Federal Court  Cour fédérale

**Date: 20200313**

**Docket: IMM-6306-18**

**Citation: 2020 FC 377**

**Ottawa, Ontario, March 13, 2020**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**ASHLEY NADINE LAING NEE PRYCE**

**Applicant**

**And**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] Ashley Nadine Laing Nee Pryce [the Applicant] is applying for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, LC 2001, c 27 [IRPA]. This application concerns a decision made by an Immigration Officer [the Officer], dated December 11, 2018, rejecting the Applicant's Application for Permanent Residence within Canada on Humanitarian and Compassionate [H&C] grounds.

[2] The Applicant's H&C grounds were based on the best interest of the child [BIOC] and hardship upon return to Jamaica due to adverse country conditions. The Officer found that the personal circumstances of the Applicant were not sufficient when considered globally to justify the granting of the requested exemption based on H&C considerations under Section 25 of the IRPA.

[3] The Applicant seeks an order to set aside the decision made by the Officer and an order to remit the matter back for a redetermination by a different immigration officer by way of judicial review.

[4] This application for judicial review is allowed.

## II. Facts

[5] The Applicant is a citizen of Jamaica who was born on August 19, 1985. She was legally adopted and grew up in a single-parent household raised by an adoptive mother. The Applicant's adoptive mother never married, but she fostered 12 children altogether, including the Applicant, however being the only adopted child. The Applicant has very few and distant biological family in Jamaica and none that she and her children have a close relationship with.

[6] The Applicant's mother worked with "Youth With A Mission" [YWAM]. Therefore, the Applicant grew up on the Ministry campus and decided to become a missionary. After completing the educational requirements, she worked as a leader in the Ministry campus in Montego Bay where she served for 10 years from 2006 to 2016.

[7] The Applicant met her husband, a Canadian Citizen, in 2006 at a Ministry campus in Jamaica. They began dating in 2006 and married in 2007. They had three children: Judah was born in 2008, Maleeq was born in 2010, and Israel was born in 2013. The three children were born in Jamaica and are dual citizens of Jamaica and Canada.

[8] In 2016, her husband encouraged the Applicant to quit her job and go abroad with him to Israel. Prior to leaving, she resisted leaving for Israel because her husband had been behaving strangely and she felt that things were not right between them. He reassured her and encouraged her to move to Israel, indicating that once they got there they could talk things over.

[9] The Applicant and her husband resigned from the Ministry and travelled to Israel with their three children to explore other ministry opportunities after being full-time missionaries for so many years in Jamaica. Along with them was a 23-year-old young woman, who had been disciplining in the Christian ministry. Three days after arrival in Israel, the husband revealed that he was having an affair with the young woman. He thereafter abandoned the Applicant and her three children, leaving Israel with the young woman and returned to Canada to live in Belleville, Ontario, where eventually he had a child with the younger woman.

[10] The leadership of YWAM found out what happened and news spread throughout the ministry in Jamaica. Consequently, the Applicant indicated that she could not go back and work in the Ministry because she felt humiliated, and after what happened, it was difficult to give herself spiritually as was necessary for the duties.

[11] Instead, she traveled with her children to United States in November 2016. She attended some counseling sessions trying to cope with what had happened to her. The Applicant subsequently met relatives of her husband's family. They persuaded the husband to bring the Applicant and children back to Canada. They all entered the country on December 27, 2016.

[12] The three children now live with the Applicant in Stoney Creek, outside of Hamilton, Ontario, where they have close friends and family members of her husband. Their residence is 3 ½ hours from that of their father who lives in Belleville.

[13] The children have acclimatized well to Canada at school and socially. They currently see their father at least once a month. Despite the events, the children are in a good relationship with their father, except that the older son is dealing with anger issues over the breakup of the family. The children share a very warm and loving relationship with the husband's family members, particularly the paternal grandparents, who make efforts independent of their son to maintain that relationship. They too are upset by their son's treatment of his first family and still hold out hope that the marriage will reconcile, although the Applicant finds this very unlikely. He now drives a truck, while abandoning missionary work.

[14] The Applicant has limited education and work experience that is transferable, which was limited to her missionary work. In addition, because of events, spirituality is not something she can return to. Having devoted her entire life to Christian ministry work and to her children, she finds herself at a loss. She says returning to Jamaica, besides being culturally humiliating, holds

out few prospects for earning a decent living, even doing basic jobs such as those found in Canada, but non-existent in Jamaica.

[15] She is particularly concerned about her children, who have come out relatively unscathed from the breakup of the family and all the associated events, thanks largely to the loving support of the grandparents, other members of the family and the involvement of her husband. Taken out of this environment, she does not see them coping upon their return to Jamaica, where education is not free and where previously the children were homeschooled by the parents in the environment of the Missionary. She also anticipates difficulties in returning to a country where the economic, social, health and political conditions are barely tolerable for all citizens. They will be without other family support from distant non-biological relatives with whom she has had little contact over her life or friends who were in the ministry. In addition, she has safety concerns for herself as a divorced single woman and her children in returning to Jamaica, as she would no longer have the protection of the Ministry and her husband. Together they provided a secure environment for her and her children, which together made it possible for them to live with some degree of personal security.

## III. Impugned Decision

[16] The Applicant advanced a number of submissions in support of her H&C application, which the Officer rejected: 1) failing to properly consider the BIOC, including the failure to consider Applicant's affidavits and to consider the BIOC with regard to country conditions in Jamaica, particularly relating to its high level of poverty and violence; 2) speculating that the Applicant would find employment in Jamaica, which is contrary to the country conditions

evidence and her sworn testimony; 3) applying an incorrect legal test upon accepting that there are serious issues of crime and violence in Jamaica; 4) finding that the Applicant would receive sufficient redress and protection based on her analysis of the country's criminal justice system; 5) conflating H&C factors with refugee and risk factors; and 6) failing to apply a compassionate and holistic approach to equitable relief mandated by *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61 [*Kanthasamy*].

[17] The Officer based her decision on the factors described in the Minister's "Guidelines" (Canada, Citizenship and Immigration Canada. "IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", in *Inland Processing*).

[18] The Officer found there was insufficient objective evidence to indicate that it would be impossible for the Applicant to reintegrate in Jamaica. After considering the evidence regarding the Applicant's life in Jamaica, the Officer concluded that there was insufficient objective evidence to indicate that the Applicant and children could not attempt to obtain reemployment with the missionary and live on the missionary campus.

[19] The Officer further noted that the Applicant has spent the majority of her life in Jamaica where she was educated and worked and maintains family ties. Consequently, the Applicant would not return to an unfamiliar place, culture, or language. Additionally, the Officer noted that the Applicant is an adaptable individual who was able to leave her native Jamaica and resettle in another country without status, which demonstrates that she is adaptable to new locales, differing cultures while facing life challenges.

[20] The Officer also concluded that there were avenues of redress via state protection should the Applicant be the victim of the violence that the Officer agrees is a risk in Jamaica. The Officer recognized that although the criminal justice system in Jamaica is not perfect and that even though crime and violence remain a serious concern, the Applicant presented insufficient objective evidence that she could not seek the assistance of the police if needed.

[21] With respect to the BIOC, the Officer referred to the evidence of the children's positive situation in Canada and their relationship with the father, however noting the absence of objective documentary evidence. Upon reviewing the evidence, including the letter of the children's father, the Officer concluded that there was insufficient corroborating evidence of the role he plays in their lives, or of his financial support to demonstrate a degree of interdependency and reliance such that separation would have a significant impact.

[22] The Officer concluded that recourse to smart phones, various social media outlets and by letters could mitigate to some extent the hardship of physical separation from the father and other family members, although not suggesting that these types of communications would be entirely satisfactory. These would supplement the Applicant's care and her emotional and financial support.

[23] Similarly, the Officer concluded from the country condition evidence that the Applicant and her extended family in Jamaica could reasonably continue to ensure the children' safety and care. The Officer also discounted somewhat the effects of the poverty and violence in Jamaica. She countered that these conditions do not necessarily affect the BIOC in a significant manner

because “no country including Canada which is built on the value of good governance can provide a guarantee that poverty and hurtful incidents of criminal or prejudicial nature will not occur in a child’s lifetime.”

[24] In sum, the Officer rejected the Applicant’s application for permanent residence because she was not of the opinion that granting the requested exemption under section 25 of the IRPA was justified on H&C considerations.

## IV. Issues and Standard of Review

[25] The Court concludes that this matter raises the issues of whether the Officer’s decision was unreasonable for failing to consider the impact of the past hardship on the children and the Applicant as a possible significant contributing factor to a finding of disproportionate suffering attendant on their removal to Jamaica, or a sufficient basis to grant special relief.

[26] By the revised principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para. 26 [*Vavilov*], reasonableness is presumed to be the applicable standard of review for all aspects of the decision. None of the exceptions described in *Vavilov* would affect the presumption that the reasonableness standard should apply in this matter.

[27] The reviewing court no longer attempts to ascertain the "range" of possible reasonable conclusions that would have been open to the decision maker. Instead, a reasonable decision is concerned with the decision-making process and its outcomes. A reasonable decision is also based on an internally coherent reasoning, and justified in light of the legal and factual

constraints that bear on the decision such that the decision as a whole is transparent, intelligible and justified. Therefore, "it is not enough for the outcome of a decision to be justifiable... the decision must also be justified." (*Vavilov* at paras. 15, 83 and 86).

[28] Regarding the first factor, the reasoning must be both rational and logical, allowing the reviewing court to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic and following a line of analysis that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived, (*Vavilov* at para. 102).

[29] Regarding the second factor, a reasonable decision is justified in light of the particular legal and factual constraints that bear on the decision (*Vavilov*, at para. 83). It is not possible to catalog all of the legal and factual considerations that could constrain an administrative decision-maker in a particular case. However, elements that are relevant in this matter in evaluating whether a given decision is reasonable include the governing statutory scheme; other relevant statutory or common law; the evidence before the decision maker; the submissions of the parties; and the potential impact of the decision on the individual to whom it applies.

[30] The particular constraint at issue in this matter pertains to the relevant case law regarding factors applying to an H&C decision. Did the Officer fail to apply a compassionate and holistic approach mandated by the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] by failing to consider whether the circumstances endured by the Applicant and her children prior to coming to Canada were unconscionable, and whether this would be a significant or sufficient factor to make the Applicant eligible for special

relief under section 25(1) without the requirement to demonstrate disproportionate hardship upon removal?

## V. Analysis

### A. *Hardship and BIOC*

[31] I find the decision to be adequately justified with extensive reasons that are both rational and logical, allowing the Court to trace the Officer's reasoning guided by the application of the Guidelines' hardship factors without encountering any fatal flaws in her overarching logic and following a line of analysis that could reasonably lead from the evidence to the conclusion arrived at.

[32] The Officer made a significant finding when concluding there was insufficient objective evidence that the Applicant could find reemployment with the Ministry and live with the children on the Ministry campus. The very brief supporting letter of the Applicant's mother not addressing these issues supports these conclusions. She remains in a senior position with the Ministry. Nonetheless, she failed to provide evidence that the Applicant would not be welcomed back with her children to continue her employment and live on the Ministry campus as in the past. This conclusion is supplemented by the evidence noted in the Applicant's affidavit, but not referred to in the reasons, that upon learning of the husband and initiate's desertion of the Applicant and her children, a member of the Ministry traveled to Israel to bring the remaining family members back to United States.

[33] The Applicant's mother could have provided highly probative evidence on the subject given her position and long years with the Ministry since 1986. Instead, she limited her comments to the facts that "[w]hile Ashley has family ties in Jamaica, she does not have physical ties". She also indicated that the Applicant had no investments or land because the couple had sold everything when they left Jamaica. Obviously, if anyone could indicate that there was no hope of employment, or the family members living at the Ministry upon returning, it would have been the Applicant's mother.

[34] I note the Officer's reluctance to fully engage in this analysis of the omission of significant evidence in a document which I conclude is due to a line of jurisprudence in this Court initiated by the decision in *Mahmud v Canada (MCI)* 167 FTR 309 [*Mahmud*]. It stands for the principle that a decision-maker should only consider what one states in an affidavit or document, not what is omitted. I respectfully, but strongly disagree with this purported rule of evidence.

[35] I set out my reasons disputing the conclusion in my recent decision of *Mohamed v MCI*, 2019 FC 1537, at paras. 93 to 97. I will not repeat them here, except in a summary fashion. *Mahmud* is not reconcilable with the Court of Appeal decision of *Dehghani v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 587 (C.A.) at para. 33. The authority relied upon in *Mahmud*, namely *Ahortor v Canada*, [1993] FCJ No 705, concerned a failure to provide corroborative evidence, not an omission of what was contained in a document entered in evidence. When an author of the document may add highly probative evidence on a relevant issue, in this matter probably the most important evidence, and fails to do so in her letter, there is

a presumption that had the evidence been tendered, it either would not support the party tendering the document or probably contradicts the party's case. This is particularly reasonable when the author of the document is not available for cross-examination, often without counsel representing the respondent in attendance. These considerations have led to the opposing evidentiary rules requiring parties to put their best foot forward to prove their case.

[36] The Officer did not accept the underlying essence of the Applicant's submissions that she and her children would endure hardship because they could not return to the Ministry, despite her statements to that effect. Even unaccompanied by her husband, there is no basis for the Court to interfere with the finding that is supported by some evidence.

[37] In addition, I do not find any reviewable error with respect to the treatment of the BIOC issue, either as concerns the sufficiency of evidence of the father's role or the degree of interdependency and reliance of the Applicant and her children on him. It is also noted that the Officer describes the evidence establishing that the Applicant as a single parent, was someone who could be counted on to make every effort to provide a safe and loving environment. The Officer also found no proof that the Applicant's extended family would not be willing to assist in their emotional re-integration. Similarly, I find no error in the alleged failure to reply to the affidavits of the Applicant and other family members regarding the close relationship with the father. The reasons indicated that the Officer reviewed this evidence, but obviously considered it insufficiently significant to affect the decision.

[38] The Applicant refers to the statement in *Kanthasamy* that "children will rarely, if ever be deserving of any hardship" to challenge the Officer for discounting the extensive poverty and violence that exists in Jamaica. This reference is in respect of "unusual and undeserved hardship", which relates to hardship that the Act or Regulations address or anticipate, or are under the control of the Applicant. It does not extend to the issue of whether the children's hardship is disproportionate.

[39] The Court in *Kanthasamy* indicated, at para. 41, that "[b]ecause 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". Thus, while acknowledging that the issue of disproportionate hardship remains relevant for children, it was important that the Officer assess such evidence through the lens of the BIOC, with the view to determining whether the children are facing greater hardship because of their circumstances as children. I find no reviewable error on the Officer's part in her consideration of the Guidelines' hardship factors to the children.

[40] I also do not accept that the Officer applied an incorrect legal test upon accepting that there are serious issues of crime and violence in Jamaica. In addition to the capacity of the Applicant to protect the children, and issues of insufficient evidence to indicate that they would not be living on the Ministry campus, the Officer cannot be faulted for her analysis of country conditions regarding Jamaica's criminal justice system. Acknowledging that it was deficient in many respects, nevertheless, there is no basis for the Court to intervene in her factual finding that

the police would likely be willing to provide assistance and to support the Applicant when approached.

[41] The Officer's findings that there was insufficient evidence demonstrating that the children will be living in poverty or that the Applicant will be unemployed are supported by the evidence to an extent that prevents the Court's intervention. I also find no fault with the Officer's conclusion regarding relative social and economic country conditions as applied in the circumstances of this matter, stated as follows:

> While I acknowledge that children in Canada often enjoy better social and economic opportunities than they would in Jamaica, I also note that there are different standards of living that exist between counties [*sic*]. It is noted that many countries are not as fortunate to have the same social, including financial and medical supports as found in Canada. However Parliament did not intend for the purpose of Section 25 of the *Immigration and Refugee Protection Act* (IRPA) to make up the difference in standard of living between situations which are unforeseen by IRPA where humanitarian and compassionate grounds compel the Minister to act.

[42] Absent demonstrating how the difference in standard of living would create sufficient hardship for children based on their particular circumstances, I do not view the above statement as describing a reviewable error. Obviously, social and economic opportunities may be relevant, but only insofar as the particular circumstances of the children make them so.

[43] The Court in *Kanthasamy* defined the best interest of the child as "[d]eciding what. . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (*Kanthasamy at* para. 36, with my emphasis). However, I do not understand that these interests

necessarily extend to social and economic circumstances based upon different country standards of living, as opposed to the care and attention that children receive from parents, relatives, friends, and to some extent supportive environments. Conversely, there is no doubt that situations of economic and social conditions, poverty and increased crime levels may apply to the particular circumstances of the child, as well as to adults if demonstrated in the materials before the Officer.

[44] Finally, I also find no basis to accept the Applicant's submission that the Officer conflated issues of risk regarding protected person status with those of humanitarian compassionate nature. The Applicant made extensive submissions to the Officer regarding risk issues. This included raising issues of violence and gender-based violence remaining widespread in Jamaica. The Officer responded to these submissions throughout her reasons, and would have been criticized for not doing so.

[45] Accordingly, I do not find the Officer's reasoning to be unreasonable, or her explanations to be inadequate, apart from concerns about the failure to adopt a holistic approach in the unique circumstances of this matter, which I next consider.

## B. *Suffering Unconscionable Treatment as Grounds for Special Humanitarian and Compassionate Relief*

[46] I conclude that the Applicant has demonstrated as a serious possibility that the husband and accompanying initiate treated her and her children in a shocking and unconscionable fashion by abandoning them upon arrival in Israel to make out as best they could when he immigrated to Canada accompanied by the younger female initiate to start a new life there.

[47] I conclude that the Officer should have considered the unconscionable treatment of the Applicant and her children as a significant consideration granting special relief pursuant to section 25(1) the IRPA. Indeed, past shocking unconscionable treatment may be sufficient to provide relief, where hardship factors faced upon removal to the country of origin would not sustain the application.

[48] During the hearing of this matter, the shocking nature of the treatment of the Applicant and her children was a matter of discussion, whether it was a factor based on the general statements of law in *Kanthasamy*. Having reflected on these discussions, I conclude that past mistreatment of the Applicant and her children is a factor that should have been considered, even though not a factor raised in the Guidelines.

[49] The reasoning in *Kanthasamy* supports a conclusion that unconscionable past treatment may warrant special relief, although not based on the Guidelines' hardship factors. The Court stated that "the equitable underlying purpose of the humanitarian and compassionate relief" (*Kanthasamy* at para. 31, with my emphasis) was that described in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*]. Sufficient equitable purposes to support an H&C claim were demonstrated by "those facts... which would excite in a reasonable [person] 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." (*Kanthasamy* at para. 13) The Court noted that the term "compassion" covers the "sorrow or pity excited by the distress or misfortunes of another, sympathy" (*Kanthasamy*, para. 13).

[50] Shocking and unconscionable conduct speaks to the same equitable considerations, which the Supreme Court in *Kanthasamy* indicated should underlie the purpose of section 25(1).

[51] The Court thereafter reconciled the approach outlined in *Chirwa* with that in the Guidelines. It adopted the compromise position from a line of Federal Court and the Federal Court of Appeal jurisprudence: *Lim v Canada (MCI)*, 2002 FCT 956 at paras. 16-17; *Chen v Canada (MCI)*, 232 FTR 118 at para. 15; *Hawthorne v Canada (MCI)*, 2002 CAF 475 at para. 9; and *Singh v Canada (MCI)*, 2014 FC 621 at paras. 10 and 12. It stands for the principle that although *Chirwa* should not be applied categorically, it nonetheless should be treated co-extensively with the Guidelines (*Kanthasamy* paras. 30 and 31). The Court confirmed that officers should not interpret the Guidelines to fetter their discretion to consider factors other than those listed in the Guidelines.

[52] Significantly, the Supreme Court in *Kanthasamy* at para. 30 approved the statement from *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 621 at para.10, that stipulated 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". The Court confirmed this approach at para. 31, as follows with my emphasis:

> [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. (*Kanthasamy*, para. 31)

[53] On this very point, the minority decision in *Kanthasamy*, at para. 97, specifically refers to "past hardship" of the applicant as being a factor that should be considered outside of "hardship arising from the application of a normal rule". This was not challenged as an issue by the majority. Paragraph 97 is as follows with the Supreme Court's emphasis, and mine for the final highlighting:

> [97] In the Federal Court of Appeal, Stratas J.A. described the hardship test as "requiring proof that the applicant will personally suffer unusual and undeserved, or disproportionate hardship arising from the application of. . . the normal rule" (para. 41 (emphasis added)). Read literally, this test is future-oriented and focuses solely on the applicant. It asks how the applicant is likely to be affected in the future if relief is denied. As such, it runs the risk of excluding from consideration otherwise relevant H&C factors such as past hardship the applicant may have suffered or the impact that denying relief is likely to have on persons other than the applicant.

[54] The Supreme Court emphasized the importance that the officers "should turn [their] mind[s] to the specific circumstances of the case", citing 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.

[55] Admittedly, this matter appears to be the first occasion that applies the equitable principles described by the Supreme Court that H&C considerations should not be limited to hardship, or that other hardship factors can supplement those outlined in the Guidelines.

[56] This said, I would understand that it is important that equitable principles be interpreted narrowly to ensure that H&C claims not "be an alternative immigration scheme" (*Kanthasamy*, at para. 23). Unconscionable treatment, by its limited and exceptional definition, has a narrow

application and thereby necessarily meets the requirement that the relief be special or exceptional.

[57] Other jurisdictions have recognized unconscionableness as an exceptional factor as presenting a high threshold to be met. For instance, in Ontario family law circumstances pertaining to the equalization of net family properties, subsection 5(6) of the *Family Law Act*, R.S.O. 1990, c. F.3 [FLA], describes unconscionable conduct as the only exception to the primary, and otherwise overriding policy of equal distribution of family assets. Subsection 5(7) of the FLA provides that the equal division of assets was "subject only to the equitable considerations set out in subsection 5(6)."

[58] In the Ontario Court of Appeal decision, *Serra v Serra*, 2009 ONCA 105 [*Serra*], the Court indicated at para. 47that the threshold an applicant must cross in order to open the door to an unequal division is exceptionally high, as follows:

> [47] In this regard, the threshold of "unconscionability" under s. 5(6) is exceptionally high. The jurisprudence is clear that circumstances which are "unfair", "harsh" or "unjust" alone do not meet the test. To cross the threshold, an equal division of net family properties in the circumstances must "shock the conscience of the court".

[59] There is a caveat to the Court's reasoning in *Serra* when it stipulated at para. 58, as follows:

> [58] Although unconscionable conduct is obviously an appropriate consideration in determining whether equalizing the net family properties would be unconscionable, in my opinion the true target of the limited exception to the general rule is a situation that leads to an unconscionable result, whether that result flows from fault-based conduct or not.

[60] I distinguish this limitation, however, inasmuch as the exception for the exemption in the FLA flows from the fault-based conduct that relates specifically to the financial effects of equal division of family assets. Equitable principles are the foundation of section 25(1). They are not a corollary or adjunct to some other primary principle as was the issue of dividing family assets in *Serra*. Unconscionable conduct lies at the heart of what excites in civilized persons the desire to provide relief from the strictures of the IRPA. Obviously, the officer must consider the entirety of the circumstances pertaining to an applicant's circumstances as a whole. Nevertheless, if it were just the outcome in terms of hardship on return to the country of origin, there would be no basis for the Supreme Court to have emphasized that the Guidelines are coextensive with the equitable principles governing section 25(1), reflected in *Chirwa.*

[61] As I understand, the threshold of "exceptional hardship" so as not to constitute an alternative immigration scheme, is the definition of hardship in the *Oxford* online dictionary as "severe suffering". The *Webster Merriam* online dictionary definition of hardship refers only to "suffering or privation". This latter definition would represent the lower threshold of "some hardship", which the Supreme Court has recognized "will inevitably be… associated with being required to leave Canada." (*Kanthasamy*, at para. 23)

[62] The point in this matter is that the threshold for suffering of children will be relatively below that of severe suffering of adults, and even more so, when children have been the subject of past shocking unconscionable treatment. This is consistent with a lower threshold indicated in *Kanthasamy* at para. 41: "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."

[63] Conversely, however, I do not agree with the Applicant's submission that hardship to children need not be demonstrated. When the Court stated at para. 41 that "the concept of 'unusual and undeserved hardship' is presumptively inapplicable to the assessment of the hardship" experienced by a child, it did not intend to suggest that "disproportionate" hardship does not apply to some degree to children.

[64] Nonetheless, I have always understood that the lower threshold should apply to the degree of suffering of children because of their vulnerability, and particularly their susceptibility to long-term developmental sequelae that may reasonably manifest later in their lives. In my view, an officer should consider any circumstance when the treatment of the child is exceptional to the point of something that would shock the conscience of the reasonable civilized person. Does it describe a reasonable possibility that there will be consequences in the future from the past unconscionable treatment, even if not immediately manifested in a child's younger years, or corroborated by probative medical expert evidence?

[65] Past hardship is not a factor listed in the Guidelines. They focus on the disproportionate suffering caused children by or upon their removal, or indirectly by that of their parents. Special needs, establishment, discrimination, safety, or appalling conditions that the claimants are returning to tend to makeup the content of the Guidelines' factors. That is not the issue here. Rather, it is a question about how much more suffering do these children, and the Applicant,

have to endure after their shocking abandonment in a foreign country with their family riven apart, only to land fortuitously on their feet in Canada, and putting such a craven experience behind them? It applies the equitable standard described in *Chirwa.*

[66] At the very minimum, I conclude that the Officer was obliged to consider the impact of the past unconscionable hardship suffered by the children and the Applicant that will not likely recur upon removal, as a possible significant contributing factor to a finding of disproportionate suffering attendant on their removal to Jamaica. Similarly, the Officer is required to assess their past mistreatment to determine whether it is a sufficient basis to grant special relief based on the principles elaborated in *Chirwa*. This would be in addition to the other considerations that the Officer weighed, but not amounting to "Guidelines" hardship.

[67] Accordingly, I would set aside the application and return it to be heard by the same decision-maker, as there is no suggestion of any error on her part, given the novelty of the issue which forms the basis for setting aside the decision.

## VI. Certification of questions for appeal

### A. *The Respondent's Question for Certification*

[68] The Court's reasoning raises a novel issue as to whether hardship stemming from past conduct prior to immigrating to Canada can be a possible ground for the granting of special relief, not found in the Guidelines' hardship factors. Because I had raised this issue which was not before the Officer, although discussed during the hearing, I provided the Respondent with an

opportunity to provide submissions to certify a question for appeal with specific reference to the conclusion in para. 66 above. At the same time I provided a confidential draft of my reasons.

[69] The Respondent submitted the following question to the Court for certification as follows:

> In the context of a request for humanitarian and compassionate considerations under subsection 25 (1) of IRPA, must an officer consider past hardship as part of the global assessment of humanitarian and compassionate factors if it has not been explicitly raised by the applicant as a relevant factor for consideration?

The Applicant chose not to provide submissions on the issue. I understand this to mean that she does not oppose the certification of the question.

[70] While the Respondent agreed that the question was one of general importance that transcends the interests of the parties to the litigation and contemplates issues of broad significance of general application, based on the decision in *Zazai v Canada (MCI)*, 2004 FCA 89 [*Zazai*], it nevertheless argued in a manner that casts doubt on my jurisdiction to certify the question in the following terms, with my emphasis:

> Further, as Pelletier J.A. stated in *Zazai*, certification demands that a proposed question meet the threshold of being "a serious question of general importance which would be dispositive of an appeal." <u>He added as a corollary that the question must have been raised and dealt with in the decision below</u>: "If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification."

[71] As shall be seen, I find that the facts in *Zazai* are distinguishable and clearly describe the “decision below” referred to by the Court of Appeal as being that of the applications judge, not the administrative decision-maker.

[72] Substantively, the proposed question considers only whether the Officer was required to address the issue of past hardship, when not raised by the Applicant as being relevant. Nonetheless, the Respondent advanced two substantive submissions similarly intended to abort the question being considered by the Court of Appeal. First, it submitted that the past hardship of the family's abandonment in Israel was referred to and found not to be a determinative factor, i.e. an argument in the nature of principles enunciated in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. The second submission was a form of "floodgates" argument. The Respondent argued that "the outcome of an appeal on this issue would affect a great many applications for humanitarian and compassionate relief." I consider these issues below

B. *The Jurisdiction of the Court to Certify the Proposed Question for Certification*

[73] As indicated, I am of the opinion that the Respondent has misapprehended the essence of the decision in *Zazai*. The Court of Appeal rejected the certified question because the applications judge had failed to provide any reasoning in support of the question being certified. This conclusion is apparent from paragraphs 9 and 12 in *Zazai*, which are as follows with my emphasis:

> [9]… Despite not having addressed the issue, the applications judge certified it as a question… In doing so, he was inviting this Court to decide at first instance a question which was properly before him, an invitation which we must decline.
>
> …
>
> [12] The corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it

> is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.

[74] As I interpret the above passages from *Zazai*, the reference to "the decision below" is to the decision of the applications judge. The nub of the complaint is that the reviewing judge certified a question without providing any comments or explanation regarding the question, leaving the Court of Appeal to deal with it "at first instance". In addition, the Court's statement that "[i]f a question arises on the facts of a case before an applications judge… it is the judge's duty to deal with it" extends the admonition to require applications judges to deal with any issue that the parties place before them.

[75] In other words, *Zazai* does not in any way relate to the jurisdiction of the reviewing court to certify a question that an officer failed to consider because it was not brought to the Officer's attention by the applicant. This issue is rather comprised in the question as to when a Court can raise an issue not considered by the parties, and therefore, not considered by the decision-maker.

[76] On this issue, I conclude that the principles enunciated in the Supreme Court decision in *R. v Mian*, 2014 SCC 54 at para. 41, which describe the conditions allowing an appellate court to raise a new legal issue, should similarly apply to an applications judge conducting a judicial review, as follows with my emphasis:

> [41] The question then is how to strike the appropriate balance between these competing principles. Appellate courts should have the discretion to raise a new issue, but this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party. This

> test is sufficiently flexible while also providing for an appropriate level of restraint to address the tensions inherent in the role of an appellate court.

[77] With respect to the factors to be considered that permit a new issue to be raised, there is no dispute of there being "a sufficient record" regarding past hardship of the Applicant and her children. There is also no apparent procedural prejudice being raised by the Respondent, nor should there be one. The issue of past hardship was first raised by the Court and debated to a certain extent with counsel during the hearing. The Court then provided a copy of its confidential draft reasons to assist them in formulating a certified question, besides granting two extensions of time. Had any issue arisen concerning the Court's jurisdiction to add an issue for review requesting an opportunity to respond, beyond those contained in the Respondent's letter, they could have been advanced at that time. The Respondent's submissions also include the substantive arguments referred to above that the Officer considered the issue of past hardship and the potential "floodgates" policy consideration. In any event regarding the factors in *Mian*, the overriding issue is whether not dealing with the matter would risk an injustice. Given the seriousness of the prejudice occasioned by removal of the Applicant and her children, the potential failure of justice is significant.

[78] The Court in *Mian* also provided some general direction to assist in determining whether an issue would risk an injustice at para. 46 of the decision, namely that the court should have "good reason to believe" that a failure to raise a new issue "would risk an injustice", as follows with my emphasis:

> [46] The determination of whether there is good reason to believe that a failure to raise a new issue "would risk an injustice" requires performing a preliminary assessment of the issue. <u>The standard of</u>

> "good reason to believe" that a failure to raise a new issue "would risk an injustice" is a significant threshold which is necessary in this context in order to strike an appropriate balance between the role of appellate courts as independent and impartial arbiters with the need to ensure that justice is done.

[79] In the present matter, I consider that there is good reason to conclude a failure of justice could occur, in that the Officer failed to apply the proper test in accordance with the principles set out in *Kanthasamy*. There is a need for justice to be done with respect to the Officer failing to address vivid and probative evidence of the unconscionable treatment of the Applicant and her children when highly relevant to a legal test intended to assess compassion for relief from their deportation.

C. *Preliminary objections of the Respondent*

[80] The Respondent's substantive submissions accompanying the certified question are contained in the following two paragraphs, with the Court's emphasis on statements of interest:

> The question of whether past hardship is a mandatory consideration in the assessment of humanitarian and compassionate applications, even where not explicitly raised by an applicant, is determinative of the present matter. Here, although the Applicant certainly set out her past hardship, she did rot appear to request relief on that basis. Likewise, while the Immigration Officer noted her past hardship, it was not a factor that was determinative.
>
> This question also transcends the interests of the parties in this case. While there is no explicit set of criteria that must be taken into account in a humanitarian and compassionate application, with the exception of the best interests of any children affected, past hardship has not been a factor that has been routinely applied in such cases. Thus, the outcome of an appeal on this issue would affect a great many applications for humanitarian and compassionate relief.

[81] I interpret the first paragraph above to be a submission that past hardship facts about abandonment of the family abroad were considered but not found to be a determinative factor. I disagree that the reasons can be interpreted in a fashion suggesting that the Applicant's evidence of the family's abandonment was considered by its mere mention as a chronological item of fact. The circumstances were referred to in one brief paragraph in the introductory statement of facts, without any follow-up consideration in the reasons. Thus, the Officer's extensive and thorough analysis was conducted under the headings of "Hardship upon Return to Jamaica" and "Best Interest of the Child". There is no indication that the family's suffering due to their abandonment in Israel was assessed.

[82] The Respondent as much as confirms this conclusion by noting in the following paragraph that "past hardship has not been a factor that has been routinely applied in such cases (referring only to the best interest of the child)." It was not considered a factor by the Officer in this matter either. Admittedly, this oversight arose because the Applicant did not focus on the issue for the same reason, namely that the teachings of *Kanthasamy* are not fully reflected in the jurisprudence. Instead, the test is limited to factors outlined in the Guidelines, which do not consider other compassionate factors, including that of past hardship.

[83] The Respondent's statement, with the Court's emphasis that "the Applicant <u>certainly</u> set out her past hardship" understates the greater proportional impact that the abandonment evidence had in generating compassion in the mind of the reasonable civilized Canadian, although not translated into compassion to allow the family to remain in Canada. These facts stand out and dominate the family's narrative, as was generally agreed during the hearing.

[84] I also disagree with what I have described as a form of "floodgates" submission of the Respondent. I am in agreement that raising new issues in the field of immigration and refugee law has potential floodgates consequences not found in other areas of Canadian law and therefore generally an exception to the rejection of this form of argument. Nevertheless, even recognizing the wide contextual scope of evidence on past hardship, its general application is significantly circumscribed by fixing the "threshold" of mistreatment of applicants at the level of being unconscionable, i.e. "shocking" to the reasonable civilized person. Shocking unconscionability is arguably the strictest evidentiary threshold in Canadian law. Moreover. the exceptional nature of this form of compassionate relief at the threshold of unconscionable is only attained by highly probative evidence requiring objective corroboration that leaves no doubt about the occurrence and degree of mistreatment of the applicant in the mind of the civilized person that excites relief from the strictures of removal.

D. *The Failure to apply the teachings of Kanthasamy*

[85] The Respondent's question for certification that focuses on the Officer's obligations to consider matters not advanced by the Applicant requires further comment by the Court. It is my view that the failure of justice in this matter arises from too narrow an application of the teachings of *Kanthasamy*. The Supreme Court described actionable hardship operating on two generally co-extensive approaches or foundations that married the Guidelines factors with the equitable compassionate test of the reasonable compassionate person described in *Chirwa*. I understand that the Court sought to temper the impact and scope of the Guidelines, although endorsed, with the equitable principles enunciated in *Chirwa*.

[86] The test in *Chirwa* mandates the Officer to assess hardship from the perspective of civilized persons endowed with a sense of compassion to be excited to the point of wanting to grant relief to applicants from having to return to the country of origin. It requires the officer to consider all the facts that could generate compassion in the minds of reasonable Canadians to support applicants remaining in Canada. Essentially, this means that the officer should consider whether, and to what degree, any of the facts would likely excite a sense of compassion warranting special relief from removal, whether a Guidelines factor or not.

[87] What I find to be irresolvable in considering this issue is how the co-extensive principles in *Chirwa* can apply, if their statement is not expressed or implied by the officer's reasons when obvious compassionate-exciting factors are not discussed?

[88] Indeed, I would go so far as to suggest that the present routine framing of the principles in H&C applications required by *Kanthasamy* is generally insufficient because it does not require the decision-maker to address the overall equitable foundation underlying section 25(1). The conclusionary statement normally "wrapping up" an H&C request would require either explicit reference to the wording in *Chirwa*, or it being implicitly understood as the foundation for the global assessment, as demonstrated by its application to the facts where warranted by the officer's reasons.

[89] Focusing on the facts of the case that excite compassion necessarily would have directed the mind of the Officer to the shocking abandonment of the Applicant and her children as a significant "compassion-exciting" consideration. This would add to the Guidelines factors that

would possibly warrant relief from removal, or even stand alone to excite the compassionate civilized person to provide special relief from removal.

[90] The BIOC also plays a role in the issue of whether the Officer was required to consider the past hardship as a factor in her decision based on the standards enunciated in *Kanthasamy* (paras. 38 and 39) that the officer be alert, alive and sensitive to their interests, so as not to minimize or insufficiently consider them.

[91] It is obvious that the compassion to relieve will be considerably more compelling when the mistreatment is of vulnerable and dependant children. The Applicant's children are about to be deported from a happy, secure, and hopeful environment to one impregnated with memories of loss and sorrow caused by the shocking behaviour and loss of their father – in effect dodging a bullet in finding happier circumstances, but which slip through their fingers overnight. There are lessons learned, perspectives derived and characters formed by children having hopes shockingly buffeted back and forth - how they will perceive and interact with the world during their lives, even if returned to safe familiar surroundings, but without a father. These are normal considerations that the reasonable civilized person, being a parent, would be concerned about in resolving the removal options of this family whose members suffered unconscionable treatment by a parent, but which hold out hope by remaining in Canada. It at least merits consideration by the Officer.

[92] Accordingly, I am of the view that depending upon the circumstances, an officer must consider all relevant facts based on their expertise in matters of humanitarian compassionate

relief, and certainly those that vividly jump off the page when considering this issue, whether or not found in the Guidelines, even if not relied upon by the Applicant. The Officer possesses the expertise in assessing H&C factors.

[93] The problem is that the test is not expressed in terms of considering what facts excite compassion caused by significant suffering that may not be comprised in the Guidelines, but nevertheless may likely affect the judgment of the civilized person to be desirous of granting relief from removal from Canada even if the circumstances are unlikely to recur.

[94] I conclude that the test in *Chirwa* has been circumscribed by overreliance on the Guidelines to apply only to compassion generated by being returned to recurring hardship. The test as actually stated in *Chirwa* describes an unlimited scope of circumstances so long as they generate compassion in the minds of civilized persons which excites a desire to afford the applicants special relief from removal. Would the civilized person consider that the Applicant and her children have suffered enough from their past circumstances? And if so, upon what basis? Contextually, in order for such past hardship to be considered, it must be at a level of shocking to the civilized person. If so, the officer should consider the hardship. If not considered, there is "good reason to believe" that a failure to raise and consider this issue "would risk an injustice". This would motivate the Court to intervene by raising a new issue, whether or not the Applicant raised it with the officer.

[95] Accordingly, the following question is certified for appeal:

In the context of a request for humanitarian and compassionate considerations under subsection 25 (1) of IRPA, must an officer consider evidence of past hardship of unconscionable mistreatment of an applicant and her children, not recurring or arising on removal, and not cited as a factor in the Guidelines, but that may accord with the principles in *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 adopted in *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61, even if the issue has not been explicitly raised by the applicant as a relevant factor for consideration? If not, may the applications judge raise the question as a new issue in accordance with the principles of *R. v Mian*, 2014 SCC 54?

**JUDGMENT IN IMM-6306-18**

**THIS COURT'S JUDGMENT is that**

1. The application is allowed and the matter returned to the same Officer with the direction to consider whether the past hardship was of an unconscionable nature, and if so, to consider the evidence in the context of a humanitarian and compassionate request for special relief in accordance with the Court's reasons based on the principles in *Chirwa.*

2. In addition the following question is certified for appeal:

   In the context of a request for humanitarian and compassionate considerations under subsection 25 (1) of IRPA, must an officer consider evidence of past hardship of unconscionable mistreatment of an applicant and her children, not recurring or arising on removal, and not cited as a factor in the Guidelines, but that may accord with the principles in *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 adopted in *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61, even if the issue has not been explicitly raised by the applicant as a relevant factor for consideration? If not, may the applications judge raise the question as a new issue in accordance with the principles of *R. v Mian,* 2014 SCC 54?

"Peter Annis"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6306-18 |
| **STYLE OF CAUSE:** | ASHLEY NADINE LAING NEE PRYCE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 29, 2019 |
| **REASONS FOR JUDGMENT:** | ANNIS, J. |
| **DATED:** | MARCH 13, 2020 |

**APPEARANCES:**

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| CHANTAL DESLOGES | FOR THE APPLICANT |
| JUDY MICHAELY | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| CHANTAL DESLOGES | FOR THE APPLICANT |
| JUDY MICHAELY<br>ATTORNEY GENERAL OF CANADA | FOR THE RESPONDENT |