THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

IMMIGRATION ISSUES—2016 UPDATE
PAPER 4.1

H&C Update Following the SCC Kanthasamy Decision

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H&C UPDATE FOLLOWING THE SCC KANTHASAMY DECISION

The purpose of this paper is to provide an overview of the influence of the Supreme Court's decision of *Kanthasamy v. Canada* on humanitarian and compassionate applications for permanent residence.

I. Case Summary

In December 2015, the Supreme Court of Canada *decided Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61. Jeyakannan Kanthasamy was Tamil teenager from Sri Lanka, who had filed an application for humanitarian and compassionate relief under s. 25(1) of the *Immigration and Refugee Protection Act* to obtain permanent resident status from within Canada (hereinafter "H&C application"). The deciding Immigration Officer used the test of "unusual and underserved or disproportionate hardship" to assess the application and rejected the application. On judicial review, the Federal Court held that the Officer's decision had been reasonable and the Federal Court of Appeal agreed.

In the majority judgement, McLachlin C.J., held that the Officer's decision was not reasonable. In coming to this decision, the Court reviewed the history[1] and purpose of s. 25(1), which states:

> 25. (1) The Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible - other than under section 34, 35 or 37 - or who does not meet the requirements of this Act, and may, on

[1] In particular, Chirwa v. Canada (Minister of Citizenship and Immigration) (1970), 4 I.A.C. 338.

> request of a foreign national outside Canada - other than a foreign national who is inadmissible under section 34, 35 or 37 - 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*. (emphasis added)

The Court wrote, several times in the decision, that the purpose of s. 25(1) is to offer *equitable relief*, and that equitable relief would excite, in a reasonable person, in a civilized community a desire to relieve the misfortunes of others. The Court further wrote that "what warrants relief will vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them".

The IRCC Guidelines had stated that applicants must demonstrate either "unusual and undeserved" or "disproportionate" hardship for relief under s. 25(1) to be granted. The SCC stated that while the Guidelines are useful, they are not legally binding, are not intended to be either exhaustive or restrictive, and should not be treated as mandatory requirements. Officers should not look at H&C applications through the lens of these three adjectives "as discrete and high thresholds". The three adjectives should be seen as instructive but not determinative, which allows for a more flexible approach to achieve equitable goals. The Court stated that Officers "should not fetter their discretion by treating these informal Guidelines as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion granted by s. 25(1)".

The SCC also gave a clear directive that assessments ought to be made holistically. Officers must consider an applicant's circumstances as a whole and not take a narrow and/or segmented approach to the assessment. The requisite analysis is whether, in light of the humanitarian purpose of s. 25(1), the evidence *as a whole* justifies relief.

A. Best Interest of the Child (BIOC)

Since Jeyakannan Kanthasamy was a minor as well as the principal applicant, much of the decision focused on the appropriate assessment of the "best interest of the child" principle. S. 25(1) specifically states that the best interest of a child who is directly affected should be considered. The Court held the following:

(1) Children will rarely, if ever, be deserving of *any* hardship and that therefore the concept of unusual or undeserved hardship is presumptively inapplicable to a child applicant.

(2) Children may experience greater hardship than adults when faced with comparable situations and therefore circumstances which may not warrant H&C relief for an adult may warrant relief for a child.

The "best principle" applies to all children under 18 years of age, is highly contextual, and must be applied in a manner responsive to each child's particular age, capacity, needs and maturity. Also, the interests of children must be sufficiently considered. Decision makers must do more than simply *state* that the interests of a child have been taken into account; the interests must be examined with a great deal of attention.

II. IRCC Guideline Updates

Following the SCC decision of Kanthasamy, the IRCC has updated its on-line information about H&C applications accordingly. While IRCC no longer has manuals accessible on-line, their guidelines are available and reflect the procedures to be followed by IRCC decision makers. The Guidelines highlight that policy guidelines provide assistance to decision makers but that they are not intended to be either exhaustive or restrictive, and that decision makers should not fetter their discretion by treating the guidelines as if they were mandatory requirements.

According to the Program Objective, the purpose of H&C discretion is to allow flexibility to approve deserving cases not covered by legislation. The website further states:

(1) What warrants relief will vary depending on the facts and context of the case, but officers making H&C determinations must substantively consider and weigh all the relevant facts and factors before them; and

(2) Individual H&C factors should not be considered in isolation; there must be a global assessment of all the relevant factors.

