Federal Court  Cour fédérale

**Date: 20170509**

**Docket: IMM-1756-16**

**Citation: 2017 FC 482**

**Vancouver, British Columbia, May 9, 2017**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**VINESH KAPOOR SCHLEICHER**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, a long time permanent resident of Canada found inadmissible due to serious criminality, seeks judicial review of the decision of an Inland Enforcement Officer [the Officer] of the Canada Border Services Agency [CBSA], dated April 28, 2016, which refused to defer his removal to Fiji.

[2] For the reasons that follow, this application is dismissed. The Officer considered the evidence on the record and reasonably found that it was not sufficient to warrant the exercise of his limited discretion to defer the Applicant's removal.

## I. The Background

[3] The Applicant came to Canada in 1972 at the age of nine with his mother and siblings. He married a Canadian citizen in 2007 and they have one daughter, born on January 17, 2010.

[4] The Applicant's criminal history dates back to 1988. However, the criminal convictions which resulted in a finding of inadmissibility pursuant to s. 36 of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] occurred more recently. The Applicant was convicted in August 2014 of one count of robbery and two counts of attempted robbery under s. 344 of the *Criminal Code*, RSC 1985, c C-46. He pled guilty to these charges and was sentenced to three years and six months in jail, with 18 months credit for pre-trial detention.

[5] The Applicant also faces additional charges in Alberta, some of which have been resolved and others of which the Crown intends to stay upon the Applicant's removal from Canada.

[6] As a result of the finding of inadmissibility, a deportation order was issued on May 21, 2015. The Applicant applied for a Pre-Removal Risk Assessment [PRRA] in July 2015, which was considered and refused on August 19, 2015. The PRRA officer found that the Applicant had not provided sufficient evidence to establish, on a balance of probabilities, that he would face personalized risk of serious harm and, therefore, he was not a person in need of protection. The Applicant did not apply for judicial review of the PRRA decision.

[7] The Applicant then applied for permanent residence on humanitarian and compassionate [H&C] grounds on August 26, 2015. In his H&C application, he described, among other things: his status as a permanent resident of Canada for 33 years; his lack of any ties to Fiji having never returned there; his past employment; his drug addiction and efforts to address it; his criminal convictions and sentences; his expression of remorse; and, the impact of his possible deportation on his young daughter and on his wife, who has taken on the role of single parent and who has health problems, cannot work, and is now "financially destitute".

[8] With respect to the impact on his daughter, his H&C submissions state that his current incarceration has had a "deep emotional impact" which would be compounded by his removal. He adds that his removal would cause "catastrophic disruption to his family", referring to his elderly mother, his wife, and his daughter.

[9] More specifically, with respect to the best interests of his daughter, the submissions state that, "great emotional and developmental harm will arise to the child should Mr. Schleicher be removed from Canada. It is in the best interest of Mr. Schleicher's Canadian daughter that he not be removed from Canada and that he be permitted to raise her in Canada".

[10] At the same time that he made his H&C application, the Applicant requested a deferral of his removal pending the determination of his H&C claim. The submissions of his Counsel consisted of a letter requesting that the H&C application and submissions, which were enclosed, be considered in the determination of the deferral.

[11] The request for deferral of removal was refused on October 27, 2015, because no removal date had yet been set due to the Applicant's outstanding criminal charges in Alberta.

[12] The Applicant made a second deferral request on April 26, 2016, following receipt of a notice of removal that was scheduled for May 2, 2016. The Applicant did not provide supporting documents with the second request; rather, he directed the Officer to rely on the information that he had submitted with his initial request. The second deferral request noted that the Applicant's six-year-old daughter would be affected by any decision made. It also stated that: compelling circumstances existed to justify a stay of the removal order; that "under the circumstances …severe harm would arise to Mr. Schleicher's daughter should he be removed"; that removal would be "against the short and long term interests of the child, particularly as Mr. Schleicher has deepened his relationship with his daughter since being removed to Alberta from British Columbia and in light of the recent case law, specifically *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61"; and finally, that the child had recently begun seeing a child psychologist who would issue a report on how the Applicant's removal would impact her. The letter stated that this report would be provided as supplementary material in support of the pending H&C application. The Applicant's Counsel requested an immediate decision.

[13] On April 28, 2016, the Officer refused to defer the Applicant's removal. The April 28, 2016 decision is the subject of this application for judicial review.

## II. The Decision Under Review

[14] The Officer noted the submissions as set out above. The Officer also noted that documents had not been provided in support of the second request for deferral and that he would consider the information that had been submitted with respect to the first deferral request. The Officer listed the documents considered, which included the Applicant's H&C application,

affidavits from the Applicant's wife and another friend, various country condition documents and media articles regarding Fiji.

[15] The Officer noted, among other things, the Applicant's criminal history that had led to the finding of inadmissibility and subsequent deportation order, the outstanding charges the Applicant faced in Alberta, which would be stayed upon the Applicant's removal from Canada, and the results of the PRRA decision.

[16] The Officer noted that he had limited discretion under s. 48 of the Act, which requires that a removal order be enforced as soon as possible. He added that a removals officer does not generally have the jurisdiction to consider H&C factors, but does have a limited discretion to consider "compelling or special circumstances, including the short-term interests of children involved".

[17] The Officer also noted that filing an H&C application does not affect the validity of a valid removal order and that there is no statutory stay of removal pending the determination of an H&C application. The Officer added that the processing times for H&C applications range from 30 – 42 months and, based on the fact that the Applicant had submitted his H&C in August 2015, estimated that the H&C application might not be determined for an additional 24- 34 months. The Officer observed that the Applicant was not making a short-term deferral request.

[18] With respect to the best interests of the child [BIOC], the Officer noted that he had considered the submissions made in the August 2015 H&C application. The Officer also considered that the letter from the Applicant's Counsel indicated that the Applicant's daughter

was seeing a child psychologist and that a report would be forthcoming as a supplementary submission to the H&C application.

[19] The Officer found that the Applicant had failed to provide any documentary evidence in support of his assertions about the effect his removal would have on his daughter. The Officer considered that the child had only begun to see a psychologist one week before the second deferral request (which was submitted on April 26, 2016 and determined on April 28, 2016) and, as a result, the psychological findings were unknown, as was the timing of the report.

[20] With respect to the Applicant's other submissions in support of deferring his removal, the Officer noted that the Applicant's risk had been assessed in the PRRA. The Officer found that documentary evidence regarding incidents of discrimination in Fiji occurred prior to the Applicant's PRRA and several of the same reports had been submitted to and considered by the PRRA officer. Therefore, the allegations and documents in support had already been dealt with by the appropriate officer. The Officer acknowledged that the Applicant might face discrimination upon return to Fiji, but concluded that insufficient evidence had been submitted to establish, on a balance of probabilities, that the Applicant would face personalized risk of serious harm if returned to Fiji.

[21] The Officer concluded that based on the totality of the evidence, a deferral of removal was not warranted.

## III. The Standard of Review

[22] Discretionary decisions of removals officers are reviewed on the reasonableness standard (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para

25, [2010] 2 FCR 311 [*Baron*]; *Escalante v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 897 at para 13, [2016] FCJ No 859 (QL)).

[23] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether 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 at para 47, [2008] 1 SCR 190).

[24] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-15, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that the reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome".

## IV. The Issues

[25] The Applicant raised several arguments in his written memorandum. They were narrowed in oral argument to focus on whether the Officer's decision is reasonable.

[26] The Applicant submits that the Officer erred by failing to exercise his discretion to defer removal pending the determination of the H&C application, given the compelling circumstances.

[27] The Applicant further submits that, although the Officer was not required to conduct a full H&C analysis, the Officer had a duty to consider the short-term best interests of the child and that this consideration should have been guided by the Supreme Court of Canada's decision

in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. The Applicant submits that *Kanthasamy* has modified the scope of a removal officer's discretion in deferring removal where the best interests of children are at stake and governs the approach to the consideration of those interests.

## V. The Applicant's Submissions

[28] The Applicant argues that officers have the discretion to defer the removal of an individual despite a valid deportation order and pending the determination of an H&C application. The H&C considerations, particularly the best interests of the child, constitute compelling circumstances to justify a deferral (*Ortiz v Canada (Minister of Public Safety and Emergency Preparedness*), 2012 FC 18 at paras 43-46, [2012] FCJ No 11 (QL)).

[29] The Applicant acknowledges that it is not the role of an officer considering a deferral of removal to conduct a full H&C analysis. However, faced with the compelling circumstances set out in the Applicant's H&C application, the Officer was required to consider whether these circumstances justified deferring his removal until such time as his H&C application could be determined.

[30] The Applicant submits that the circumstances are clearly compelling, particularly the impact on his daughter in the context of the other circumstances, including that: his wife has health issues and is unable to work; his other family members depend on him; he was the sole financial provider for his wife and daughter prior to his incarceration; he has spent the vast majority of his life in Canada; and, he has no ties to Fiji.

[31] The Applicant argues that *Kanthasamy* has broadened the scope of an officer's discretion when considering BIOC, including in the context of a deferral request where there is a pending H&C application. He submits that an officer must conduct a meaningful preliminary assessment of the merits of an H&C application and, if there is a possibility that a child's short-term interests may be prejudiced by removal, defer removal to permit the H&C to be determined by the appropriate decision-maker. The Applicant submits that this preliminary assessment must apply the *Kanthasamy* principles, including the Supreme Court of Canada's reiteration that "[c]hildren will rarely, if ever, be deserving of any hardship" (at para 41).

[32] The Applicant submits that the Officer did not conduct a meaningful preliminary assessment in light of *Kanthasamy* The failure to consider the hardship that would befall the Applicant's daughter, he argues, when coupled with the other evidence on the record of the compelling circumstances in his case, renders the refusal to defer his removal unreasonable.

## VI. The Respondent's Submissions

[33] The Respondent submits that the law is clear that a removal officer's discretion to defer removal is limited and *Kanthasamy* has not changed the scope of this discretion. *Kanthasamy* addressed how H&C applications should be considered where BIOC issues are raised. It did not address the considerations relevant to a deferral of removal.

[34] The Respondent submits that Officers have no jurisdiction to conduct substantive reviews of H&C factors, as this would usurp the role of the H&C decision-maker and turn the removals stage into a "'pre H&C' application" (*Simoes v Canada (Minister of Citizenship and Immigration)* (2000), 187 FTR 219 at para 11, [2000] FCJ No 936 (QL)).

[35] The Federal Court of Appeal has established that an officer has limited discretion in enforcing removals. The existence of an H&C application does not constitute a bar to the execution of a valid removal order (*Baron*, above at paras 49-51).

[36] The Respondent points to several decisions of this Court post-*Kanthasamy*, which confirm that the law remains unchanged; removal officers are only mandated to consider the short-term BIOC in the context of determining whether compelling circumstances exist to warrant deferral (See for example, *Animodi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 845 at para 21; *Yuris v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1333 at paras 9-10, 15-16, [2016] FCJ No 1380 (QL); *Nguyen v Canada (Minister of Public Safety and Emergency Preparedness)* 2017 FC 225 at paras 11-14, [2017] FCJ No 203 (QL)).

VII. The Officer's Discretion to Defer Removal is Limited

[37] In *Dheer v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 1194 at para 12-13, [2016] FCJ No 1485 (QL), in the context of a motion for a stay of a removal order, Justice Roy succinctly noted:

> [12] The removal officer is not without any discretion when a removal order is to be enforced. However, the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 [*Baron*], is a binding authority for the proposition that "[i]t is trite law that an enforcement officer's discretion to defer removal is limited." (para 49). Nadon J.A., with the support of Desjardins J.A., found at para 50:
>
> > [50] I further opined that the mere existence of an H&C application did not constitute a bar to the execution of a valid removal order. With respect to the presence of Canadian-born children, I took the view that an enforcement officer was not required to

> undertake a substantive review of the children's best interests before executing a removal order.
>
> That approach found echo in the reasons of Blais J.A. (as he then was) who wrote that "H&C applications are not intended to obstruct a valid removal order". (para 87)
>
> [13] A different bench of the Federal Court of Appeal reached the same conclusion in *Shpati v Minister of Public Safety and Emergency Preparedness*, 2011 FCA 286, [2012] 2 FCR 133, where Evans J.A., on behalf of the Court, ruled that "enforcement officers are not intended to make, or to remake, PRRAs or H&C decisions" (para 45). This is in effect what the Applicants argue should have been done by the removal officer. They speak of the better life the children would enjoy in Canada and of the family life that should be enhanced and cherished. That leads to the conclusion "that the humanitarian application that they have submitted should be studied before any deportation" (Memorandum of facts and law, para 13). Unfortunately for the Applicants, such is not the state of the law. These are not considerations that are to be taken into account at the stage of removal.
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> [My emphasis]

[38] In *Baron*, Justice Nadon cited *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FCR 682 at para 48, 2001 FCT 148 [*Wang*], where the Federal Court of Appeal found that deferral of removal orders "should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment". At paragraph 51 of *Baron*, Justice Nadon endorsed the reasons and the range of factors set out in *Wang* that may be relevant to a decision to defer removal, including that:

- In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

> - Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.
>
> [Emphasis in original]

[39] The Applicant argues that "special considerations" or compelling circumstances can be, and in this case are, set out in the pending H&C application and that this justifies deferral. The Applicant points to *Ortiz*, above at para 45, where Justice O'Keefe stated that removal officers can consider "compelling circumstances such as H&C considerations". However, that phrase must be considered in the context of the passages that precede and follow it. These passages clearly reflect Justice O'Keefe's articulation and application of the prevailing jurisprudence, including that "an outstanding H&C application, absent special considerations, is not sufficient on its own to justify delay unless there is a threat to personal safety" (*Ortiz*, above at para 43) and that the scope of a removal officer's considerations in assessing a deferral request is limited (*Ortiz*, above at para 44, citing *Wang*, above). Justice O' Keefe then goes on at paragraphs 45-46 to state that:

> [45] Removal officers are not positioned to evaluate all the evidence that might be relevant in an H&C application (see *Ramada* above, at paragraph 7). However, they can consider whether there are good reasons to delay removal, such as a person's ability to travel, the need to accommodate other commitments such as school obligations or compelling circumstances such as H&C considerations (see *Ramada* above, at paragraph 3). They can also consider whether the consequences of removal can be remedied by readmission after an outstanding application is approved (see *Wang* above, at paragraph 48).
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> [46] In terms of affected children, their immediate interests should be treated fairly and with sensitivity (see *Joarder v Canada (Minister of Citizenship and Immigration)*, 2006 FC 230, [2006] FCJ No 310 at paragraph 3). However, removal officers have "no obligation to substantially review the children's best interest before executing a removal order" (see *Baron* above, at paragraph 57).

[Emphasis added]

[40] Justice O'Keefe's reference to what a removal officer can consider to justify removal does not, in my view, expand the officer's discretion, but rather confirms that compelling circumstances "such as" H&C considerations could justify deferral. In other words, H &C considerations may be compelling, but that is a determination to be made based on the evidence.

[41] The fact of a pending H&C application is not, on its own, a special consideration justifying a deferral. Such an approach would be inconsistent with the law, which requires valid removal orders to be executed as soon as possible and does not provide for a stay of removal pending the determination of an H&C application.

[42] More recently, in *Danyi v Canada (Minister of Public Safety and Emergency Preparedness)* 2017 FC 112, [2017] FCJ No 156 (QL) [*Danyi*], Justice Boswell addressed similar arguments and reviewed the jurisprudence and noted at para 30:

> [30] Moreover, in *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 45, [2012] 2 FCR 133, the Court of Appeal stated that enforcement officers' "functions are limited, and deferrals are intended to be temporary. Enforcement officers are not intended to make, or to re-make, PRRAs or H&C decisions." In *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 at para 36, [2006] 2 FCR 664 [*Munar*], the Court observed that enforcement officers "cannot be required to undertake a full substantive review of the humanitarian circumstances that are to be considered as part of an H&C assessment. Not only would that result in a 'pre-H&C' application,' to use the words of Justice Nadon in Simoes, but it would also duplicate to some extent the real H&C assessment."

[43] The recent jurisprudence confirms that the principles enunciated in *Baron* and *Wang* continue to apply. Recent jurisprudence has also considered the scope of a removal officer's consideration of BIOC within the assessment of special circumstances.

[44] As noted by the Respondent, the Federal Court of Appeal decision in Canada *(Minister of Citizenship and Immigration) v Varga*, 2006 FCA 394, [2007] 4 FCR 3, remains applicable. At paragraph 16 of that decision, Justice Evans stated that "[w]ithin the narrow scope of removals officers' duties, their obligation, if any, to consider the interests of affected children is at the low end of the spectrum, as contrasted with the full assessment which must be made on an H&C application under subsection 25(1)."

[45] In *Danyi*, above at paras 34-35, Justice Boswell considered the nature of the assessment of BIOC that is called for in the context of a deferral of removal, noting that:

> [34] More recently, in *Kampemana v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060 at para 34, [2015] FCJ No 1119 [*Kampemana*], the Court confirmed that while enforcement officers "must consider the immediate and short-term interests of the children and treat these fairly and with sensitivity", they "are not required to review the best interests of any children comprehensively before enforcing a removal order." Likewise, in *Ally v Canada (Citizenship and Immigration)*, 2015 FC 560 at para 21, [2015] FCJ No 547, the Court concluded that enforcement officers "lack jurisdiction to perform the full substantive analysis of the best interests of the child that is required in an application for permanent residence on H&C grounds" and they "should consider only the short-term best interests of the child."
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> [35] The jurisprudence has established that enforcement officers are required to consider the short-term best interests of a child in a fair and sensitive manner (see: *Joarder* at para 3; *Kampemana* at para 34). It is also clear that: "while the best interests of the children are certainly a factor that must be considered in the context of a removal order, they are not an over-riding consideration" (*Pangallo v Canada (Public Safety and Emergency Preparedness*), 2014 FC 229 at para 25, 238 ACWS (3d) 711).

[46] In summary, the jurisprudence has established that: the discretion of a removals officer is limited; the consideration of H&C factors is limited to compelling circumstances, including the short-term best interests of a child; and, while the short-term best interests of a child must be

considered in a fair and sensitive manner, it is not a full substantive analysis as in the H&C determination and, in comparison, is at the low end of the spectrum, and is not an overriding consideration.

[47] In the present case, the Officer did not err in finding that his discretion to defer removal was limited and that his jurisdiction to consider H&C factors should focus on whether there are compelling circumstances, including the short-term best interests of a child, to justify a deferral of removal. The issue is whether the Officer considered the short-term best interests of the child and exercised his limited jurisdiction reasonably.

VIII. The Impact of *Kanthasamy*

[48] In *Kanthasamy*, the Supreme Court of Canada addressed how section 25 of the Act should be interpreted. Section 25 provides that an exemption from some findings of inadmissibility and from other criteria or obligations of the Act may be granted on the basis of humanitarian and compassionate considerations, "taking into account the best interests of a child directly affected".

[49] I agree with the Respondent that *Kanthasamy* does not change the scope of a removal officer's limited discretion to defer removal. However, I am of the view that *Kanthasamy* is not necessarily limited to determinations pursuant to section 25 and would provide guidance to decision-makers who consider humanitarian and compassionate factors, including the best interest of the child, in analogous contexts.

[50] That said, several of the passages in *Kanthasamy* relied on by the Applicant to argue that the Officer erred in his consideration of the short-term best interests of the child in light of *Kanthasamy* overstate the impact of the decision and must be put in context.

[51] The Applicant notes that *Kanthasamy* confirmed that children are rarely deserving of any hardship, suggesting that "any hardship" should be sufficient to justify deferral of removal. This language of "any hardship" originated in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9, [2003] 2 FC 555 (FCA) [*Hawthorne*], which also provided guidance for the assessment of the best interests of a child in an H&C application. The principle that a child is rarely deserving of any hardship is not disputed, but "any hardship" does not provide a new threshold for determining an H&C application. In *Kanthasamy*, the Supreme Court of Canada acknowledged that some hardship was inevitable.

[52] At paragraph 41 of *Kanthasamy*, the Supreme Court focussed on Mr. Kanthasamy's particular circumstances, given that he was the applicant and was a child (under the age of 18) at the relevant time. The Court stated:

> [41] It is difficult to see how a child can be more "directly affected" than where he or she is the applicant. In my view, the status of the applicant as a child triggers not only the requirement that the "best interests" be treated as a significant factor in the analysis, it should also influence the manner in which the child's other circumstances are evaluated. And since "[c]hildren will rarely, if ever, be deserving of any hardship", the concept of "unusual and undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9. Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief: see *Kim v. Canada (Citizenship and Immigration)*, [2011] 2 F.C.R. 448 (F.C.), at para. 58; UNHCR,

> *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, December 22, 2009.
>
> [Emphasis added]

[53] I do not agree with the Applicant that the possibility of a child experiencing "any hardship" is determinative of the child's short-term best interests within the limited discretion of the removal officer to defer removal of the child's parent pending the determination of an H&C application.

[54] The Supreme Court's guidance in *Kanthasamy*, above at para 23, sets out the need to consider all relevant factors and calls for a more liberal interpretation of H&C considerations, but it also acknowledges that some hardship is inevitable:

> [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).

[55] In *Kanthasamy*, the Supreme Court explained that what will warrant relief under section 25 will vary depending on the facts and context of each case. Officers making such decisions must substantively consider and weigh all of the relevant facts and factors before them (at para 25). A significant aspect of *Kanthasamy* is the Court's clear direction to avoid imposing a threshold of unusual, undeserved or disproportionate harm and to "give weight to all relevant

humanitarian and compassionate considerations in a particular case" (*Kanthasamy*, above at para 33) [emphasis in original]. Officers must be alert, alive and sensitive to the best interests of the child; simply stating that the interests have been considered is not enough. The child's best interests must be well identified and examined in light of all the evidence (*Kanthasamy*, above at paras 35-39).

[56] In the present case, the Officer considered the Applicant's submissions in support of his request for deferral, including the best interests of his daughter. There is no suggestion in the decision that the Officer imposed a threshold of undue, undeserved or disproportionate harm or that the Officer did not consider all the relevant facts and factors on the record in assessing the short-term best interests of the child. *Kanthasamy* does not impose an obligation on the Officer to seek out additional information about the child's short–term best interests. The Officer reviewed all the evidence that was available to him.

## IX. The Officer's Decision is Reasonable

[57] The H&C submissions (in support of the H&C application filed in August 2015) were the same submissions relied on by the Applicant to support his request for deferral, along with the letter from his Counsel. In accordance with the guidance of *Newfoundland Nurses*, at para 15, I have reviewed the record to better inform my assessment of the reasonableness of the Officer's decision. The record reveals that very little information was provided regarding the child's best interests, whether in the long- or short-term. There were assertions regarding the re-established relationship between the Applicant and his daughter and that the Applicant's incarceration had a deep emotional impact on his wife and daughter, which would be exacerbated by his removal. These same statements appeared in the Applicant's affidavit and in his wife's affidavit. In

addition, there was one paragraph in the request for deferral which specifically referred to the best interests of the child and stated that "great emotional and developmental harm will arise…" and that "it is in the best interest of [his daughter] that he not be removed from Canada and that he be permitted to raise her in Canada".

[58] In *Nguyen*, Justice Boswell considered the reasonableness of a decision refusing to defer removal and submissions, similar to the submissions in the present case regarding a failure to consider BIOC. Justice Boswell noted:

> [23] The burden upon an applicant of adducing evidence with respect to the BIOC in the context of an H&C application applies equally in the context of a request for deferral of a removal order. In this regard, the Court in *Omidsorkhabi v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 954 at para 15, [2015] FCJ No 980, stated: "removal officers have very limited discretion to defer removal…The burden is on the Applicant to provide the necessary evidence and justification for his request." Furthermore, it has been established that: "it is up to the person relying on the best interests of the child to adduce proof supporting his or her allegations. Vague conjectures are not sufficient" (see *Mondelus v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1138 at para 76, [2011] FCJ No 1392).

[59] Similarly, in the present case, the burden was on the Applicant to provide evidence to support his assertions regarding the short-term best interests of the child. I acknowledge the Applicant's Counsel's submission that the Applicant's incarceration and the family's financial situation made it difficult for the Applicant to garner supporting evidence. However, the Applicant made two deferral requests a year apart, both aided by Counsel; yet, the record does not include any supporting information about the impact on the child.

[60] As noted by the Officer, the promise of a report from a psychologist, at some point in the future, for the purpose of supplementing the pending H&C application, does not assist in

supporting the deferral request. The Applicant did not adequately support his assertions regarding the best interests of his child. The Officer considered the little evidence provided with respect to the child, which amounted to assertions, and the other related submissions made regarding separation from his family. The Officer reasonably found that, based on the record, there was insufficient evidence regarding the effect of the applicant's removal on his daughter.

[61] It is not for the Court to reweigh the evidence or to speculate about the impact the father's removal will have on his child.

[62] As noted in *Baron*, above at para 69:

> "… one of the unfortunate consequences of a removal order is hardship and disruption of family life. However, that clearly does not constitute irreparable harm. To paraphrase the words of Pelletier J.A., found at paragraph 88 of his Reasons in *Wang*, supra, family hardship is the unfortunate result of a removal order which can be remedied by readmission if the H&C application is successful."

[63] The Officer's overall finding that, based on the totality of the evidence, a deferral of removal was not warranted, is reasonable.

## X. No Question is Certified

[64] The Applicant initially proposed that the following question be certified:

> Has the Supreme Court of Canada's decision in *Kanthasamy v Canada* modified the scope and nature of a removal officer's authority when considering the best interest of a child directly affected by a decision in relation to the child's parent's request for deferral of removal where there is an underlying pending application for permanent residence grounds based on humanitarian and compassionate considerations.

[65] Following further submissions, the Applicant agreed that there were two steps to the Officer's analysis and that the first step, which focuses on the Officer's limited discretion to defer removal, was not affected by *Kanthasamy*. At the second step, the question is whether the Officer's consideration of the short-term best interests of a child may be affected by *Kanthasamy*. Hence, the proposed question would focus on whether the interpretation and guidance of the Supreme Court of Canada regarding H&C assessments and the best interests of the child apply in contexts other than section 25 of the Act.

[66] Although it is my view that the principles in *Kanthasamy* would guide determinations of H&C factors and the best interests of a child in other analogous contexts and that the resolution of this issue would bring some clarity and further guidance to removal officers, the determination of the question would not be dispositive of the current application. As noted, there is no indication in the decision that the Officer erred in his assessment of the short-term best interests of the child. The Officer's finding was based on the insufficient evidence provided by the Applicant to establish that the child's short-term best interests would be affected and overall, that the totality of the evidence did not warrant deferral.

[67] As a result, the proposed question will not be certified.

## JUDGMENT

**THE COURT'S JUDGMENT IS THAT:**

1. The Application for Judicial Review is dismissed.

2. No question is certified.

"Catherine M. Kane"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1756-16 |
| **STYLE OF CAUSE:** | VINESH KAPOOR SCHLEICHER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | MAY 1, 2017 |
| **ORDER AND REASONS:** | KANE J. |
| **DATED:** | MAY 9, 2017 |

**APPEARANCES:**

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| Hilla Aharon | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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