proceeding under paragraph 34(1)(f) did not prevent him from conducting such assessment. The H&C Decision could therefore fully examine the admissibility of Mr. Nagamany under paragraph 34(1)(f) of the IRPA even if this had not been raised before by the Canadian immigration authorities. In other words, the fact that the CBSA had not yet

initiated an inadmissibility proceeding under this paragraph did not preclude the Officer from assessing this new ground of inadmissibility; in fact, it was the Officer's duty to do so as an independent decision-maker. When asked at the hearing, counsel for Mr. Nagamany could not point the Court to any authority supporting his position that the Canadian immigration authorities would somewhat be estopped from looking at this issue as part of their reconsideration of Mr. Nagamany's H&C Application in 2018.

[24] With regards to Mr. Nagamany's second issue estoppel argument, the Officer could certainly assess the H&C considerations put forward by Mr. Nagamany, since the PRRA Officer Assessment is not a decision and does not contain any clear conclusion accepting his H&C considerations. The PRRA Officer Assessment is a standard internal procedure that is not meant to decide on any issue. The title of the document clearly indicates that its purpose is to transfer the file for the central administration to eventually decide on the H&C considerations raised by the applicant. Again, when asked at the hearing, counsel for Mr. Nagamany could not identify any passage in the 2008 PRRA Officer Assessment showing that this administrative document could be interpreted as a "decision" on Mr. Nagamany's H&C considerations. Since there was no "decision", no *res judicata* or issue estoppel can arise from this assessment.

[25] On the alleged breach of natural justice, Mr. Nagamany points to the abnormally long delay between the moment he first submitted his H&C Application in 2008 and the H&C Decision 10 years later, a delay that he is not responsible for. He argues that this delay was oppressive and that the uncertainty caused stress to his family and him. Moreover, he claims that the Officer's letter requesting for updates was not clear. While it is certainly regrettable to see an

H&C Application take such a long time before it is decided, I am not convinced that it amounts to a breach of natural justice in this case.

[26] A lengthy delay is not sufficient, in and of itself, to constitute an abuse of process; otherwise, this would create a judicially-imposed limitation period for administrative proceedings (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] at para 101; *Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 [*Ching*] at para 81). Rather, an applicant must prove that a significant prejudice resulted from the delay (*Blencoe* at para 101). For example, prejudice may arise when a delay compromises the fairness of the hearing, such as when memories have faded, essential witnesses have died, or evidence has been lost (*Blencoe* at para 102; *Bergey v Canada (Attorney General)*, 2017 FCA 30 [*Bergey*] at para 66). It can also arise when the applicant suffered significant psychological or reputational harm because of the delay (*Blencoe* at para 115; *Canada (Attorney General) v Norman*, 2002 FCA 423 [*Norman*] at paras 22, 25). In both cases, the delay must be "unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para 121; *Bergey* at para 66; *Norman* at para 26). This determination depends on a contextual analysis of all the relevant circumstances, such as the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived it (*Blencoe* at para 122; *Norman* at para 26; *Ching* at paras 83-85). Such determination requires evidence in support of the allegations of harm.

[27] Here, Mr. Nagamany only alleged psychological harm, in that the uncertainty surrounding his H&C Application caused stress to his family and to him. I do not find that the

prejudice described by Mr. Nagamany meets the high threshold established by the Supreme Court in *Blencoe*. The process of submitting a permanent residence application is no doubt stressful but, in order to succeed with this argument, significant prejudice must result from the delay itself, and must be demonstrated. There is no such evidence in the case of Mr. Nagamany, apart from the uncertainty typically associated with a permanent residence application.

B. *The H&C Decision contains numerous errors and falls outside the range of possible, acceptable outcomes*

[28] Mr. Nagamany submits that the Officer could not reasonably deny his H&C Application in light of all the evidence he submitted on his integration into Canadian society, on the impact on his children and on the hardship he would suffer if he were to return to Sri Lanka. He contends that the Officer did not use the proper test for H&C applications. Furthermore, he argues that the BIOC assessment was not done in accordance with the principles established in *Kanthasamy*, in that the H&C Decision required hardship to the children to outweigh his inadmissibility; more specifically, he pleads that the Officer did not assess the factors described in *Kanthasamy*, and improperly ignored the consequences of a denial on his family and himself. He further claims that the information he submitted was not used, especially the National Documentation Package on Sri Lanka that sets out the risks for Tamils suspected of LTTE involvement.