The factor of hardship has not gone away altogether. IRCC states that while there is no hardship "test" for H&C applicants, the determination of whether there are sufficient grounds to justify granting an H&C request will generally include an assessment of hardship. As per the Guidelines "hardship continues to be an important consideration in determining whether sufficient humanitarian and compassionate considerations exist to justify granting an exemption and/or permanent resident status". Hardship refers to the situation and effects that would arise from forcing the applicant to apply for permanent residence from outside Canada. The Guidelines instruct the decision maker to consider the extent to which the applicant, given their particular circumstances, would face hardship if they had to leave Canada in order to apply for permanent residence abroad".

Other factors that may be considered by the decision maker are:

- establishment in Canada;
- ties to Canada;
- the best interests of any children directly affected by the H&C decision;
- factors in applicant's country of origin including adverse country conditions (i.e. war, natural disasters, lack of employment, unfair treatment of minorities, widespread violence, political instability);
- health considerations including inability of a country to provide medical treatment (must show that the applicant requires the treatment and that the treatment is not available in the applicant's country of origin);
- family violence considerations;
- consequences of the separation of relatives;
- inability to leave Canada has led to establishment; and
- any unique or exceptional circumstances that might merit relief.

Unfair treatment of minorities often relates to discrimination and the Guidelines state that the applicant does not need to demonstrate that he or she has been targeted personally. It can be sufficient to show evidence of discrimination experienced by others who share the applicant's profile.

Note: there are other factors listed in the Guidelines for overseas applications but this paper is limited to H&C applications made from within Canada.

The Guidelines also specially instruct decision makers (under the heading "Threshold of Proof") that "once all elements of the case have been determined, using the appropriate standard of proof, assess all facts in the application and decide whether a refusal to grant the request for an exemption would, more likely than not, result in unusual and underserved or disproportionate hardship".

A. Best Interest of the Child (BIOC)

The IRCC Guidelines provide specific instructions regarding BIOC:

> The codification of the principle of "best interests of a child" into the legislation *does not mean* that the interests of the child outweigh all other factors in a case. While factors affecting children should be given substantial weight, the best interests of a child is only one of many important factors that the decision maker needs to consider when making an H&C decision that directly affects a child.

The Guidelines further provide instructions reflecting the wording from *Kanthasamy*. Decision makers must be "alert, alive and sensitive" to the best interests of the children; should bear in mind that children will rarely, if ever, be deserving of any hardship; and realize that circumstances which may not warrant H&C relief when applied to an adult, may warrant relief to a child because children may experience greater hardship than adults when faced with a comparable situation.

Decision makers are instructed to consider factors relating to a child's emotional, social, cultural and physical welfare. These factors may include, but are not limited to:

- the age of the child
- the level of dependency between the child and the H&C applicant
- the degree of the child's establishment in Canada
- the child's links to the country in relation to which the H&C assessment is being considered
- the conditions of that country and the potential impact on the child
- medical issues or special needs the child may have
- the impact to the child's education
- matters related to the child's gender
- potential risks to the child

III. Caselaw Post-Kanthasamy

It has been a year since *Kanthasamy* was decided and so there are now sufficient subsequent decisions to indicate how the *Kanthasamy* decision is being applied by both Immigration Officers and the courts. As of 11 November 2016, there have been 47 cases decided by the Federal Court and IRB-IAD which cite *Kanthasamy*; not all deal with the issues of the hardship test or BIOC. Below are some of the more significant decisions:

A. Semena v. Canada (Citizenship and Immigration), 2016 FC 1082

Ms. Semena was found inadmissible for misrepresentation which she appealed at the IAD based on H&C grounds. She judicially reviewed the negative IAD decision arguing that the IAD did not properly assess the BIOC factor, as it neglected to follow the three-step process for considering the children's best interests, as set out in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166. Justice Gascon disagreed and held that the IAD is required to be "alert, alive and sensitive" to the best interests of the children. Pursuant to Baker and *Kanthasamy*, the interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence". However, there is no specific formula or rigid test prescribed or required for a BIOC analysis; there is no "magic formula to be used by immigration officers in the exercise of their discretion". Justice Gascon further highlighted that, in *Kanthasamy*, the Supreme Court did refer to certain passages of *Williams*, but refrained from adopting the three-step approach laid out in that decision.

B. Cortez v. Canada (Citizenship and Immigration), 2016 FC 800

This case is also a judicial review of a negative IAD decision on misrepresentation. Mr. Cortez argued that courts "should presume, absent compelling evidence to the contrary, that the actions of parents are indicative of the children's best interests". Justice Diner stated that without some stronger expression in law than that offered by Mr. Cortez, he could not agree that the default position in a BIOC analysis is that whatever the parents "do in practice" for (or with) that child is in his or her best interest, meaning that the decision maker can rely on its own assessment.

C. Canada (Public Safety and Emergency Preparedness) v. Nizami, 2016 FC 1177

Justice Shore affirmed that H&C exemptions are exceptional and represent a discretionary remedy, and should therefore only remain available for exceptional cases in order to avoid becoming an 'alternative immigration stream' or an appeal mechanism.

D. Puna v. Canada (Citizenship and Immigration), 2016 FC 1082

Mr. Puna asked the Court to judicially review a negative IAD decision. Mr. Puna argued, based on *Kanthasamy*, that the SCC had removed the "unusual, undeserved and disproportionate" component from the test for hardship when considering H&C grounds. Justice Mosley disagreed and stated that the SCC had not eliminated the "unusual and undeserved or disproportionate hardship" standard. Rather, the Court held that the standard should be "treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1)" of the IRPA.

E. Cerezo v. Canada (Citizenship and Immigration), 2016 FC 1224

Ms. Cerezo judicially reviewed a negative decision of her H&C application. Justice Campbell stated that the Officer's analysis of the best interests of the children was conflicted to the point of being unintelligible. The Officer found that "it is in the best interest of the Applicant's children to remain with both parents and that their interests are better served in Canada" yet later stated that in the decision that serious dislocation and separation was tolerable. It is this hardship upon which the H&C application was based and which was apparently neglected. The engagement of sensitivity is fundamental to rendering a decision on the best interests of a child.

F. Sutherland v. Canada (Citizenship and Immigration), 2016 FC

Ms. Sutherland also judicially reviewed a negative decision of her H&C application. Uncontradicted psychological evidence before the Officer showed that returning Ms. Sutherland to Grenada or St. Vincent would exacerbate her mental health problems and that her mental health condition would suffer if she were removed from Canada. In such circumstances, it was not enough for the Officer to simply look at the availability of mental health care in Grenada or St. Vincent. The Officer needed to expressly take into consideration "the effect of removal from Canada would be [on her] mental health".

G. Li v. Canada (Public Safety and Emergency Preparedness), 2016 FC 451

Mr. Li was found to be inadmissible based on misrepresentation and he judicially reviewed this decision. He had appealed the removal order based on humanitarian and compassionate grounds and the best interests of the child as his wife was pregnant at the time of the IAD hearing. The IAD had stated that as the child was not yet born, it had no interest *per se* and the best interests of the child was not considered. Justice Shore held that the IAD, at the very least, should have considered the child's best interests of being united in Canada with his/her family.

H. Lu v. Canada (Citizenship and Immigration), 2016 FC 175

Mr. Lu judicially reviewed a negative sponsorship application of his 8-year old son who had not been declared or examined. Justice Russell found that the decision maker did not attempt to engage the specifics of the case or try to explain why, given what this child faces if he remains in China, there are insufficient grounds to warrant a positive consideration. The Officer might just as well have said "I have considered your application and I don't think it presents sufficient grounds to warrant a positive consideration under humanitarian and compassionate grounds." If that were adequate, then no H&C decision that used these general words would ever be set aside on judicial review. The jurisprudence of this Court tells us that more is required.

I. Tabatadze v. Canada (Citizenship and Immigration), 2016 FC 24

One of the issues in this judicial review was the use of medical reports. Here, Justice Brown confirmed that reports of health care professionals are of most value to the extent they contain health care-related evidence; they should not be rejected because they fail to name a claimant's assailant(s).

J. D'Aguiar-Juman v. Canada (Citizenship and Immigration), 2016 FC 6

This was a judicial review of a negative H&C application. Justice Gleeson dismissed the application and highlighted that the onus of providing information and evidence rests with the applicant. He states "while decision-makers must do more than simply state that the interests of a child have been taken into account when considering their best interests, the flip side of that coin is that the applicant must do more than simply assert what is in a child's best interests".