Federal Court  Cour fédérale

Date: 20150724

Docket: IMM-92-14

Citation: 2015 FC 904

Ottawa, Ontario, July 24, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

JAN JANETTE JOSEPH
RUDY MAXWELL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Jan Janette Joseph and Rudy Maxwell [the Applicants] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of a decision by a Senior Immigration Officer [the Officer], dated December 10, 2013, in which the Officer refused the Applicants' application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

I. Facts

[2] Jan Janette Joseph [the Principal Applicant] was born in Laborie, St. Lucia, where she is a citizen. She arrived in Canada on March 14, 2002. She met her common law partner, Rudy Clement Maxwell [the co-Applicant], in Canada and they moved in together in September 2003. The co-Applicant also came to Canada from St. Lucia, in May 2002. Their child, Rudy Joseph Maxwell Junior, was born in Canada in 2008 and has mild autism.

[3] The Applicants applied for permanent residency on the basis of H&C grounds on December 6, 2012. Their application was refused by the Officer on December 10, 2013. Leave to apply for judicial review was granted on April 8, 2015.

II. Decision under Review

[4] The Officer noted that the Applicants made no efforts to regularize their status in Canada for more than a decade prior to applying for H&C relief. The Officer noted the exceptional nature of H&C relief, stated the test the Applicants had to meet, namely to demonstrate that the hardship brought forward would result in unusual and undeserved or disproportionate hardship if they had to apply for permanent residence from outside Canada, and referred to subsection 25(1) of the *IRPA*. The Officer then considered the following issues.

A. *Establishment*

[5] The Officer noted the Applicants had demonstrated some strong establishment links to Canada, but again noted their failure to regularize their status in Canada for almost eleven years before they made their H&C application. The Officer found the Applicants' lack of compliance with respect to working without a work permit and their lack of effort to regularize their status over a period of almost eleven years was problematic and that it detracted from their overall establishment in Canada.

[6] The Officer nevertheless noted that in most aspects of their lives, the Applicants had made serious efforts at establishing themselves in Canada, but that was as would be expected from being in the country for almost twelve years. The Officer found they had not established themselves to a degree that would result in an unusual and undeserved or disproportionate hardship if they had to apply for permanent residence from outside Canada. The Officer gave establishment some weight.

B. *Best Interests of the Child [BIOC]*

[7] The Applicants' main concern is that their mildly autistic child will not receive the speech, language and behavioral therapy he needs in St. Lucia because, they alleged, adequate institutions are not available to provide for his needs. They stated the only organization in St. Lucia that provides services for special needs is the Child Development and Guidance Centre and they do not have behavioural therapy programs. In this connection, the Officer conducted independent research on the internet using the terms "Autism in St. Lucia", which resulted in

several links to websites dealing with autism in St. Lucia, including a 2005-2006 publicly-available UNESCO report on education in St. Lucia. The UNESCO report noted five special education institutions, three of which dealing specifically with persons with learning disabilities, including autism.

[8] The Officer agreed with the Applicants' submission that if they were returned to St. Lucia, it would be in the best interests of the child to accompany them.

[9] Regarding the child's establishment, the Officer noted that the Applicants provided little evidence of his involvement in school or that he had started building relationships in school. The Officer found that the child's involvement in his community was not so entrenched that leaving Canada with the Applicants would negatively impact his best interests. The Officer noted that the "Family Time" program the Applicants' child attended at the Toronto Public Library appeared to be an activity for kids to participate with parents or caregivers but not necessarily to build social relationships with other children. The Officer noted that the Applicants provided no evidence that similar programs that focused on reading were not available in St. Lucia for young children.

[10] Regarding the lack of health care, the Officer noted that other than their son's mild autism, the Applicants had not indicated that he was unhealthy in any other aspect. Their argument was that there is a severe lack of services for people with disabilities, that health care in general is difficult to access, and that this situation would disproportionately impact their child more. The Officer found these assertions to be speculative because the Applicants had not

indicated their son was unhealthy in any other way. In sum, the Officer found the best interests of the Applicants' child would not be compromised by accompanying his parents to St. Lucia.

[11] Regarding the BIOC considerations as they relate to the Principal Applicant's goddaughter, after taking note of case law that was cited by the Applicants' counsel, the Officer accepted that the Principal Applicant played a role in her goddaughter's life and that it would be difficult for her to face separation in this regard as she appeared to have formed an emotional bond to the Principal Applicant from regular daily interaction. However, the Officer noted the Principal Applicant had not taken over her goddaughter's life as her primary caregiver although she played a definite auxiliary role. The Officer found that the Principal Applicant's departure from Canada would have a negative impact on her goddaughter's life, but that this negative impact could be mitigated by the application of modern technology.

[12] The Officer acknowledged that in general, Canada offers a lifestyle and future opportunities that are generally considered more desirable than those in St. Lucia, but weighed against this were the facts that the Applicants' son is still fairly young and still relies primarily on his parents for care. The Officer accepted that the Applicants' son is established in Canada to some degree but was not satisfied that he was so integrated into Canadian society that it would compromise his well-being to return to St. Lucia to live with his parents.

C. *Risk and Adverse Country Conditions*

[13] The Officer assessed the Principal Applicant's fear that her community will discover that she was physically and sexually abused in the past and that she will consequently face

humiliation and discrimination if she returned to St. Lucia. The Principal Applicant also alleged her fear of backlash from the perpetrator if the allegations of abuse were made public.

[14] The Officer accepted that the Principal Applicant had been physically abused by her family, as well as sexually abused. However, the Officer noted that the Principal Applicant provided no details about her sexual abuse such as details about the perpetrator's identity, how old she was at the time, over what length of time the abuse took place, or whether it was just a single incident.

[15] The Officer noted the only indication the Principal Applicant had sought counselling was with her social worker (who had left on maternity leave in November 2012); the Principal Applicant had not demonstrated that she sought any other counselling services. The Officer also cited United States Department of State documentation showing counselling services are available in St. Lucia.

[16] The Officer noted the Principal Applicant had not taken advantage of counselling services even when available, noting that since her arrival in Canada in 2002, more than 11 years passed before she made any attempt to seek counselling. The Officer also found she provided little evidence she would face psychological hardship if she were to return to St. Lucia. The Officer found counselling services are available in St. Lucia, and further found that even if the alleged lack of availability of counselling services in St. Lucia was true, this point was moot because the evidence showed the Principal Applicant did not appear to be pursuing this avenue of therapy even when it was available to her.

[17] The Officer noted the Principal Applicant provided little evidence that anyone was aware of the abuses against her and there was little evidence to show how anyone would be likely to become aware of her past. Given the lack of detail the Applicants had provided regarding the sexual assault against the Principal Applicant, the Officer found it difficult to assess the likelihood of it becoming community gossip, or that it would lead to humiliation. The Officer found this factor was not a disproportionate hardship for the Principal Applicant.

D. *Other FactorsConsidered*

[18] Regarding the psychological report indicating the Principal Applicant would re-experience trauma from being re-exposed to adults and places associated with her trauma, the Officer noted she presented little evidence that this would still be a problem if she simply moved to a different part of St. Lucia. The Officer gave some weight to the existence of a remedy for the Principal Applicant.

[19] The Officer also noted that the psychological report made no mention of the Principal Applicant's sexual abuse, and that she provided no explanation why this topic was not broached with the psychologist. The Officer found this problematic.

[20] In light of the above, the Officer gave some weight to the Applicants' establishment, as well as the best interests of their Canadian son, but found their establishment was not sufficient for H&C relief to be granted. The Officer found the best interests of the child was to stay with his parents, a point the Applicants themselves had made in their submissions, and that they were not compromised with respect to his autism because there are organizations in St. Lucia to deal

with autistic children. The Officer found the best interests of the goddaughter and the Principal Applicant's fears of returning to St. Lucia did not warrant H&C relief. Regarding difficulties of finding employment, the Officer noted that this was a generalized risk for everyone in St. Lucia and that the Applicants had acquired new skills from their time spent in Canada which will give them some additional advantage in St. Lucia. The Officer found that the above factors, individually or collectively, and taking into account the BIOC, did not result in an unusual and undeserved or disproportionate hardship to the Principal Applicant and her family if they had to apply for permanent residence from outside Canada. The Officer found the circumstances in the present case not sufficiently compelling to merit an exemption under subsection 25(1) of the *IRPA* and consequently refused the application.

III. Issues

[21] This matter raises the following issues:

A. Whether the Officer erred in assessing the Applicants' degree of establishment; and

B. Whether the Officer breached procedural fairness by relying on independently researched extrinsic evidence without notice to the Applicants, or acted erroneously or unreasonably in considering the BIOC and the allegation of sexual abuse.

IV. Standard of Review

[22] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence

has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question". The standard of review applied to an officer's H&C decision has been determined to be reasonableness: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]. In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] The case at bar also raises an issue of procedural fairness, which is reviewable on the standard of correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Sketchley v Canada (AG)*, 2005 FCA 404 at paras 53-55. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

V. Submissions of the Parties and Analysis

A. *Whether the Officer erred in assessing the Applicants' degree of establishment*

[24] To begin with, I wish to note that the Officer correctly identified H&C relief as an exceptional remedy. H&C is not a parallel or stand-alone immigration regime. The regular immigration regime governs individuals such as the Applicants. Only in exceptional cases may relief be granted under the H&C exception. The Supreme Court of Canada confirmed the exceptional nature of H&C relief in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 64 [*Chieu*] in which it stated an application for H&C relief "is essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the [IRPA]". The Federal Court of Appeal in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 16 [*Legault*], relying on the Supreme Court of Canada's decision in *Chieu* also confirmed H&C relief is an exceptional and discretionary measure which:

> … is a part of a legislative framework where "[n]on-citizens do not have a right to enter or remain in Canada", where "[i]n general, immigration is a privilege not a right" (*Chieu*, *supra*, at paragraph 57) and where "the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. It is an important aspect of the statutory scheme that these different categories of individuals are treated differently, with appropriate adjustments to the varying rights and contexts of individuals in these groups" (*Chieu*, paragraph 59).

[25] The Federal Court of Appeal agreed with this conclusion, and stated in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 47 [*Kanthasamy*] that the "unusual and undeserved, or disproportionate hardship" standard is the appropriate test under subsection 25(1) of the *IRPA* because it expresses "in a concise way the sort of exceptional

considerations that would warrant the granting of such relief within the scheme of the Act". In other words, "[s]een in the wider context of the [IRPA], subsection 25(1) is an exceptional provision": *Kanthasamy* at para 40.

[26] It should also be noted that judicial review is not an appeal of the Officer's decision. Further, the role of this Court is not to reweigh the evidence before the Officer, as in many respects the Applicants ask it to do: *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187 at para 12.

[27] The Applicants submit the Officer erred in assessing their establishment by unduly focussing on undisputed facts that they both were working in Canada without required work permits, and apparently had not paid any income taxes for more than a decade. I disagree. In my view it was reasonably open to the Officer to consider the Applicants' decision to remain in Canada, and to consider that they elected to do so without obtaining any of the necessary authorizations required under the *IRPA*. Moreover, it seems they did so without paying income taxes even though both were employed. In my view these facts were reasonably open to the Officer to consider in assessing their establishment.

[28] Lengthy illegal residence and participation in its economy are both reasonable and relevant facts for an H&C Officer to consider according to well-established jurisprudence of this Court, which the Applicants ask me to ignore or reject. I am not prepared to do either. This Court's long-standing jurisprudence specifically approves consideration of lengthy illegal residence by an H&C Officer. See for example *Millette v Canada (Minister of Citizenship and*

Immigration) 2012 FC 542 at para 41, where Justice Russell affirmed a decision of Justice Nadon stating:

> [41] As the Decision makes clear, the Officer was aware that the Applicant had been in Canada for over 15 years, and he specifically deals with the years since her failed refugee claim. The Applicant cannot expect to profit from the earlier years when she lived and worked here illegally. It would mean that someone who manages to remain here illegally would be better placed than someone who has respected the system. As Justice Nadon pointed out in *Tartchinska v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 373 (FC) at paragraphs 21 and 22:
>
> > More importantly, the Guidelines certainly do not suggest that an applicant must pursue self-sufficiency at all cost and without regard to the means. I therefore disagree with the Applicants' argument that "[i]t is irrelevant whether self-sufficiency is pursued with or without a work permit." In my opinion, the source of one's self-sufficiency is very relevant; otherwise, anyone could claim an exemption on the basis of self-sufficiency even if that self-sufficiency derived from illegal activities. I appreciate that in this case the Applicants worked honestly, albeit illegally. Nonetheless, the Applicants knowingly attempted to circumvent the system when they chose to continue working without authorization. Indeed, despite being told during their first interview that they were not authorized to work and that they should cease, there was no indication that the Applicants had given up their employment at the time of the second interview. Moreover, their lawyer had cautioned them about the risks of working without a work permit as well as on the ostensible benefit of showing self-sufficiency (regardless of its source), and they chose to remain in Canada and work illegally.
>
> > I understand that the Applicants hoped that accumulating time in Canada despite a departure order against them might be looked on favourably insofar as they could demonstrate that they have adapted well to this country. In my view, however, applicants cannot and should not be "rewarded" for accumulating time in Canada, when in fact, they

> have no legal right to do so. In a similar vein, self-sufficiency should be pursued legally, and an applicant should not be able to invoke his or her illegal actions to subsequently claim a benefit such as a Ministerial exemption. Finally, I take note of the obvious: the purpose of the exemption, in this case, was to exempt the Applicants from the requirement of applying for status from abroad, not to exempt them from other statutory provisions such as the requirement of a valid work permit.
>
> [emphasis added]

[29] This Court's concurrent findings in these two cases apply almost word for word to the case at bar. In my view, the Applicants cannot expect to profit from the years they lived and worked here illegally. Spending more time underground does not entitle those here illegally to achieve greater success on an H&C application. Allowing this argument to succeed would encourage those here unlawfully to remain without regularizing their status, such that the longer they delay, the better they are positioned in terms of H&C relief. Allowing the Applicants' argument could encourage some not yet in Canada to arrive and go underground, and the longer the better, as occurred here. Those who disrespect and refuse to follow Canadian laws cannot by their misconduct become better placed than those who respect Canadian immigration laws and processes.

[30] The Applicants argue the Officer must be compassionate, and should not hold against those here illegally the fact of their illegality when they apply for relief on H&C grounds. Put another way, they say an H&C application should not be refused for the very reasons it is sought in the first place (long-term unlawful status). While in the abstract this argument has some attractions, it falls down on the facts of this case. Each case must be examined on its own and in

terms of its unique circumstances. In some cases, the fact of illegal status will not be a great obstacle to H&C relief, although it may be a reasonably relevant consideration. But here, the Applicants persisted in their conduct for over a decade. The Officer found their conduct "detracts from their overall establishment in Canada". Given the circumstances here, in my respectful opinion, this Officer's conclusion was certainly reasonable on the facts of this case, and one in respect of which the Applicants have no reasonable cause to complain.

[31] The Applicants further allege they could not apply for permanent residence from outside Canada because they would not be admitted in Canada. Setting aside the fact that this argument turns the scheme of the *IRPA* upside down, there was no evidence on this point. They cannot be heard to complain about the intended results of the *IRPA*.

[32] As to their apparent failure to pay federal and provincial income taxes that all residents of Canada must pay, I was told it is not possible to pay income taxes without a Social Insurance Number. Apparently the adult Applicants have not applied for SIN numbers. However, the Applicants provided no evidence on this point. In my view, the legal requirement to pay income taxes is another reason why those here illegally should move promptly to regularize their status if they wish to stay.

[33] Overall, the Officer's finding that the Applicants' illegality "detracted" from their establishment was reasonable on the facts and falls within the range of possible and acceptable outcomes per *Dunsmuir*.

[34] The Applicants further allege that the Officer erred in finding the establishment they achieved was what the Officer "would expect that the applicant would have established herself in Canada to some degree. Things like employment, community involvement and making friends are activities that I would expect the applicant to engage in while in Canada". It is alleged this discussion fails to examine the Applicants' unique circumstances, fails unreasonably to explain why the finding was made, and does not link the decision to the facts. Again, with respect, I disagree. It is well established that H&C Officers need not go into every piece of evidence nor recount every step in their reasoning process: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]. To the contrary, they are given a fair bit of discretion in their analysis, which, as counsel agreed, is tested not on the correctness but on the reasonableness standard of review. In this respect, the Applicants simply disagree with the reasons and the weight afforded by the Officer to their evidence and submissions. As already noted, it is not the role of the Court to reweigh the evidence. I note the Officer actually gave the Applicants' submissions "some weight". In my view, this ground of review must be rejected; the Officer's findings are reasonable on the facts and fall within the range of possible and acceptable outcomes per *Dunsmuir*.

[35] Lastly, on the reasonableness of the Officer's decision, I see no merit in the Applicants' argument that the Officer's reasons are inadequate or that evidence was not assessed. The reasons allow me to understand why the Officer made its decision and permit me to determine whether the conclusion is within the range of acceptable outcomes: *Newfoundland Nurses*. In my

view, the Officer's decision is justified, transparent and intelligible. It falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir*.

B. *Whether the Officer breached procedural fairness by relying on independently researched extrinsic evidence without notice to the Applicants, or erred in its BIOC analysis or regarding sexual abuse*

(1) Breach of Procedural Fairness

[36] The Officer conducted independent research in response to the Applicants' argument that their mildly autistic son would be unable to access the same kind and quality of speech, learning and behavioural therapies in St. Lucia that exist in Canada and that the services for children with special needs there are extremely limited and cannot provide for their son's needs. Through basic internet research, the Officer found publicly available evidence that contradicted the Applicants' submissions.

[37] H&C applicants have the legal onus to establish their claim. The Applicants had professional advisors when making their H&C submissions. They asserted that their son, who has mild autism, could not get the treatment he needed in St. Lucia. Faced with this assertion, the Officer did the most basic internet search, typing in the words "Autism in St. Lucia". The Officer identified a UNESCO report dated 2005-2006 (dated seven years before the H&C application). The UNESCO report lists five special education institutions, all in St. Lucia, three of which specifically deal with persons with learning disabilities, including autism.

[38] While procedural fairness is measured on the standard of correctness, the tests developed with respect to allowable extrinsic evidence include an objective component, namely an element of reasonableness. One test to determine what constitutes allowable extrinsic evidence is whether it was sufficiently known or otherwise "reasonably available" to the Applicants: *Azida v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1163 at paras 18-19. Accepting that as the test, on the issue of whether the documentation was reasonably available, I have no hesitation in concluding the 2005 UNESCO report was reasonably available to the Applicants at the time they filed their H&C application in 2013. The Applicants filed no evidence to suggest otherwise.

[39] In reply, the Applicants rely on *Arteaga v Canada (Minister of Citizenship and Immigration)* 2013 FC 778 [*Arteaga*] at para 24, where this Court held that "novel and significant" information an applicant could not "reasonably anticipate" requires disclosure. I note again the objective reasonableness component of this test. Accepting this as the law leads to the same conclusion for several reasons. First, in my view the information located by the Officer's rudimentary internet search is not novel because the UNESCO report was more than seven years old. Moreover, the same search could have been done by the Applicants; the legal onus to establish their claim for exceptional relief was on them. Finally the Applicants could reasonably anticipate the H&C Officer would conduct a basic internet search when faced with their allegation that assistance for the son was not available in St. Lucia. Therefore the tests in *Arteaga* are also met.

[40] The Applicants filed affidavit evidence on judicial review to the effect that the Applicants are not able to afford certain programs identified by the Officer. When faced with the

Respondent's objection to this new evidence, counsel for the Applicants advised that the sole purpose of filing the new evidence was rebutting any argument of futility the Respondent may raise. I agree that the appropriate time to submit that information was at the time of their original H&C filing. This Court is not able to accept as "new evidence", evidence that the Applicants could have discovered at the time they filed their H&C application. I make no futility finding.

[41] In my view, the Officer did not breach procedural fairness in conducting and relying on the independent internet search.

(2) Best Interests of the Child (BIOC) and Sexual Abuse

[42] In terms of the BIOC, the Applicants made several submissions. They alleged that their arguments regarding discrimination against their son were not expressly dealt with by the Officer. However, the Supreme Court of Canada has held that decision-makers, such as H&C Officers, are under no duty to deal with every single issue, evidentiary point and argument made before them: again see *Newfoundland Nurses*. A failure to give reasons in this regard, in my opinion, does not justify judicial review.

[43] The Applicants alleged that the Officer erroneously or unreasonably assessed the BIOC on the basis of their child remaining with them. However, the Officer did this because that is what these parents expressly told the Officer: they submitted that if they had to leave Canada they would take their son with them. Therefore, in my view the Officer reasonably assessed the BIOC in the context of the removal of the parents, as the Applicants asked him to do.

[44] The Applicants then say there should have been a more thorough assessment of the BIOC in terms of their staying in Canada. However, that analysis cannot be conclusive because it will almost always favour staying in Canada: see *Jaramillo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 744 at para 71, referring to *Vasquez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 91 at para 43; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 5; *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292 at para 28; *Yue v Canada (Minister of Citizenship and Immigration)*, 2006 FC 717 at para 9; *Ramotar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 362 at para 37; *Miller v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1173 at paras 25, 28.

[45] Overall, in my view the Officer reasonably weighed the BIOC against other factors in dealing with the Applicants' application for H&C relief.

(3) Sexual Abuse

[46] In my view, the Officer reasonably responded to the Principal Applicant's issues respecting sexual abuse and its possible discovery, and the issue of availability of counselling, given the very limited material filed in this case, as outlined above.

VI. Certified Question and Procedural Issues

[47] Because the Supreme Court of Canada has now heard argument in the appeal in the *Kanthasamy* matter, the Applicants asked that I either delay giving judgment until after the Supreme Court of Canada gives its judgment or, in the alternative, they ask that I certify a

question for the Federal Court of Appeal. It is their wish that their case remains in the judicial system, pending determination of *Kanthasamy*, so they may have its benefit should the Supreme Court of Canada decide in their favour. They submit the Supreme Court of Canada's decision is "just around the corner", the case having been argued in April 2015, with judgment reserved. More realistically, they state judgment might be delivered in October 2015. It is well known that the Supreme Court of Canada takes approximately six months on average to give a decision; some appeals take less time, while others taking considerably more.

[48] The Applicants said they did not want an adjournment.

[49] I am not prepared to defer giving judgment. The delay could be three or four months but it could equally be six months or more. A request for deferred judgment is tantamount to a request to adjourn and openly invites a bifurcated hearing. It ignores my duty to decide cases as they arise. The law for this Court is stated by the Federal Court of Appeal in *Kanthasamy*, which stands until such time as the Supreme Court of Canada may decide otherwise.

[50] While the Applicants requested that I certify a question, they did not provide a draft question for review. The draft question should have been served and filed before the hearing. That said, I granted a two-day extension for submissions to be filed, with equal time for the Respondent to respond.

[51] The Applicants ask that I certify the following questions saying it is the same as issues raised before the Supreme Court of Canada in *Kanthasamy*:

> In considering humanitarian and compassionate grounds pursuant to section 25 of *IRPA*, do immigration officers unlawfully fetter their discretion and err in law in requiring that applicants demonstrate unusual, undeserved and disproportionate hardship if they had to leave Canada and apply for permanent residency from abroad?
>
> Is the standard adopted by the Immigration Appeal Board [*sic*] in *Chirwa*, of whether the facts would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes warrant the granting of special relief, the more appropriate test to be applied in assessing humanitarian and compassionate grounds under s. 25?

[52] In my respectful opinion, these are variants on the questions already put before, considered and answered in the negative by the Federal Court of Appeal in *Kanthasamy*. Specifically, the Federal Court of Appeal considered and rejected the test in *Chirwa v Canada (Minister of Manpower and Immigration)* (1970), 4 IAC 338 (IAB). The questions having been answered, and the Federal Court of Appeal's decision being binding on this Court, no such question will be certified.

VII. Conclusions

[53] Standing back and reading the decision as a whole as I must do, it is my view that the reasons provide justification, transparency and intelligibility within the decision-making process. I find that the decision falls within the range of possible, acceptable outcomes defensible in respect of the facts and law. Therefore judicial review should be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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