Federal Court  Cour fédérale

**Date: 20200414**

**Docket: IMM-1827-19**

**Citation: 2020 FC 511**

**Ottawa, Ontario, April 14, 2020**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**GEEGEE MARIE REDUCTO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] In 2018, the applicant applied for permanent residence in Canada under the Caring for Children Program. She included her husband and her four children on her application as family members. However, the applicant's eldest son did not qualify as a dependent child because he was already 22 years of age. After being informed that Immigration, Refugees and Citizenship Canada [IRCC] had removed him from the application, the applicant requested on humanitarian

and compassionate grounds that her eldest son be considered for permanent residence along with the rest of the family despite the fact that he did not qualify as a dependent child.

[2] In a decision dated March 5, 2019, an officer with IRCC refused this request.

[3] The applicant now applies for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. She contends that the officer's determination that humanitarian and compassionate considerations did not warrant making an exception for her eldest son is unreasonable.

[4] For the reasons that follow, I agree that the decision is unreasonable. The application for judicial review must therefore be allowed and the matter remitted for redetermination.

## II. BACKGROUND

[5] The applicant was born in the Philippines in September 1971. Her first child, John Cedrick, was born in December 1995. When John Cedrick was about one year old, the applicant left the Philippines to work in a hotel in Dubai. She returned to live in the Philippines again about three years later. The applicant had three more children, the youngest of which was born in April 2007. In 2008, the applicant left the Philippines again to work overseas. She worked first in Hong Kong and then in Russia. Throughout this time, the applicant sent money home to support her family. She maintained regular contact with her family in the Philippines but saw them in person only rarely.

[6] In 2016, the applicant returned to the Philippines for a few weeks before coming to Canada in late May to work as a live-in caregiver for a young child under the Temporary Foreign Worker Program. While working in Canada, the applicant continued to send money regularly to her family in the Philippines. Her husband worked as a taxi driver there.

[7] The applicant aspired to become a permanent resident of Canada along with her immediate family. Under a pilot project in effect at the time, foreign nationals who worked in qualifying occupations caring for children in Canada could apply for permanent residence. Eligible family members could also be included in the application. A minimum of two years of qualifying work experience was required. This meant that the earliest the applicant could apply was late May 2018.

[8] The applicant submitted an application for permanent residence under the Caring for Children program in September 2018. She included her husband and their four children as family members. However, the maximum age for a dependent child was 22. John Cedrick had had his 22nd birthday the previous December. Although he was still a full-time post-secondary student, he did not qualify as a dependent child. As a result, when IRCC reviewed the application, John Cedrick was determined to be ineligible and he was removed from the application.

[9] The applicant was informed of this development by IRCC in a letter dated October 10, 2018. She was given the opportunity to provide “additional information” within 60 days of the date of the letter.

[10] The applicant retained Willowdale Community Legal Services to assist her. In detailed and comprehensive submissions supported by extensive evidence, counsel for the applicant requested on humanitarian and compassionate [H&C] grounds under section 25(1) of the *IRPA* that John Cedrick be considered on the application for permanent residence despite the fact that he was excluded from the legal definition of dependent child because of his age. More particularly, the applicant requested that John Cedrick be included on her application for permanent residence as a *de facto* family member given his situation of dependency.

[11] The H&C submissions focused on five factors: (1) John Cedrick's actual dependency on the applicant; (2) hardship to the applicant; (3) hardship to John Cedrick; (4) best interests of the minor children; and (5) disproportionality of a negative decision.

[12] *Dependency*: The applicant submitted that John Cedrick was dependent on her financially and emotionally. She noted the closeness of the family unit. John Cedrick still lived with his family in their home in the Philippines. The applicant had provided him with financial support throughout his life. She was currently paying for his education.

[13] *Hardship to the Applicant*: The applicant submitted that she had suffered significant emotional hardship because of her long separation from her family during the years she had worked overseas. She submitted that this would be exacerbated if John Cedrick could not join the rest of the family in Canada. In an affidavit provided in support of the H&C application, the applicant stated:

> I cannot begin to explain how difficult this has been for me. I have seen my children grow up through the internet and not in person.

> The only thing that has sustained me during this time of separation has been the thought that these sacrifices will give my children a better future in Canada…I am so afraid that my son will not be able to join me in Canada. I am afraid that all the years of my work would be in vain.

[14] The applicant also relied on academic research and commentary concerning the hardships suffered by women who must leave their families in order to earn income to support them. As well, the applicant submitted a report by a psychologist who stated that the applicant was suffering from "stressor-related disorder with prolonged duration" characterized by symptoms of guilt, shame, helplessness, sleep, and mood disturbances. The report noted that, for the applicant, "commitment to a unified family is a central and powerful social value in Filipino culture and that the dream of living together with her husband and all of her children has been a life-long goal." The report concluded that the applicant's "psychological condition will deteriorate should her son be excluded from her application to bring her family to stay in Canada as permanent residents."

[15] *Hardship to John Cedrick:* The applicant submitted that John Cedrick would suffer emotional and psychological hardship if he were separated from the rest of his family. Among other things, she relied on a family assessment by a Filipino psychologist and a letter from John Cedrick himself. In submissions, the applicant emphasized the hardship John Cedrick had already experienced because of his long separation from her, the sacrifices he had made to care for his siblings while their mother was away, his long-standing hope that the family would all move to Canada together one day, and his close emotional bonds with his younger brother and sisters, from whom he would be separated.

[16] *Best Interests of Minor Children*: The applicant submitted that including John Cedrick in the application was in the best interests of his younger brother and sisters. As a result of their mother's prolonged absences and the responsibilities he had taken on, John Cedrick had become like a parent to them. They depended on him for emotional and psychological support. Supporting evidence demonstrated the close bonds between John Cedrick and his siblings. In submissions, the applicant emphasized the cruel irony that her other children finally being able to be reunited with her in Canada would mean being separated from John Cedrick unless the H&C application was granted. The applicant submitted:

> It is clear that separation from John Cedrick would have an immense adverse impact on these children. They are about to relocate to a new place, attend new schools, reunite with their mother after many years. The sense of loss that they will feel by not having their older brother with them is clear. A rejection of this H&C request would be akin to a removal of John Cedrick from these children's lives. It would include traumatizing the children.

[17] *Disproportionality of a Negative Decision*: The applicant submitted that the "harsh effects" of a refusal would be disproportionate compared to "the *minimal* waiver requested" (original emphasis). John Cedrick had missed qualifying as a dependent child by only a matter of months. The applicant submitted that the totality of the circumstances – John Cedrick's age, the timing of the application, and the "hardship and suffering" that the family would face due to John Cedrick's separation – warranted an exercise of discretion to avoid the disproportionate effects of a refusal.

## III. DECISION UNDER REVIEW

[18] The applicant was informed that her H&C application had been rejected in a letter dated March 5, 2019. The reasons for the decision are set out in the officer's Global Case Management System [GCMS] notes.

[19] The officer made the following key findings:

- The applicant made a difficult decision to be away from her family for many years in order to support them financially but this "does not outweigh the fact that John [Cedrick] does not meet the definition of a dependent child."

- It appears to have been a matter of personal choice that the applicant did not see her children more often when she was working overseas.

- The applicant has already spent lengthy periods of time apart from her family, which would suggest that she and John Cedrick would be able to cope with further separation from each other.

- Even if John Cedrick could not be with the applicant in Canada, the rest of her immediate family will be, which would ameliorate the effects of separation from him.

- It is a matter of "speculation" that the applicant would suffer adverse psychological consequences if John Cedrick were separated from the family but, if she did, treatment would be available in Canada.

- The applicant may have believed that John Cedrick still qualified as a dependent child because he was a full-time student when she applied for permanent residence but the onus was on her "to be aware and understand the eligibility requirements of the program."

- "It is not unusual for young adults John [Cedrick's] age to either marry, work or study away from home and while the younger siblings will miss him, it is considered part of life and growing up as family dynamics change." Indeed, it is "normal for a child to separate their life from their parent."

- Having everyone in the immediate family except John Cedrick together in Canada "may disrupt the settings of a child's daily life" but the applicant's younger children "will have both of their parents and change is inevitable and important for growth."

- "Children are quick to adapt to change provided they are guided the right way and taught how to cope with the changes beforehand. Learning to cope with change is a skill that will help children all through their life."

- The applicant and the rest of her immediate family will be able to keep in touch with John Cedrick by telephone and over the internet.

- John Cedrick will still have the support of extended family in the Philippines.

- John Cedrick can always apply to complete his studies in Canada.

[20] Weighing all of the circumstances of the case, the officer concluded that making an exception for John Cedrick and including him with the rest of his immediate family in the application for permanent residence was not warranted.

## IV. STANDARD OF REVIEW

[21] The parties agree, as do I, that the officer's decision should be reviewed on a reasonableness standard. This is well-established with respect to H&C decisions: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]; *Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at para 16.

[22] That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of an administrative decision (at para 10). Reasonableness is now the presumptive standard, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10). In my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here.

[23] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasized were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. Although the present application was argued prior to the release of *Vavilov*, the

footing upon which the parties advanced their respective positions concerning the reasonableness of the officer's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the officer's decision is unreasonable; however, the result would have been the same under the *Dunsmuir* framework.

[24] Reasonableness review "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82).

[25] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Consequently, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[26] The focus of reasonableness review "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83).

[27] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). While deferential review has never meant "blind reverence" or "blind submission" to statutory decision makers (*Dunsmuir* at para 48; *Lake v Canada (Minister of*

*Justice)*, 2008 SCC 23 at para 41), in *Vavilov* "the Court re-emphasized that judicial review considers not only the outcome, but also the justification for the result (where reasons are required)" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29).

[28] Where the decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks deleted). The reasons must be read holistically, in light of the record as a whole, and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94). The goal is to "develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable" (*Vavilov* at para 99). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13).

[29] Since section 25(1) of the *IRPA* allows exceptions to be made to the usual operation of the law and decisions to do so are highly discretionary, a decision maker's determination will be accorded a considerable degree of deference by a reviewing court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15 [*Legault*]).

[30] The burden is on the applicant to demonstrate that the officer's decision is unreasonable. She must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency"

(*Vavilov* at para 100) or that the decision is "untenable in light of the relevant factual and legal constraints that bear on it" (*Vavilov* at para 101).

## V. PRELIMINARY ISSUE

[31] On April 2, 2019, the applicant and members of her immediate family except John Cedrick were granted permanent resident status. In a communication with the parties prior to the hearing of this application, I queried whether the applicant had standing to seek judicial review of the officer's decision (cf. section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 and *Chinenye v Canada (Citizenship and Immigration)*, 2015 FC 378 at paras 17-18). I also queried whether, in any event, John Cedrick was a necessary party to this application and should be added as such under Rule 104(1)(b) of the *Federal Courts Rules*, SOR/98-106. In response, Mr. Gepner, counsel for the applicant, obtained John Cedrick's consent to be added as a party if necessary and confirmed that, should this occur, he was instructed to appear on John Cedrick's behalf. However, both Mr. Gepner and Ms. Hepburn-Craig, counsel for the respondent, were of the view that, in the particular circumstances of this case, the applicant has standing to bring this application and John Cedrick is not a necessary party for the matter to be determined on its merits. Moreover, Ms. Hepburn-Craig confirmed on behalf of IRCC that, should the matter be returned to them for reconsideration, it would not pose any difficulty if John Cedrick is not a party to this application.

[32] I thank both counsel for their responsiveness to my concerns. In view of their joint position, I am satisfied that the applicant has standing to bring this application and that it is not necessary to add John Cedrick as a party.

## VI. ANALYSIS

### A. *Legal Context*

[33] In *Vavilov*, the majority emphasized the importance of the legal constraints that bear on an administrative decision, including the statutory scheme within which the decision is made, when assessing the reasonableness of that decision (*Vavilov* at paras 106 and 108). Two such constraints are pertinent here: the definition of "dependent child" in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], and section 25(1) of the *IRPA*.

#### (1) Dependent Child

[34] "Dependent child" is defined in section 2 of the *IRPR* as follows:

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|---|---|
| **dependent child**, in respect of a parent, means a child who | **enfant à charge** L'enfant qui : |
| **(a)** has one of the following relationships with the parent, namely, | **a)** d'une part, par rapport à l'un de ses parents : |
| **(i)** is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or | **(i)** soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait, |
| **(ii)** is the adopted child of the parent; and | **(ii)** soit en est l'enfant adoptif; |
| **(b)** is in one of the following situations of dependency, namely, | **b)** d'autre part, remplit l'une des conditions suivantes : |
| **(i)** is less than 22 years of age and is not a spouse or | **(i)** il est âgé de moins de vingt-deux ans et n'est pas |

| | |
|---|---|
| common-law partner, or | un époux ou conjoint de fait, |
| **(ii)** is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition. | **(ii)** il est âgé de vingt-deux ans ou plus et n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents depuis le moment où il a atteint l'âge de vingt-deux ans, et ne peut subvenir à ses besoins du fait de son état physique ou mental. |

[35] For present purposes, the significant part of this definition is (b)(ii). John Cedrick is not a dependent child because, when his mother submitted her application for permanent residence in September 2018, he was over the age of 22 years and he was not unable to be financially self-supporting due to a physical or mental condition. (In fact, John Cedrick was already too old when the applicant became eligible to apply in May 2018.) This definition has been in effect since October 24, 2017.

[36] At one time a child over the age of 22 could be considered a dependent child as long as they were pursuing a course of academic, professional or vocational training on a full-time basis and, before the age of 22, they had been continuously enrolled in and attending a post-secondary institution and had depended substantially on the financial support of the parent. This definition was changed effective August 1, 2014, in two relevant respects. First, the maximum age of dependent children lowered from 22 to 19. Second, the exception for those who were over the maximum age but who were enrolled in full-time post-secondary studies was eliminated.

[37] When these changes were proposed, the first was justified on the basis that it would enhance the economic integration of dependent children. The Regulatory Impact Analysis Statement explained that "the current definition of a dependent child for immigration purposes is out of step with the Government of Canada's objective of selecting migrants who contribute best to Canada's economic growth and sustainability" (*Canada Gazette Part II, Vol. 148, No. 13* (June 18, 2014), p. 1636). The government of the day pointed to economic data showing that "older dependent children (those who arrive between the ages of 19 and 21) have lower economic outcomes over the long run than those who arrive in Canada at a younger age (between 15 and 18 years old)" (*ibid.*). In the government's assessment, "[t]he younger immigrants are when they are granted Canadian permanent residence, the better their long-term labour market outcomes relative to those who immigrate at a later age, and the more closely their experience resembles that of people born in Canada" (p. 1645). The second change was justified on the basis that "the current allowance for older dependent children who are pursuing full-time studies to accompany principal applicants creates significant challenges and inefficiencies in processing applications. The verification of attendance and enrolment is both labour-intensive and vulnerable to fraud" (p. 1636). Further, "the expanded eligibility for full-time students can allow those who are well into their late 20s or even 30s to come to Canada as dependent children, despite weaker integration, and weaker long-term economic performance outcomes" (*ibid.*). On the other hand, once the changes were made, children aged 19 and above who will no longer be able to immigrate as dependents of their applicant parents "may decide to come to Canada as international students" and then acquire Canadian work experience after that (p. 1646).

[38] The current definition of "dependent child" came into effect on October 24, 2017. While the exception for full-time post-secondary students was not revived, the maximum age was raised back to 22. According to the Regulatory Impact Analysis Statement (*Canada Gazette Part I, Vol 150, No 44* (October 29, 2016)), the issue addressed by this change was the following:

> The Government of Canada has established as a priority for the immigration program the goal of family reunification, which is about giving family members the opportunity to live with or near each other, instead of being separated by borders and long distances. It is recognized that many young adults remain with their parents for a longer period of time. Given the importance placed on education, it is not unusual for some children to remain with their nuclear family while pursuing higher education before entering the labour market. The current definition of "dependent child" in the *Immigration and Refugee Protection Regulations* (the Regulations) is limited to persons less than 19 years of age and is therefore too restrictive (p. 3265).

[39] Thus, a primary objective of the regulatory amendment "would be to enhance family unity and reunification by enabling Canadians and permanent residents to bring their young adult children between 19 and 21 years of age to Canada. This is consistent with one of the main stated objectives of the *Immigration and Refugee Protection Act*: 'to see that families are reunited in Canada'" (p. 3266).

[40] The rationale for the change was explained in part as follows (p. 3268):

> When families are able to remain together as an economic household unit, their integration into Canada and their ability to work and contribute to their communities all improve. The proposed increase of the maximum age of dependent children is consistent with the underlying socio-economic trend that children remain at home longer with their parents, particularly those studying for lengthier periods.

> . . . .
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> Whether studying or not, many young adults in Canada and other countries live with their parents.
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> . . . .
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> An increase to the upper age limit of the "dependent child" definition would therefore more closely align Canada's immigration programs with the Canadian and international experience. Notably, the proposed higher age limit would enable many post-secondary students — who complete a degree at a median age of 24.8 years of age [footnote omitted] — to be eligible as dependent children through much of their undergraduate studies. These young adults would be unlikely to be eligible for permanent resident status as principal applicants under an economic immigration program, until they have completed post-secondary education and gained significant work experience.

[41] In sum, the government determined that the rationale for lowering the age limit of dependency in 2014 was no longer compelling and that there were sound reasons for raising it back to its previous level.

(2) Section 25(1) of the *IRPA*

[42] The second legal constraint on the decision in issue here is section 25(1) of the *IRPA*. This provision authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. Relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." These considerations include matters such as children's rights, needs and best interests; maintaining connections between family members; and averting the

hardship a person would suffer on being sent to a place where he or she has no connections (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 41). As this passage suggests, section 25(1) is often invoked in efforts to forestall removal from Canada; however, it is not limited to such situations (see, for example, *Kisana* and *Jani v Canada (Citizenship and Immigration)*, 2018 FC 1229 [*Jani*]). While this provision was enacted in 2001 as part of the new *IRPA*, a statutory authority to make exceptions in deserving cases had been part of Canadian immigration law for many decades (see *Kanthasamy* at paras 11-21).

[43] The fundamental question under section 25(1) is whether an exception ought to be made in a given case to the usual operation of the law (*Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22). This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Whether relief is warranted in a given case depends on the specific circumstances of that case (*Kanthasamy* at para 25).

[44] In *Kanthasamy*, the Supreme Court of Canada adopted an approach to section 25(1) that is grounded in its equitable underlying purpose. Writing for the majority, Justice Abella approved of the approach taken in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338, where it was held that H&C considerations refer to "those facts, established by the evidence, 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). Section 25(1) should therefore be interpreted by decision makers to allow it "to respond flexibly

to the equitable goals of the provision" (*Kanthasamy* at para 33). At the same time, it is not intended to be an alternative immigration scheme (*Kanthasamy* at para 23).

[45] Ministerial Guidelines for processing requests for H&C relief had directed immigration officers to consider whether an applicant had demonstrated either "unusual and undeserved" or "disproportionate" hardship. Justice Abella held for the majority in *Kanthasamy* that, while these words could be helpful in assessing when relief should be granted in a given case, they were not the only possible formulation of when there were H&C grounds justifying the exercise of discretion under section 25(1). Instead, she endorsed the following approach (at para 33):

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond flexibly to the equitable goals of the provision.

[46] With this holding, *Kanthasamy* is often described as having widened the lens through which H&C applications must be viewed compared to what was set out in the Ministerial Guidelines (cf. *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at para 28 and the cases cited therein). At the same time, it is not an error for an officer to focus on hardship when this is responsive to submissions that are framed in those terms (*Jani* at para 46).

[47] Finally, section 25(1) specifically requires a decision maker to take into account the best interests of any child directly affected by the decision. The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy* at para 35, quoting *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 11, and *Gordon v Goertz*, [1996] 2 SCR 27 at para 20). As a result, it must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). Protecting children through the application of this principle means "[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, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA) at 489). It is insufficient for a decision maker simply to state that the interests of children who will be directly affected have been taken into account. Rather, those interests must be "'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39, quoting *Legault* at paras 12 and 31 and referencing *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paras 9-12).

[48] In short, rendering a decision on an H&C application is a balancing exercise in which an immigration officer must weigh different and sometimes competing factors. H&C relief is a highly discretionary measure (*Legault* at para 15; *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). An officer's determination is entitled to deference from a reviewing court unless the party challenging it can establish that it is unreasonable.

B. *The Officer's Decision is Unreasonable*

[49] The applicant has challenged the officer's decision on a number of grounds but it suffices to state that I agree that the decision is unreasonable in the following four respects.

[50] First, the officer unreasonably minimized the hardship the applicant would experience if John Cedrick had to stay behind in the Philippines while the rest of the immediate family joined her in Canada. The applicant supported her position with an opinion from a psychologist but it is not necessary to understand her potential hardship in such terms. Indeed, it was reasonably open to the officer to give the psychological assessment little weight given, for example, that the opinion was based on a single interview with the applicant of unknown duration and no follow-up treatment was sought. Rather, a key factor the applicant relied on was that after years of being apart from her family, her dream of reuniting with all of them in Canada had been dashed. While not necessarily determinative in and of itself, this is the sort of situation that could call for the compassionate exercise of discretion. There was substantial evidence showing how close-knit this family is. The officer did not express any doubts about this evidence. It demonstrated that leaving John Cedrick behind would disrupt existing relationships and would effectively exclude him as the family builds a new life together in Canada. A compassionate person would understand the hurt this would cause to the applicant without needing to have that hurt described by a psychologist. (Of course, if that hurt also could give rise to harmful psychological consequences, or if there were a relevant psychological or psychiatric history, this would be an additional factor to consider – cf. *Kanthasamy* at para 48.) The officer's failure to view the hurt that would be caused by separating John Cedrick from the applicant through a humane and

compassionate lens makes the decision untenable in light of the relevant factual and legal constraints.

[51] Instead of viewing the case humanely and with compassion, the officer looked for reasons to diminish the significance of how things had turned out for the applicant and her family. The officer suggested that it was a matter of the applicant's "choice" that she did not see her family more often without considering whether the terms of the applicant's overseas employment or the family's financial circumstances would have permitted this. The officer considered that being separated from John Cedrick would not be that bad because the applicant had already spent so many years away from him, this despite compelling evidence from the applicant that it was precisely because they had been separated for so long that the prospect of further separation from John Cedrick was so painful. The officer suggested that John Cedrick could come to Canada to complete his studies without considering whether this was feasible financially or John Cedrick's prospects for obtaining a temporary resident visa in any event once his immediate family all had status in Canada. The officer pointed out, correctly, that it was the applicant's responsibility to understand the eligibility requirements of the program she was applying under but failed to consider that this did not necessarily lessen the emotional impact on the applicant of learning she was mistaken. In my view, none of these efforts to minimize the hardship of further separation are tenable in light of the factual and legal constraints that bear on the officer's decision.

[52] Second, the officer's assessment of the crux of this case – the prospect of John Cedrick being left behind in the Philippines – is tainted by unfounded generalizations and paternalistic

assumptions. The officer appears to be of the view that John Cedrick is old enough to be on his own now. After all, it is "not unusual" and even "normal" for young adults to be establishing independent lives at his age. The officer offers no evidence to support these claims. In fact, the officer's assumptions run counter to the rationale for raising the maximum age for a dependent child back to 22 – namely, "the underlying socio-economic trend that children remain at home longer with their parents, particularly those studying for lengthier periods" and the fact that "[w]hen families are able to remain together as an economic household unit, their integration into Canada and their ability to work and contribute to their communities all improve" (see paras 38-40, above). But even if it were the case that young persons around John Cedrick's age typically start to establish independent lives, the officer's analysis fails to consider why, in the particular circumstances of this case, John Cedrick has not done so. The officer also fails to consider whether the impact of the separation of an older child from his or her family might be entirely different if it is forced rather than chosen freely.

[53] Third, the officer's assessment of the best interests of the applicant's other children depends on unfounded generalizations and paternalistic assumptions as well. The officer asserts that "[c]hildren are quick to adapt to change provided they are guided the right way and taught how to cope with the changes beforehand" and that "[l]earning to cope with change is a skill that will help children all through their life." There is no indication that the officer is trained in child psychology, nor is any evidence offered to support these generalizations. Platitudes like these add nothing when what must be determined is the impact separation from their older brother will have on these particular children, especially when evidence concerning their specific circumstances has been offered. As the Supreme Court of Canada emphasized in *Kanthasamy,*

section 25(1) must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (at para 35, emphasis added); assessing the best interests of a child is a matter of "[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" (at para 36, emphasis added). Moreover, even if (as is no doubt the case) everyone hopes that these children would have the resilience and parental support to be able to cope with leaving John Cedrick behind in the Philippines if they had to, the real question is whether it is necessary to subject them to this experience in the first place. The life can be hard but children are resilient approach taken by the officer is the antithesis of the compassion that is meant to be shown under section 25(1) of the *IRPA*.

[54] Finally, the applicant contends that the officer erred by "completely ignoring" her argument that the impact of the law is disproportionate because John Cedrick had just missed the age cut-off when the applicant became eligible to apply for permanent residence.

[55] The officer does not address this argument directly but a decision maker does not err simply by failing to address every argument put before him or her (*Vavilov* at para 91). As well, John Cedrick's proximity to the maximum age could hardly have escaped the officer's notice. Further, I do not necessarily agree with the suggestion implicit in the applicant's argument based on disproportionality that proximity to a cut-off alone should make it easier to justify an exception. When section 25(1) of the *IRPA* is invoked, the onus is on an applicant to show why an exception is warranted. This depends on all of the circumstances of the case, not simply the

degree to which one falls outside a legally defined category. Someone could be just above the maximum age for being a dependent child yet have established a fully independent life.

[56] That being said, it may be arguable in a case that is close to the line that the objectives that are served by having the line where it is would not be affected adversely if an exception were made or, at least, that they would be limited less than in a case that falls farther from the line. Whenever an age-based class is created, a line must be drawn. The closer one gets to that line, the more arbitrary it might seem to be excluded from the class it defines and the more warranted an exception might also seem to be. Thus, while not determinative, proximity to the line can be a relevant consideration.

[57] Canada has made the policy determination that children younger than 22 years of age will be considered dependents and (with certain exceptions) anyone older than this will not be. This rule strikes a balance between two objectives: preserving the unity of family groups (with all the benefits this entails) while filtering out those who ought to seek status in Canada on their own merits (cf. the rationales for the definition of "dependent child" discussed in the 2014 and 2016 Regulatory Impact Analysis Statements). Adopting a definition of dependent child allows this balance to be maintained in a stable and predictable way. However, section 25(1) of the *IRPA* entails that the definition provides a general rule, not an absolute one. Exceptions can be made when a fair-minded person would consider it just and equitable to do so.

[58] In the present case, while the officer certainly understood that an application under section 25(1) called for the exercise of discretion and a balancing of relevant factors, the officer

did not engage meaningfully with the applicant's argument that John Cedrick's close proximity to the maximum age of a dependent child was a relevant consideration in this balancing. When determining whether an exception should be made to the general rule, the rationale for the rule must be considered. Put another way, the officer's determination that the family's circumstances do not "outweigh the fact that John [Cedrick] does not meet the definition of a dependent child" is incomprehensible without some explanation of the weight that definition adds to its side of the scale. As well, especially in a case that falls close to the line, the rationale for increasing the maximum age in 2017 – namely, to better promote family unification given that young adults typically are dependent on their families for longer periods of time now – should also be considered when determining whether the particular circumstances of that case warrant an exception being made. When a discretionary decision maker has identified the relevant factors and balanced them, the final determination will be accorded considerable deference by a reviewing court. Here, however, the officer did not address the rationale for the general rule at all or consider the extent to which (if at all) it would be compromised if an exception were made in this case. This leaves the officer's determination lacking in justification, intelligibility and transparency.

## VII. CONCLUSION

[59] For these reasons, the application for judicial review is allowed, the decision of the IRCC officer dated March 5, 2019, is set aside, and the matter is remitted for redetermination by a different decision maker.

[60] The parties did not suggest any serious questions of general importance for certification under section 74(1) of the *IRPA*. I agree that none arise.

**JUDGMENT IN IMM-1827-19**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.

2. The matter is remitted for redetermination by a different decision maker.

3. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1827-19 |
| **STYLE OF CAUSE:** | GEEGEE MARIE REDUCTO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 17, 2019 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | APRIL 14, 2020 |

**APPEARANCES:**

| | |
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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |