Federal Court  Cour fédérale

Date: 20170109

Docket: IMM-2326-16

Citation: 2017 FC 27

Ottawa, Ontario, January 9, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

THI HONG DUC NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Thi Hong Duc Nguyen [the Applicant] pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by a Senior Immigration Officer at Citizenship and Immigration Canada [CIC], dated May 17, 2016, in which the Applicant's request for permanent resident [PR] status on humanitarian and compassionate [H&C] grounds was denied [the Decision].

[2] The Court is not asked to, nor may it, reweigh the evidence. Judicial review is not an opportunity to re-litigate the case below, nor is it in any way a trial *de novo*. The over-arching consideration is not whether the decision below is right or wrong, but whether it is reasonable or unreasonable. The key question is whether the Decision falls within the range of outcomes that is defensible on the facts and the law.

[3] In enacting section 25 of the *IRPA*, Parliament gave the Minister of Citizenship and Immigration the authority and responsibility to apply the correct legal standard and to reach a decision in H&C matters that is reasonable, as defined by the Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*]. The Minister has delegated this authority to H&C Officers so that they may make such decisions on his behalf. According to the jurisprudence, both the Minister and his delegated Officer(s) have an exceptional and highly discretionary authority in this regard. Their authority deserves considerable deference by the Court.

[4] While I agree that a different officer might have come to a different result, the Decision in this case is reasonable and therefore may not be set aside on judicial review. This application must therefore be dismissed.

II. Facts

[5] The Applicant is a 36-year-old Vietnamese citizen and mother who has resided in Canada for 10 years. She was granted permanent resident status on April 25, 2006 and has been residing in Canada since then. On November 22, 2010, the Immigration Division [ID] of the Immigration

and Refugee Board [IRB] found the Applicant inadmissible due to misrepresentation under section 40(1)(a) of the *IRPA* and issued an exclusion order. The ID found that the Applicant had entered into a fraudulent marriage with her first husband for no other purpose than to gain PR status in Canada and, had this information been known at the port-of-entry [POE], she likely would not have been granted PR status. The Applicant appealed the decision of the ID and on April 10, 2012, the Immigration Appeal Division [IAD] of the IRB denied the Applicant's appeal. The removal order was therefore still in effect. The Applicant did not leave the country.

[6] The Applicant applied on three occasions for permanent resident status on H&C grounds, pursuant to s. 25(1) of the *IRPA*. She was denied each time. Her first H&C application was refused in February 2014. The Applicant applied a second time, adding two professional psychological reports regarding her daughter that had not been included in the first H&C application. This application was refused in March 2015. The Applicant applied for judicial review of this decision. Following this Court's grant of leave, the Department of Justice consented to the file being sent back to the IRB for redetermination. The H&C application was updated and a second report from a psychotherapist, Ms. Natalie Riback, was added. The Applicant also relied upon an earlier report from a psychologist, Dr. Lynne Sinclair. This third application was refused on May 17, 2016.

[7] The Applicant's first marriage ended in divorce shortly after her arrival in Canada. The Applicant re-married in 2008, this time with a different man who she met in Vietnam. They had a child together in 2010; she is now six years old. This child is the focus of much of this application. The second marriage also ended in divorce and the husband remains in Vietnam. He

plays no role in the child's life. The Applicant is currently in a relationship with a Canadian citizen; they have been together for the past three years. There is evidence they plan to get married when he obtains a divorce, at which time he may sponsor her.

[8] The Applicant has been consistently employed and paying taxes since 2007. She has never been on Canadian social assistance. She has purchased a residential property in Toronto and has accumulated savings. She is active in the Buddhist community and has taken part in various volunteer activities within her community. She alleges she has become an ordained Buddhist in Canada.

[9] The Applicant's daughter is a Canadian citizen by birth and attends school in Toronto. The Applicant has sole custody of the child, although the Applicant's current partner willingly acts as a father figure. The Applicant is the child's primary caregiver and plans to take the child with her should she be forced to return to Vietnam. Her current partner's son is around her daughter's age and they have become very close. The child has also become close with other family members in Canada, particularly the Applicant's niece's family, with whom they lived until July 2014. The Applicant points to 16 family members with whom she is in regular contact. The only family the Applicant has in Vietnam is her elderly mother, aged 72. The Applicant has siblings in Vietnam but does not have a close relationship with them.

III. Decision

[10] On May 17, 2016, the Applicant's application for PR status on H&C grounds was refused. The Immigration Officer considered the Applicant's extensive efforts at establishing herself in Toronto but assigned little weight to this factor:

> While I commend the applicant's efforts in establishing herself in Canada, I note the applicant's establishment could not have occurred without her acquiring her immigration status through fraudulent means. Given the applicant was not entitled to be in Canada, I attach little weight to the establishment efforts she has undertaken while in the country.

[11] Despite noting the Applicant's close-knit relationship with her extended family members in Canada, the Immigration Officer concluded:

> …I am not satisfied that separation from family in Canada would sever the bonds that have been established. While not a substitute for a physical presence, regular contact could be realized through various means of telecommunication. Inevitably, deportation would cause some psychological and emotional upset for the applicant. Although unfortunate, I find the separation from family members that would ensue for the applicant to be an inherent consequence of removal from Canada.

[12] In the BIOC assessment, the Immigration Officer noted the strong and loving relationship shared between the child and the Applicant's partner, also noting that having him and her extended family members in her life would undoubtedly be beneficial to the child. However, the Officer concluded:

> Notwithstanding, based on the information before me, it would appear that the applicant continues to be the primary caregiver for the child. Jessica remains wholly dependent on her mother. The applicant has stated that if forced to return to Vietnam as a mother with a daughter that is completely reliant upon her, she will take Jessica to Vietnam with her. As the early years in a child's life are essential for establishing and maintaining emotional relationships with their parents, the bond between mother and daughter would only be strengthened by remaining in close contact.

[13] Making note of the conclusions contained in the Dr. Riback's report, the Officer found the child to be too young to "recognize or experience significant ties to any country" and noted that the Applicant would be able to guide the child through the transition. The Officer noted that comparative socio-economic advantages are not in and of themselves determinative, and that "education is compulsory, free and universal through age 14" in Vietnam. The Officer concluded, "…I do not find the applicant has provided sufficient objective evidence to demonstrate that her removal from Canada would adversely affect her daughter."

[14] The Immigration Officer concluded that the Applicant failed to adduce sufficient evidence to confirm that potential treatment for her alleged mental health disorders were unavailable in Vietnam. The Officer acknowledged the Applicant's depression and anxiety, which the Applicant claimed to be a result of her impending removal from Canada, but was not satisfied that "the applicant had a reasonable expectation that she would be allowed to remain in Canada permanently since her resident status was obtained through fraudulent means and removal could have become an eventuality". The Officer found the evidence supplied by the Applicant in support of her claim that she would be stigmatized, face rampant sexism and be unable to find work to be scant, uncorroborated, and insufficient. The Officer ultimately found that an exemption under subsection 25(1) of the *IRPA* unjustified.

[15] It is from this decision that the Applicant seeks judicial review.

IV. Issues

[16] This application raises the following issues:

1. Whether the Office applied the correct legal test for BIOC?
2. Whether the Immigration Officer's unreasonably assigned little weight to the Applicant's establishment?
3. Whether the Immigration Officer's unreasonably assessed the reports of the psychotherapist and psychologist in terms of the Applicant and the child?

V. Standard of Review

[17] In *Dunsmuir*, above at paras 57, 62, 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." A review of an officer's findings of fact in an H&C application is conducted on the reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404 at para 30; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18. The decision of whether to grant or deny an exception for humanitarian and compassionate reasons is "exceptional and highly discretionary; thus deserving of considerable deference by the Court": *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30.

[18] The Respondent submits that the highly discretionary nature of H&C assessments results in a "wider scope of possible reasonable outcomes": *Holder v Canada (Minister of Citizenship and Immigration)*, 2012 FC 337 at para 18; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108 at para 13. I agree.

[19] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> 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.

[20] The choice of the correct legal test for determining the best interests of a child is reviewed on the correctness standard: *Etienne v Canada (Minister of Citizenship and Immigration)*, 2014 FC 937 at para 6. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review 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.

[21] In addition, the Supreme Court of Canada has instructed that judicial review is not a line-by-line treasure hunt for errors; the Decision must be reviewed as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54.

VI. Analysis

Issue 1:- Whether the Office applied the correct legal test for BIOC?

[22] It is appropriate to start with the legal test, because that is critical. With respect, I am not persuaded that the Officer applied the wrong legal test for BIOC. I say this for several reasons.

[23] First, nowhere in the Decision does the Officer use the expression "undue, undeserved or disproportionate hardship", which was the test at issue in the Supreme Court of Canada's judgment in *Kanthasamy*. This moves the discussion considerably against the Applicant's assertion, although I accept that the Court must do more than simply see if the words used offend legal rules; it is necessary in some cases to examine the decision to determine if the decision-maker resorted to a disguised form of impermissible review.

[24] In her memorandum, the Applicant pointed to the Officer's use of the words "may be difficult" and that a move to Vietnam would not be "detrimental to [the child's] culture, social, physical and emotional development," to support her argument. I do not read these as evidence that the Officer was applying the wrong test. In fact, the use of the words "detriment" and "detrimental" were put into play by the Applicant's psychologist, Dr. Sinclair, to describe the consequences of the Applicant and her child leaving Canada. In my view, the Officer's use of those words took place in the required analysis of the Applicant's professional evidence; the Officer tested the facts against the psychologist's evidence and, using the Applicant's own words, came to the opposite conclusion. That is not objectionable. Moreover, it illustrates that Dr. Sinclair's assessment was indeed considered, contrary to what the Applicant argued.

[25] I am not persuaded the assessment of BIOC must proceed in a formulaic manner: *Diaz v Canada (Minister of Citizenship and Immigration)*, 2015 FC 373 at para 30, citing *Williams v*

Canada (Minister of Citizenship and Immigration), 2012 FC 166. In my respectful view, it was open for the Supreme Court of Canada to say otherwise in *Kanthasamy* when this issue was broached. The Court chose not to do so and I do not take its silence on the matter to as constituting an endorsement.

[26] The Applicant is correct in noting that *Kanthasamy* brought about a change in the law, re-establishing *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 [*Chirwa*], as one of governing principles, in combination with the Guidelines, to be applied in H&C matters:

> [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.
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> *Kansathamy*, above at paras 13, 31.

[27] It is important to note that the majority in *Kanthasamy* does not reject the "unusual and undeserved or disproportionate hardship" test. In fact, that is the reverse of what the Supreme Court determined. While *Kanthasamy* found that those words could not be "determinative" or "the only possible formulation" of H&C considerations, the Court also said that the Guidelines

remained "helpful" (para 31) and "useful" (para 32) and that the *Chirwa* approach should be considered "as co-extensive with the Guidelines" (para 30):

> [30] A second approach is found in decisions which treat *Chirwa* less categorically, using the language in *Chirwa* as co-extensive with the Guidelines: see *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956, at paras. 16-17 (CanLII); *Chen v. Canada (Minister of Citizenship and Immigration)*, 232 F.T.R. 118, at para. 15. In these decisions, the Federal Court and Federal Court of Appeal have made it clear that the Guidelines and the "unusual and undeserved or disproportionate hardship" threshold merely provide assistance to the immigration officer but that they should not be interpreted as fettering the immigration officer's discretion to consider factors other than those listed in the Guidelines. In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555, the Federal Court of Appeal noted that the Guidelines are "not meant as 'hard and fast' rules" and are, rather, "an attempt to provide guidance to decision makers when they exercise their discretion": para. 9. And in *Singh v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 621, the Federal Court noted that humanitarian and compassionate considerations "are not limited . . . to hardship" and that the "Guidelines can only be of limited use because they cannot fetter the discretion given by Parliament": paras. 10 and 12 (CanLII).
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> [31] This second approach, which seems to me to be more consistent with the goals of s. 25(1), focuses more on the equitable underlying purpose of the humanitarian and compassionate relief application process. It sees the words in the Guidelines as being helpful in assessing when relief should be granted in a given case, but does not treat them as the only possible formulation of when there are humanitarian and compassionate grounds justifying the exercise of discretion.
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> [32] There is no doubt, as this Court has recognized, that the Guidelines are useful in indicating what constitutes a reasonable interpretation of a given provision of the *Immigration and Refugee Protection Act*, SC 2001, c 27. *Agraira*, at para. 85. But as the Guidelines themselves acknowledge, they are "not legally binding" and are "not intended to be either exhaustive or restrictive": Inland Processing, s. 5. Officers can, in other words, consider the Guidelines in the exercise of their discretion, but should turn "[their] mind[s] to the specific circumstances of the case": Donald J. M. Brown and The Honourable John M. Evans with the assistance of Christine E. Deacon, Judicial Review of Administrative Action in Canada (loose-leaf), at p. 12-45. They

> 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): see *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, at p. 5*; Ha v. Canada (Minister of Citizenship and Immigration),* [2004] 3 F.C.R. 195 (C.A.), at para. 71.

[28] In addition, *Kanthasamy* explicitly states that the H&C mechanism is not an "alternative immigration scheme". It emphasizes that the H&C officers must review "*all* the relevant facts and factors before them" [emphasis in original]. With the exception of the BIOC analysis, a review of this sort necessarily includes an analysis of the hardship to be faced by an applicant:

> [23] There 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): see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para. 13 (CanLII); *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206 (F.C.T.D), at para. 12. Nor was s. 25(1) intended to be an alternative immigration scheme: House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40 (Peter MacDougall); see also *Evidence*, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 9:55 to 10:00 (Joan Atkinson).
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> [24] And, as is stated in s. 25 (1.3), added to the *Act* in 2010 (S.C. 2010, c. 8), s. 25(1) is not meant to duplicate refugee proceedings under s. 96 or s. 97(1), which assess whether the applicant has established a well-founded fear of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment.
>
> [25] What *does* warrant relief will clearly 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: *Baker*, at paras. 74-75.
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> [emphasis in original]

[29] The Applicant asked me to find that *Kanthasamy* has brought an end to the principle that H&C relief is extraordinary, as was held in *Khosa v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24 at para 6, citing *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84 [*Chieu*]. With respect, there is no such injunction in *Kanthasamy*. While raised in the dissent, the majority is silent on this point. It is difficult to construe the Supreme Court of Canada's silence as effecting a change in the law, given the Court had the opportunity to do so explicitly had that been its intent. Since section 25 of *IRPA* is not a parallel or "alternative immigration scheme", it seems to me that H&C considerations are still properly considered to be extraordinary and, as *Chirwa* put it, a form of "special relief".

[30] I am therefore not persuaded the Officer applied an incorrect test to determine either the BIOC or the H&C as a whole. On this ground, therefore, judicial review cannot succeed.

Issue 2: Whether the Immigration Officer's unreasonably assigned little weight to the Applicant's establishment?

[31] As noted above, the Officer assessed the Applicant's establishment and, having done so, attached little weight to the Applicant's establishment efforts:

> While I commend the applicant's efforts in establishing herself in Canada, I note the applicant's establishment could not have occurred without her acquiring her immigration status through fraudulent means. Given the applicant was not entitled to be in Canada, I attach little weight to the establishment efforts she has undertaken while in the country.

[32] Over a number of years, this Court, has adopted the following statement of principles on judicial review, as set out in *Millette v Canada (Minister of Citizenship and Immigration),* 2012 FC 542, Russell J:

> [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:
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> > 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.

[33] I appreciate that there will be evidence-based exceptions to this general principle: see *Li v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 451 at paras 34-36, for example. But the importance of this general principle is reinforced in my view by *Kanthasamy's* reiteration of the law that section 25 of IRPA is not a parallel or "alternative immigration scheme," which confirms that the H&C remedy operates within the normal parameters of the *IRPA.* That, of course, includes consequences for obtaining permanent resident status by marriage fraud. While *Kanthasamy* creates, or perhaps more accurately revives, the previous law in *Chirwa* – in terms of the breadth of the considerations underlying the remedy – it nonetheless requires that *all* facts and factors be assessed. I take that to include an applicant's unlawful entry into the country. While this Applicant's illegal entry occurred some time ago, it cannot be ignored. I note the Applicant maintains her first marriage broke down due to the infidelity of her first husband.

[34] In *Millette*, the Applicant had 15 years in Canada; here the Applicant has had 10 years. Removal has been a reasonable possibility for many years and the Officer did not act unreasonably making that finding. I am unable to find the assessment of establishment to be

unreasonable. It is in accordance with the established jurisprudence and the conclusion of the Officer, in my respectful view, was backed by the evidence. The Decision falls within the range of reasonable outcomes open to the Officer in this case.

Issue 3: Whether the Immigration Officer's unreasonably assessed the reports of the psychotherapist and psychologist in terms of the Applicant and the child?

[35] The Applicant made several allegations concerning the inadequacy of the Officer's consideration of the evidence of the Applicant's psychotherapist and psychologist. These allegations are set out below, in italics. My comments follow each:

- *The Officer did not reasonably consider the best interests of the child.*
    a. This, by far, is the most important consideration in this case. To begin with, the Officer was clearly "alert, alive and sensitive" to the best interests of this child. There is no doubt that giving great weight to BIOC factors will not necessarily result in a family remaining together in Canada. There is no doubt the evidence will often support the finding that the best interests of a child would be best served by remaining with parents and extended family in Canada. There is also little doubt that this could be said of virtually every child with extended family in Canada who faces removal to their parent's country of nationality. In many cases, the only option is for the Canadian child to accompany her mother to the country to which the custodial parent is returning; this is the option elected by the Applicant in this case.
    b. In this case, the paramount consideration was the importance of the child remaining with her mother during her early years and the child being raised by her. The paramount consideration could therefore be served whether the child and her mother

remain in Canada or in Vietnam. My review of the Decision leads me to conclude that the BIOC was fairly and reasonably considered. The Applicant does not agree with it but has not shown how it is unreasonable.

c. Moreover, a great portion of the H&C Decision deals with the BIOC, as one would expect. The Decision addresses BIOC under several headings, the first being Linkages to Canada. Here, the Officer acknowledges the argument that the Applicant has become an integral part of her extended family in Canada. Those she lives with are discussed. There is appreciation of the close knit family and emotional support both the Applicant and her daughter receive. But the Officer concludes that separation would not sever the bonds that have been established and reasonably finds that, while no substitute for physical presence, regular contact can be maintained by telecommunication. The Officer notes, as does the Supreme Court of Canada in paragraph 23 of *Kanthasamy*, that there will inevitably be some hardship associated with being required to leave Canada and that, as *Kanthasamy* put it, "this alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)". I am unable to find that the Officer concluded unreasonably in this connection.

d. Under the heading Best Interests of the Child, the Officer reasonably captured the essence of the Applicant's submissions as well as those of her psychotherapist and psychologist. The Officer concluded that the Applicant is the primary caregiver upon whom the child is wholly dependent and completely reliant. This conclusion was urged and supported by the professional evidence. The Officer held that the early years are essential for establishing and maintaining emotional relationships with

parents, and therefore reasonably found, that the child's best interests would be served by returning to Vietnam with the Applicant. The Officer also noted the Applicant had used babysitters to look after the child while they lived in Canada; therefore, absent evidence to the contrary, similar arrangements could be made in Vietnam. The Officer specifically noted the concerns of Dr. Riback regarding the child's psychological, social and educational development, ultimately finding that the child was not yet of an age where she would recognize or experience significant ties to any country. Furthermore, the child would continue to have the full benefit of care from her mother to guide her through the transitional phase of resettlement. The Officer found that the Applicant's direction and support would enable the child to adjust to living in Vietnam and therefore rejected the Applicant's concerns regarding the child's cultural, social, physical and emotional development. The Officer noted the "intrinsic resiliency" accompanying the child's young age and was satisfied of her capability to assimilate to a new scholastic environment, after a period of adjustment. The Officer also dealt with the concerns of both Drs. Sinclair and Riback, regarding the Applicant's depression, under the heading Factors in Country of Origin; I will deal with these reports later.

- *The Officer was overly focused on the Applicant's breach of the IRPA underlying her initial arrival in Canada. In the Officer's Decision, every positive factor is tainted by the negative factor of the Applicant's original misrepresentation; the decision is therefore about punishment, not H&C.*

    a. Here again, I disagree with the Applicant's argument. The fact of the fraudulent marriage is first referred to by the Officer with respect to the Applicant's

establishment, and reasonably so as noted above. It is referred to again in connection with the Applicant's depression, where the Officer agrees the Applicant's concern about and reaction to removal was comprehensible. These references to the initial misrepresentation are reasonable. The Officer was not satisfied that the Applicant had a reasonable expectation that she would be allowed to remain permanently. This, too, is reasonable; the fact remains the Officer had a duty under *Kanthasamy* to assess the Applicant's wish to stay with the way she chose to enter Canada. I do not see the breach permeating the decision; rather, it is considered where it is relevant. The consequence of ignoring it would be to allow all those who enter Canada illegally to be assessed as if they entered legally, which, according to this Court's jurisprudence of this Court, is not the entitlement of such claimants.

- *Dr. Sinclair's concern regarding the Applicant falling into deep depression was ignored, as was her vulnerability to severe depression and her evidence of the high likelihood of hardship in Vietnam, with negative consequences for the child. The Officer failed to assess the impact of returning to Vietnam and made the final Decision without regard to the lesser availability of mental health care clinics in Vietnam like those in Canada.*
    a. I have already noted one instance where Dr. Sinclair's report was considered, albeit without being accepted. I should add that the evidence of the psychotherapist was similar. The Officer did assess this concern and, as noted, found it to be comprehensible in one respect. In terms of her removal, the Officer also briefly assessed the effect removal from Canada would have on the mental health of the Applicant. *Kanthasamy* (at para 48) requires such factors to be identified and weighed, "regardless of whether there is treatment available". The Officer recognized

> that "potential treatment was required" – this was a reasonable assessment. The Officer then concluded, based on the evidence, that there was not "sufficient objective evidence confirming that the potential required treatment, should [the Applicant's] mental health decline upon returning, is unavailable in Vietnam." Such a finding ultimately comes down to assessing the evidence. The Officer in this case found the evidence was lacking. The Officer also noted that, while not extensive by Canadian standards, treatment and services are available for those experiencing mental health disorders in Vietnam. The record supports these findings; they are defensible on the record and are therefore reasonable per *Dunsmuir*.

[36] At the hearing, both parties reviewed the evidence; the Applicant's review was conducted in considerable detail, given she had the burden of establishing unreasonableness and setting the evidentiary stage. I agree this is a difficult case, and I am sympathetic to the Applicant's position.

[37] At the end of the day, it is necessary for the Court to stand back and assess the Decision as an organic whole, determine if it meets the *Dunsmuir* tests and accords with *Kanthasamy* in terms of the best interests of the child. As noted above, the correct legal approach was taken in regards to the best interests of the child. In terms of reasonableness, the Decision is justified, transparent and intelligible. In my respectful view, the Decision also falls within the range of outcomes that are defensible in terms of the facts and law, as required by *Dunsmuir*. The Decision is therefore reasonable, as defined by the Supreme Court of Canada. Judicial review must be dismissed.

VII. Certified question

[38] Neither party proposed a question of general importance and none arises.

VIII. Conclusion

[39] The application for judicial review must be dismissed and no question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review 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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