[29] I agree. In my view, the H&C Decision contains numerous errors that push it outside the range of possible, acceptable outcomes.

(1) The general approach to H&C applications

[30] In *Kanthasamy*, the Supreme Court clarified the legal test that representatives of the Minister must use to assess H&C applications under paragraph 25(1) of the IRPA. In *Kanthasamy*, the Supreme Court established that *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 [*Chirwa*] provided an important governing principle for H&C assessments. The Supreme Court expressed the view that "the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350" (*Kanthasamy* at para 21; *Kaur* at paras 32-33).

[31] Therefore, looking at the issue of H&C considerations solely through the lens of hardships is no longer sufficient and the language of "unusual and undeserved or disproportionate hardship" must not be used by immigration officers in a way that limits their ability to consider and give weight to *all* relevant H&C considerations in a particular case (*Kanthasamy* at para 33). A reviewing court must therefore be satisfied that the approach outlined in *Kanthasamy* transpires from the reasons and that the decision-maker has, in his or her analysis, properly considered not just hardships but all relevant H&C considerations in a broader sense.

[32] I find that, in the case of Mr. Nagamany, the H&C Decision does not allow me to draw that conclusion. The Officer's reasons and his discussion of the H&C considerations are well

wide of the mark and do not reflect, in my view, the attitude of a person sensitive and responsive to the misfortunes of others or animated by a desire to relieve them. I agree that being desirous to relieve the misfortunes of an applicant does not mean that officers have to automatically find that an H&C relief is merited. The *Chirwa/Kanthasamy* language certainly does not call for a given result. But the approach necessitates a certain mindset and disposition on the part of immigration officers, and it dictates a certain path to be followed in their analysis of the evidence in order to echo the overarching purpose of H&C provisions like subsection 25(1) of the IRPA. Immigration officers of course retain their discretion to assess the evidence, equipped as they are with their specialized expertise in handling immigration matters, and the *Chirwa/Kanthasamy* approach to H&C applications therefore does not impose the destination to be ultimately reached by the decision-makers. But it certainly defines a road to be taken in the analysis (*Kaur* at para 36).

[33] Here, the Officer has failed to embark on the prescribed road. Mr. Nagamany was not entitled to a certain result on his H&C Application; but he was entitled to a certain process and to see his application treated under the lens established in *Kanthasamy*. This is what he did not get in the H&C Decision. The passages of the H&C Decision dealing with Mr. Nagamany's establishment, the BIOC and the risk analysis illustrate the Officer's failure.

(2) The treatment of Mr. Nagamany's establishment

[34] I first agree with Mr. Nagamany that it was unreasonable for the Officer to conclude that his level of establishment in Canada was something that could simply be brushed aside as ordinary, without any more analysis. Other decisions of this Court have held that it is unreasonable to require, without more explanation, an "extraordinary" level of establishment

(*Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 13; *Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at para 14; *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 80).

[35] True, the H&C Decision mentions that Mr. Nagamany works, owns a house and contributes to the society. But it ignores compelling evidence indicating that his establishment is certainly not just "ordinary": Mr. Nagamany has been employed for many years, he has reported substantial income and growing revenues since 2009, and he purchased a house of sizeable value in Canada. His wife is Canadian and his two daughters were born in Canada. I am mindful of the fact that the Court owes a large degree of deference to the Officer on establishment issues (*Bhatia* at para 27). Indeed, an immigration officer "has the expertise and experience necessary to permit him or her to identify the level of establishment that is typical of persons who have resided in Canada for the same approximate length of time as the Applicants and, therefore, to use this as a yardstick in assessing their establishment" (*Kaur* at 69; *Villanueva v Canada (Citizenship and Immigration)*, 2014 FC 585 at para 11). However, in the circumstances of this case, I do not find it reasonable to treat the evidence on Mr. Nagamany's establishment with the limited consideration given to it by the Officer.

(3) The treatment of the BIOC

[36] Turning to the BIOC, the Minister claims that the Officer reasonably assessed this factor. He notes that the report describing the developmental problems of Mr. Nagamany's oldest daughter was written when she was three years old and, while she was now 12 years old, no update had been provided. The Minister also argues that a denial decision always creates

difficulties when a parent must leave Canada, but that the harm must be beyond the case at bar, citing my decision in *Patel v Canada (Citizenship and Immigration)*, 2018 FC 882 [*Patel*] at paragraph 15.

[37] I am not persuaded that the Officer reasonably applied the BIOC test in this case. On the BIOC, the Supreme Court clarified the relevant test in *Kanthasamy*. It held that a decision under subsection 25(1) of the IRPA will be found unreasonable "if the interests of children affected by the decision are not sufficiently considered", in the sense that "decision-makers must do more than simply state that the interests of a child have been taken into account": they must ensure that those interests are "'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39; *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 [*Hawthorne*] at para 32; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 [*Legault*] at para 31). Immigration officers have the duty to consider the children's best interests "as an important factor", give them "substantial weight", and "be alert, alive and sensitive to them" (*Kanthasamy* at para 38; *Baker* at paras 74-75).

[38] The bottom line in assessing this factor is that it is not enough for immigration officers to say that the best interests of the children have been considered. In order to escape judicial scrutiny, the reasons must reflect that these interests are "well identified and defined" and are effectively examined by the officer "with a great deal of attention". Ultimately, the officer must be "alert, alive and sensitive" to these interests in what has to be a "highly contextual" analysis because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy*

at paras 35 and 38-39; *Baker* at para 75; *Hawthorne* at para 10). In order to meet this requirement, it is necessary for the analysis to address the "unique and personal consequences" that removal from Canada would have for the children affected by the decision (*Kaur* at para 41; *Tisson v Canada (Citizenship and Immigration)*, 2015 FC 944 at para 19; *Ali v Canada (Citizenship and Immigration)*, 2014 FC 469 at para 16). The analysis must likewise not be made in a vacuum, but must take into account the "child's level of development", as it is necessary to be "responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35; *Hawthorne* at para 5).

[39] Again, the teachings of *Kanthasamy* on the BIOC necessitate a certain mindset and disposition on the part of immigration officers, and they dictate the path to be followed in their analysis of the BIOC evidence. In the case of Mr. Nagamany, I am unable to say that this is what the Officer actually did. I cannot conclude that the Officer studied the best interests of Mr. Nagamany's daughters with a great deal of attention. In my view, the reasons show that the Officer did not give sufficiently serious consideration to their worries about being separated from their father, and to the general impact of their father's removal on their life. In my opinion, the Decision does not communicate any empathetic efforts by the Officer to understand the evidence as well as any openness and sensitivity to the children's situation. On the contrary, it tends to unreasonably discount any adverse impact on them.

[40] I point for example to the Officer's remark that it is "reasonable to believe that they could continue their development without too many problems", an affirmation not supported by the evidence on the record. There is also no evidence to support the Officer's statement that the

growth and development of the children would likely not be hindered by Mr. Nagamany's departure. The evidence submitted by Mr. Nagamany rather points to the contrary. The decision ignores the concerns expressed by the daughters and minimizes the consequences of a separation by assimilating it to the experiences of other children in vastly different contexts. It did not consider the particular situation of Mr. Nagamany's daughters or the impact of a separation on their education and strong establishment in Canada, where they have lived their entire life. Nowhere is there a consideration that the separation from their father might be permanent due to Mr. Nagamany's inadmissibility. I further observe that the H&C Decision ignores the evidence indicating that Mr. Nagamany's wife would likely not be able to keep their house and pay the mortgage by herself, and would likely have to sell the property if Mr. Nagamany has to leave Canada, forcing the children to move to a different place.

[41] Throughout his analysis, 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 children of their father's removal to a foreign country. In fact, the Officer's analysis was centered on Mr. Nagamany's wife's expected ability to work and support the children financially, and that she would therefore continue to meet the daughters' needs. The Officer also assumed that the children's mother would take care of them very well, thus discounting the role of Mr. Nagamany in the support, raising and education of his daughters. In the circumstances of this case, this approach falls outside the range of possible, acceptable outcomes.

[42] One of the arguments raised by the Minister is that all denial decisions, especially those involving a family separation, result in difficulties. The Minister's reliance on my decision in *Patel* is misplaced. *Patel* was in the context of a stay motion, where one of the criteria to be met is irreparable harm. There is no such criterion for H&C applications. The consequences of a family separation can constitute hardship, even if they do not amount to irreparable harm.

[43] As countervailing factors that could contribute to limit the adverse impact of the removal on the best interests of Mr. Nagamany's daughters, the Officer referred to the fact that their experience could be assimilated to that of all children separated from their families, no matter what the cause may be. The Officer thus minimized the impacts of a separation by qualifying the particular experience of Mr. Nagamany's daughters as predictable and similar to that suffered by many other children in significantly different situations. The Officer even seemed to suggest that Mr. Nagamany should have waited until his status was regularized to have children or get married.

[44] Instead of illustrating that all H&C dimensions were duly considered in the assessment of the BIOC, and that the particular age, capacity, needs and maturity of Mr. Nagamany's daughters were factored in, the H&C Decision rather reflects that the Officer failed to be alert, alive and sensitive to their best interests, omitted to identify and define those interests, and neglected to treat them with attention. The Decision does not show the required efforts to gain a full understanding of the real-life impact of a negative H&C decision on the best interests of Mr. Nagamany's daughters. Where a child's interests are minimized "in a manner inconsistent

with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable" (*Baker* at para 75).

[45] I do not dispute that the mere presence of children does not necessarily call for a certain result, and that the BIOC will not always outweigh other considerations or mean that there will not be other reasons for denying an H&C claim (*Kanthasamy* at para 38). It is well-established that the BIOC "[do] not necessarily trump other factors for consideration in an H&C application" even if it is an important factor (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 28), as it remains only one factor to be weighted among others (*Hawthorne* at para 6; *Legault* at para 12). However, in this case, the Officer's assessment of the BIOC clearly fails to meet the test established by *Kanthasamy* and its progeny.

(4) The risk analysis

[46] I also find that the Officer's risk analysis falls outside the range of possible, acceptable outcomes. The Minister contends that the assessment of hardship should Mr. Nagamany return to Sri Lanka is reasonable, given the improvement of the political situation in that country, the fact that Mr. Nagamany's involvement in the SOLT/LTTE was limited, and the fact that his SOLT/LTTE involvement, his failed refugee claim and his presence in Canada are not public knowledge. This is no supported by the evidence.

[47] In *Nagamany*, in which the Court dismissed Mr. Nagamany's application for judicial review of the RPD Decision, the Court found that Mr. Nagamany was associated with the LTTE and was active for several years in two vital functions of the LTTE and its student unit SOLT,

namely propaganda and finance (*Nagamany* at para 67). It is difficult to reconcile these findings with the Officer's conclusion in the H&C Decision that Mr. Nagamany's involvement would not put him at risk upon return to Sri Lanka. The country conditions evidence indicates that actual or perceived links or past involvement with the LTTE are likely to bring someone to the adverse attention of the Sri Lankan authorities. This is not a situation where the evidence could reasonably lead one to conclude that Mr. Nagamany would not be perceived as having any LTTE connection.

[48] In addition, in light of this Court's decision in *Nagamany*, which is easily available on the Court's website, the Officer's statement that Mr. Nagamany's association and active involvement with the SOLT/LTTE is not public knowledge is incomprehensible and certainly unreasonable. I note that, in discounting the adverse impact of his departure on his family, the Officer had said that Mr. Nagamany would be able to communicate with his family through electronic means such as Skype. Yet, in stating that Mr. Nagamany's involvement in the SOLT/LTTE is not public knowledge, the Officer implies that the Internet would not be available in Sri Lanka for the government to be aware of the *Nagamany* decision and of Mr. Nagamany's active involvement in the SOLT/LTTE. This is not a reasonable and intelligible conclusion. Moreover, given the Officer's determination that Mr. Nagamany is inadmissible in Canada because of his membership and participation in the SOLT/LTTE, his conclusion that Mr. Nagamany would not face hardship upon return based on his limited involvement in this organization defies any logic.

[49] I therefore find that the Officer's conclusion that Mr. Nagamany would face no significant hardship should he return to his country finds no support in the evidence before him.

(5) The absence of a weighing analysis

[50] Finally, it is impossible to understand if and how the Officer weighed all the evidence on the H&C considerations, an exercise that the immigration officers must conduct in reviewing an H&C application. Nowhere in the H&C Decision is there a discussion of the weighing analysis that the Officer was required to undertake in making his H&C determination (*Kanthasamy* at para 25). As they stand, the conclusions of the Officer do not allow the parties or the Court to understand how the H&C factors were considered and assessed, and how the H&C Decision was ultimately reached. This silence on the weighing exercise which must be part of any H&C assessment is another element rendering the Decision unreasonable and putting it outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[51] I acknowledge that subsection 25(1) of the IRPA remains a responsive exception to the ordinary operation of the IRPA. On that note, the Supreme Court in *Kanthasamy* underlined that "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1), […] [nor] was s. 25(1) intended to be an alternative immigration scheme" (*Kanthasamy* at para 23). An H&C exemption is an exceptional and discretionary remedy (*Legault* at para 15), sitting outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently. I also accept that a decision-maker

is not required to refer to each and every detail supporting his or her conclusion. It is sufficient if the reasons permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible, acceptable outcomes (*Newfoundland Nurses* at para 16). Under the reasonableness standard, the reasons are to be read as a whole, in conjunction with the record, in order to determine whether the reasons provide the justification, transparency and intelligibility required of a reasonable decision (*Dunsmuir* at para 47; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 51-53). Under a reasonableness review, the Court's role is limited to "finding irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction", such as the presence of illogic or irrationality in the fact-finding process or in the analysis, or the making of factual findings without any acceptable basis whatsoever (*Kanthasamy FCA* at para 99).

[52] But the standard of reasonableness requires that the findings and overall conclusion of a decision-maker withstand a somewhat probing examination. Where parts of the evidence are not considered or are misapprehended and where the findings do not follow from the evidence, a decision will not withstand the probing examination. This is the situation here.

IV. Conclusion

[53] For the foregoing reasons, Mr. Nagamany's application for judicial review is granted. The Officer's refusal of the H&C Application is not a reasonable outcome in respect of the law and the evidence on the record. In the circumstances of this case, I am not satisfied that the reasons provide the justification, transparency and intelligibility required of a reasonable decision. Under the reasonableness standard, the Court must intervene if the decision under

judicial review falls outside the range of possible and acceptable outcomes in respect of the facts and law. Therefore, I must allow the application for judicial review and remit Mr. Nagamany's H&C Application for reconsideration by another officer.

[54] Mr. Nagamany has proposed to certify one question in relation with the Officer's decision to consider Mr. Nagamany's inadmissibility under paragraph 34(1)(f) of the IRPA. I do not find that the proposed question meets the requirements for certification developed by the Federal Court of Appeal. According to paragraph 74(d) of the IRPA, a question can be certified by the Court if "a serious question of general importance is involved". To be certified, "a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15-16; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9). I decline to certify the question as it would not be dispositive of the appeal, given my conclusion on the unreasonableness of the Officer's assessment of the H&C considerations.

[55] There are therefore no questions of general importance to be certified.

JUDGMENT in IMM-2615-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, without costs.

2. The May 2018 decision denying Mr. Nagamany's application for permanent residence based on H&C considerations is set aside.

3. The matter shall be returned to the Minister of Citizenship and Immigration for reconsideration by a different officer.

4. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2615-18
STYLE OF CAUSE:	SIVANESAN NAGAMANY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 6, 2019
JUDGMENT AND REASONS:	GASCON J.
DATED:	FEBRUARY 13, 2019

APPEARANCES:

Dan M. Bohbot	FOR THE APPLICANT
Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dan M. Bohbot, Lawyer Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT