Federal Court  Cour fédérale

Date: 20201020

Docket: IMM-6695-19

Citation: 2020 FC 985

Ottawa, Ontario, October 20, 2020

PRESENT: Mr. Justice A.D. Little

BETWEEN:

MEHEDI HASAN BAPPY KHANDAKER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr M.H.B. Khandaker, applied for permanent residence in Canada. His spouse would like to sponsor him, but she is ineligible to do so under a regulation. Mr Khandaker therefore requested an exemption from the regulation on humanitarian and compassionate grounds.

[2] A senior immigration officer refused his application. Mr Khandaker now challenges that decision, requesting that the Court set it aside and return the application for redetermination by a different officer.

[3] For the reasons below, the application is dismissed.

I. Facts and Events Leading to this Application

[4] Mr Khandaker is a citizen of Bangladesh. Mr Khandaker entered Canada in 2016. In 2017, the Refugee Protection Division determined that he was not a refugee or a person in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*"IRPA"*). The Refugee Appeal Division subsequently dismissed an appeal of that decision.

[5] In 2018, Mr Khandaker married Ms. Khadija Akter. She is a permanent resident of Canada. Ms Akter became a permanent resident of Canada through the sponsorship of her first husband, to whom she was married from February 2015 until he died, suddenly, in August 2017.

[6] In 2018, Mr Khandaker applied for permanent residence as a member of the Spouse or Common-Law Partner in Canada ("SCLPC" or "Spouse in Canada") Class in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*"IRPR"*). However, subs. 130(3) of the *IRPR* restricted Ms Akter from sponsoring a foreign national as a spouse, common-law partner or conjugal partner unless she had been a permanent resident for a period of at least five years preceding the day on which her sponsorship application was filed.

[7] When Mr Khandaker filed his application for permanent resident status in November 2018, the five-year period applicable to Ms Akter had not elapsed. So she was not eligible to sponsor him. In his application, he therefore expressly requested an exemption from this ineligibility provision on humanitarian and compassionate ("H&C") grounds under s. 25 of the *IRPA*.

[8] By letter dated November 6, 2018, Mr Khandaker's legal counsel provided written submissions that enclosed his completed application for permanent residence as a member of the SCLPC Class. Counsel's letter referred to his spouse's ineligibility due to subs. 130(3) of the *IRPR* and advised that "[w]e are requesting an exemption from this ineligibility provision on humanitarian and compassionate grounds pursuant to s. 25 of IRPA". The letter set out the factual circumstances and submitted that the marriage between Mr Khandaker and Ms Akter "is a genuine marriage relationship and that all other requirements for membership in the [SCLPC] class have been met". The letter asked that Ms Akter be exempted from the ineligibility provision on humanitarian and compassionate grounds.

[9] By letter dated May 3, 2019, Immigration, Refugees and Citizenship Canada ("IRCC") advised Mr Khandaker that in the assessment of his application for permanent residence made under the SCLPC Class, an officer had "determined that [he did] not meet an eligibility requirement of this class". IRCC's letter then advised that according to paragraph 124(*c*) of the *IRPR*, a foreign national is a member of the SCLPC Class if they are the subject of a sponsorship application. The letter told him:

> You do not have a valid sponsor and therefore [are] not a member of the spouse or common-law partner in Canada class.

[10] The May 3, 2019 letter continued:

> In your submission, you requested an exemption from that eligibility requirement(s) under subsection 25(1) of the [IRPA]. As such, we are transferring your application to **The Humanitarian & Migration Office in Vancouver**, who will make a final decision on your application for permanent residence.
>
> [Original emphasis.]

[11] IRCC's letter advised Mr Khandaker that within 30 days he must complete and submit a supplementary information form to facilitate his H&C application under *IRPA* subs. 25(1). He did so.

[12] A senior immigration officer reviewed the application and refused it by decision dated September 26, 2019, with reasons bearing the same date. In brief, the officer considered the applicant's submission that he had become established in Canada over the previous three years and wished to remain in Canada in order to be with his wife, who was pregnant. The officer found that the applicant had not shown the couple would incur undue hardship as a result of having to return to Bangladesh. The officer concluded that the applicant's evidence did not support a conclusion that his situation was extraordinary such that an exemption under IRPA subs. 25(1) would be justified.

II. Issues Raised by the Applicant

[13] Mr Khandaker raises two arguments on this judicial review application. First, he submits that the officer erred in law by failing to consider his request for permanent residence as a member of the SCLPC Class coupled with a request for an exemption from the sponsor's

ineligibility under *IRPR* subs. 130(3) based on humanitarian and compassionate ("H&C") grounds under subs. 25(1) of the *IRPA*. Rather, he says, the officer treated the application as being for permanent residence based on H&C grounds.

[14] Second, the applicant submits that the H&C determination was unreasonable and should be set aside, applying the principles of judicial review in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

III. Standard of Review

[15] The standard of review is reasonableness. Both parties made submissions to this effect based on the Supreme Court's recent decision in *Vavilov*. Reasonableness is the presumed standard and I agree that it applies.

[16] *Vavilov* requires that on a judicial review application, the court must determine whether the decision at issue is reasonable, in both its rationale or reasoning and its outcome. The starting point is the decision-maker's reasons. A reviewing court takes a sensitive and respectful, but robust, approach to determining whether the administrative decision-maker's decision, including its reasons, are transparent, intelligible and justified, looking at the decision as a whole: see *Vavilov*, esp. at paras 13, 15, 67 and 99.

[17] A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision-maker: *Vavilov*, at para 85. An otherwise reasonable outcome will not stand if it was reached on an

improper basis, for example by an unreasonable chain of analysis in the reasons, or if the decision is not justified in relation to the facts and applicable law: *Vavilov*, at paras 83-86 and 96-97; see also *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6.

[18] Not all errors or concerns about a decision are enough to cause a reviewing court to intervene on a judicial review. The Supreme Court in *Vavilov*, at paragraph 100, held that the reviewing court must be satisfied 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. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central, fundamental or significant to render the decision unreasonable: *Vavilov*, at paras 99-100.

[19] The Supreme Court in *Vavilov*, at paragraph 101, identified two types of fundamental flaws: (i) a failure of rationality internal to the reasoning process in the decision; and (ii) when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.

[20] The Supreme Court contemplated that the reviewing court may consider the submissions of the parties, because the decision-maker's reasons must meaningfully account for the central issues and concerns raised by the parties. This connects to the principle of procedural fairness and the right of the parties to be heard, and listened to: *Vavilov*, at para 127. The decision-maker is not required to respond to every line of argument or possible analysis or to make explicit findings on every point leading to a conclusion. However, as a majority of the Supreme Court

stated, “a decision-maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision-maker was actually alert and sensitive to the matter before it”: *Vavilov*, at para 128.

IV. Analysis

A. *Statutory Provisions*

[21] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt a foreign national from the ordinary requirements of the *IRPA* if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. When a request is made, the provision provides that the Minister must

> examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister if of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.
>
> [Emphasis added.]

[22] There are several key provisions related to sponsorship that set the stage for this application. Sponsorship by a spouse in Canada is governed by subs. 12(1) of *IRPA* and *IRPR* Part 7 (Family Classes), Divisions 2 (SCLPC Class) and 3 (Sponsors), ss. 123-137. Section 123 of the *IRPR* provides:

> 123 For the purposes of subsection 12(1) of the Act, the spouse or common-law partner in Canada class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.

[23] Section 124 provides:

> 124 A foreign national is a member of the spouse or common-law partner in Canada class if they
>
> (a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;
>
> (b) have temporary resident status in Canada; and
>
> (c) are the subject of a sponsorship application.

Paragraph (*c*) is underlined because it features in the respondent's argument.

[24] Subsection 130(1) of the *IRPR* provides, subject to subs. 130(2) and 130(3), that a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class, must be a Canadian citizen or permanent resident who is at least 18 years of age, resides in Canada, and has filed a sponsorship application in respect of a member of the SCLPC Class in accordance with s. 10 of the *IRPR*.

[25] The five-year requirement is in subs. 130(3) of the *IRPR*:

> **(3)** A sponsor who became a permanent resident or a Canadian citizen after being sponsored as a spouse, common-law partner or conjugal partner under subsection 13(1) of the Act may not sponsor a foreign national referred to in subsection (1) as a spouse, common-law partner or conjugal partner, unless the sponsor has been a permanent resident, or a Canadian citizen, or a combination of the two, for a period of at least five years immediately preceding the day on which a sponsorship application referred to in paragraph (1)(c) is filed by the sponsor in respect of the foreign national.

[26] Subsection 130(3) was added to the *IRPR* in 2012: see SOR/2012-20, later amended by SOR/2015-139. Its Regulatory Impact Analysis Statement stated, under the heading "Description and rationale":

> The primary intent of the amendments is to create a disincentive for a sponsored spouse or partner to use a relationship of convenience as a means of circumventing Canada's immigration laws, by abandoning their sponsor soon after arriving in the country and then seeking to sponsor a new spouse or partner. The bar will also help to deter some relationships of convenience in which the sponsor and the sponsored foreign national are both complicit in committing the fraud.

B. *The Officer's Alleged Failure to Address the Requested Exemption*

(1) **Details of the Parties' Positions**

[27] The applicant submitted that he requested permanent resident status in the SCLPC Class with an H&C exemption from *IRPR* subs. 130(3). What he got did not answer that request: he initially received a letter dated May 3, 2019 acknowledging that he had requested an exemption on H&C grounds, but which referred to the absence of a sponsorship application under *IRPR* paragraph 124(*c*). Next, an officer considered his application for permanent residence but with an exemption on H&C grounds *from the requirement to apply from outside Canada*, instead of an application for permanent residence as part of the SCLPC Class with an exemption for his sponsor on H&C grounds from *IRPR* subs. 130(3). The applicant maintained that the officer treated this application as a second, new and different application under *IRPA* subs. 25(1) – in effect, that his exemption application was not decided on its merits.

[28] The applicant's position was also that the officer failed to consider that Mr Khandaker and Ms Akter's marriage is genuine: they were legally married following the death of Ms Akter's first husband, and they were expecting a child. The marriage thus bears none of the mischief at which the applicant submits subs. 130(3) is aimed (i.e., in his submission, to prevent abuse of the immigration system through non-genuine marriages entered to enable spousal sponsorship).

[29] In response, the respondent argued that as a matter of law, the H&C grounds in *IRPA* subs. 25(1) cannot be used to exempt a sponsor from eligibility requirements in the *IRPR* such as the 5-year requirement in subs. 130(3). The Minister advanced this position based on ss 124 and 130 of the *IRPR*, together with the contents of a manual, policies and operating procedures created by the federal government to process applications for permanent resident status that contain requests for H&C consideration under subs. 25(1) of the *IRPA*.

[30] In particular, the respondent submitted that once an applicant's proposed sponsor has been determined not to be eligible, the applicant does not meet the eligibility requirement in *IRPR* paragraph 124(*c*) – that is, the applicant is not the "subject of a sponsorship application" under that paragraph – and the applicant is not a member of the Spouse in Canada Class. The request for an exemption from subs. 130(3) on H&C grounds therefore no longer arises and indeed, there is no mechanism to apply for it. An application such as Mr Khandaker's is therefore considered as a "regular" application for permanent resident status on H&C grounds.

(2) **The Exemption Considered in the Senior Officer's Reasons for Decision**

[31] The decision at issue in this application is contained in a letter to Mr Khandaker, with attached Reasons for Decision dated September 26, 2019. The letter advised Mr Khandaker that an officer had refused his application and had determined that the grounds for H&C consideration were not sufficient for him to be granted an exemption. There were three references in this letter to his application for permanent residence "from within Canada".

[32] The opening sentence of the Reasons for Decision stated that the "applicant is requesting processing of his application for permanent residence from within Canada based on humanitarian and compassionate grounds". In the first paragraph under the heading "CONCLUSION", the officer stated that he had considered the extent to which the applicant, given his personal circumstances, would face difficulties "if he had to leave Canada in order to apply for permanent residence abroad" [emphasis added].

[33] Both parties advised the Court that they believed the officer considered Mr Khandaker's application as being for permanent residence, with an exemption on H&C grounds from the requirement to apply from outside Canada. The applicant says this was a legal error, while the respondent says that was correct as a matter of law and under applicable policies and operating procedures.

[34] This characterization matters, because the officer's Reasons for Decision expressly recognized that "the applicant's spouse, a national of Bangladesh, became a permanent resident of Canada in 2017 through a sponsorship by her former spouse; who has since passed away. She is ineligible to sponsor the applicant under the Family Class immigration program because she

does not meet the 5-year requirement." Then, three paragraphs later, after assessing the fact that the applicant wished to be with his pregnant spouse and the evidence of hardship if they had to return to Bangladesh to raise their family, the officer's Reasons for Decision stated:

> The applicant's evidence does not support that his situation is extraordinary such that an exemption is justified in his particular case.
>
> [Emphasis added.]

[35] Both parties advised at the hearing that the "exemption" in that sentence referred to Mr Khandaker's application "from within Canada", rather than from outside Canada, and that it did not refer to the exemption requested by the applicant under *IRPR* subs. 130(3). In addition, the respondent did not take the position that the just-mentioned "exemption" had anything to do with the passage on spousal ineligibility three paragraphs earlier.

[36] Thus, the Minister's position on this application is not that the officer considered and rejected the very exemption requested by the applicant and did so reasonably on the merits. It is that the applicant had no legal right to have that exemption considered at all and that overall, the officer's H&C assessment was reasonable. The applicant's position is that an exemption from *IRPR* subs. 130(3) may be made under *IRPA* subs. 25(1) given the breadth of the phrase "an exemption from any applicable criteria or obligations of this Act" and that the applicant should be considered a member of the SCLPC Class under the *IRPA*.

[37] Which position is correct? For the following reasons, I agree in part with the applicant and in part with the respondent.

C. *Analysis of* IRPA *Subsection 25(1)*

[38] As noted, *IRPA* subs. 25(1) provides that on request by a foreign national, the Minister "may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected".

[39] Under modern principles of statutory interpretation, the words of subs. 25(1) are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and the object of the *IRPA*, and the intention of Parliament: *Vavilov*, at paras 117-118; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21; *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100, at para 39; *Hunt v. Canada*, 2020 FCA 118, at para 11.

[40] An interpretive question in this application concerns the scope of the phrase "an exemption from any applicable criteria or obligations of this Act" in subs. 25(1). In order to understand that phrase, one must consider the overall language and purposes of the provision. One cannot look only at the plain meaning of the word "any", the phrase "an exemption from any applicable criteria or obligations of this Act", or even all the words used in subs. 25(1). Further analysis must be done to understand the text, context and purpose of the provision, regardless of how clear or unambiguous the words at issue may appear to be. With respect to the text, context and purpose of subs. 25(1), see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, by Justice Abella at paras 10-41, and by Justice

Moldaver at paras 84-85 and 88-108; *Bousaleh v. Canada (Citizenship and Immigration)*, 2018 FCA 143, at paras 41 and following; and *Toussaint v. Canada (Citizenship and Immigration)*, 2011 FCA 146, at paras 30 and following (leave to appeal dismissed on November 3, 2011, SCC File No. 34336). See also *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, at paras 36, 91 and following, interpreting *IRPA* subs. 25.2(1).

(1) The Language and Purposes of subs. 25(1)

[41] The Supreme Court has provided guidance on the language and purposes of subs. 25(1) as a whole. In *Baker*, Justice L'Heureux-Dubé observed that "while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 15 (original emphasis; recently quoted in *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 SCR 973 (Cromwell, J.), at para 146).

[42] Justice LeBel described subs. 25(1) and 25.1(1) as follows in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 55, at para 41:

> These provisions contemplate the granting of ministerial relief to foreign nationals seeking permanent resident status who are inadmissible or otherwise do not meet the requirements of the IRPA. Under them, the [Minister] may, either upon request or of his own accord, "grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of" the IRPA. However, relief of this nature will only be granted if the MCI "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national".

> H&C considerations include such matters 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 (see *Baker*, at paras. 67 and 72).
>
> [Emphasis added.]

[43] The Supreme Court discussed the purposes and test to be applied under subs. 25(1) in *Kanthasamy*. Speaking for the majority of the Court, Justice Abella traced the purpose of the provision over the past 60 years, focusing on the critical phrase "humanitarian and compassionate considerations" (at paras 11 and following). She noted that the previous statutory provisions (on which the Court decided *Baker*) were incorporated into the current subs. 25(1) (at para 18). Like Justice LeBel in *Agraira*, Justice Abella in *Kanthasamy* observed that subs. 25(1) is "limited to situations where a foreign national applies for permanent residency but is inadmissible or does not meet the requirements of the [*IRPA*]" (at para 20, underlining added).

[44] Justice Abella held that the successive statutory provisions had "a common purpose, namely, to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'" (at para 21). Justice Abella further held that the proper approach to the provision involves an "assessment of hardship" (at para 22) and stated that what warrants relief "will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them" (at para 25, citing *Baker*, at paras 74-75; see also para 28). In exercising their discretion, officers may consider "unusual and undeserved or disproportionate hardship". However, consistent with the "equitable underlying purpose" of the provision, Justice Abella held that such hardship is not the

only possible formulation of when H&C grounds justify the exercise of the discretion (at para 31). The phrase "unusual and undeserved or disproportionate hardship" is descriptive, or instructive; it is neither determinative nor a "separate legal threshold" (see paras 33 and 60). The H&C decision is made on the evidence "as a whole" (at para 60).

[45] Justice Moldaver's dissenting opinion in *Kanthasamy* agreed with much of Justice Abella's reasoning about the phrase "humanitarian and compassionate considerations" under subs. 25(1). Justice Moldaver concluded however that the provision should provide a flexible, but exceptional, mechanism for relief (at para 85). Justice Moldaver stated, at paragraph 94, that subs. 25(1)

> is intended to provide flexibility and a means of relief for applicants who do not fall strictly within the rules governing the admission of foreign nationals to Canada. That said, Parliament did not intend to provide relief on a routine basis. Section 25(1) was meant to operate as an exception, not the rule.

Justice Moldaver would have rephrased the overall test for hardship under subs. 25(1) (at para 101) and expressed concern about the introduction of "equitable" principles into the assessment under subs. 25(1) (at para 107).

[46] Several additional pertinent points emerge from *Kanthasamy* for present purposes. First, on the facts, Mr Kanthasamy requested an exemption from the requirement to apply for permanent resident status from outside Canada: *Kanthasamy*, at paras 5 and 62. Neither the majority nor the minority ruled on the scope of the *IRPA* exemptions covered under subs. 25(1) and neither offered any specific interpretation of the phrase "from any applicable criteria or obligations of this Act".

[47] Second, Justices Abella and Moldaver both made reference to written Ministerial guidelines to assist their interpretation of the *IRPA*. In her reasons, Justice Abella referred to guidelines that stated that subs. 25(1) provides the flexibility to grant exemptions "to overcome the requirement of obtaining a permanent residence visa from abroad, to overcome class eligibility requirements and/or inadmissibilities" on H&C grounds [underlining added]: at para 27, citing "IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", in *Inland Processing* (Canada, Citizenship and Immigration Canada).

[48] A third point concerns the role played by subs. 25(1) in the overall scheme of the *IRPA*. Justice Abella noted that "[t]he humanitarian and compassionate discretion in s. 25(1) was … like its predecessors, seen as being a flexible and responsive exception to the ordinary operation of the Act, or … a discretion 'to mitigate the rigidity of the law in an appropriate case'" (at para 19). In the course of her reasons, Justice Abella also noted that subs. 25(1) was not intended to be an alternative immigration scheme and is not meant to duplicate refugee proceedings under s. 96 or subs. 97(1) of the *IRPA* (at paras 23-24). Similarly, in his dissenting reasons, Justice Moldaver characterized subs. 25(1) as a safety valve that supplements the two normal streams by which foreign nationals can come to Canada permanently, i.e., the immigration and refugee processes in the *IRPA* (at paras 63, 85 and 88-90).

[49] Lastly, Justices Abella and Moldaver both found that the assessment under subs. 25(1) is to be made on the basis of all of the evidence – both refer to the circumstances (or the evidence) "as a whole" and Moldaver J. also refers to the assessment being made in "all of the

circumstances" (see Abella, J., at paras 45 and 60 and Moldaver, J., at paras 63, 101, 113-115 and 145).

[50] It is clear from *Baker*, *Agraira* and *Kanthasamy* that the crux of the assessment under subs. 25(1) is not whether to grant an exemption from technical compliance with a specific provision in the *IRPA* (or as we shall see, the *IRPR*). Instead, it is whether the Minister should invoke an equitable discretion, taking into account all the circumstances, to grant the applicant the right to stay in Canada for humanitarian and compassionate reasons, without insisting on strict compliance with the *IRPA* or *IRPR* as would ordinarily occur. The Supreme Court's reasons in *Kanthasamy* concern how that discretion should be exercised under *IRPA* subs. 25(1) having regard to all the evidence.

(2) **The Scope of the Exemption Language in subs. 25(1)**

[51] With that footing in the purposes of subs. 25(1), I turn to the language in subs. 25(1) and specifically, the scope of the Minister's ability to grant a foreign national "an exemption from any applicable criteria or obligations of this Act" and whether that includes *IRPR* subs. 130(3).

[52] The statutory language used to describe the kinds of exemptions that may be granted under subs. 25(1) is very broad. The provision provides the Minister with discretion to grant an exemption from <u>any</u> applicable criteria or obligations of the *IRPA* on H&C grounds. Under subs. 2(2) of the *IRPA*, references to "this Act" include regulations made under it. On the face of the *IRPA*, therefore, there appears to be no express limitation that would preclude subs. 25(1) from

being used to provide an exemption from any criteria or obligations in the *IRPR*, including subs. 130(3).

[53] The respondent's submissions did not refer to any decided cases that conclude that the H&C grounds in *IRPA* subs. 25(1) cannot apply to an application for permanent residence that is non-compliant with the *IRPA* due to a sponsor's failure to meet eligibility requirements in the *IRPR*, such as the 5-year requirement in subs. 130(3). Nor did the applicant refer to any cases that subs. 25(1) can be used for an exemption in relation to subs. 130(3) (whether for a sponsor or a foreign national).

[54] There are, however, some decisions located by the Court that provide assistance on the scope of the excerpted language. First, in *Toussaint*, cited above, the Federal Court of Appeal interpreted subs. 25(1) when the excerpted phrase read slightly differently ("any applicable criteria or obligation of this Act"). Justice Sharlow took note of the "broad language used to describe what the Minister may waive" (at para 35). She then considered five contextual factors to assist in interpreting the scope of the discretion in subs. 25(1). She concluded, at paragraph 55, that nothing in the scheme of the *IRPA* or the statutory context compelled a conclusion that the obligation to pay a processing fee is not within the scope of the phrase "any applicable criteria or obligation of this Act". The Minister was therefore obliged to consider a request for an exemption from the requirement in the *IRPR* to pay the fee for processing a request under subs. 25(1).

[55] Second, there are decisions made under different provisions of the *IRPR* that indicate that an H&C application can provide relief when a foreign national is excluded from a Family Class due to a sponsor's conduct, or when a sponsor does not qualify as a sponsor. One such kindred case is *Bousaleh*, cited above. Mr Bousaleh filed an application to sponsor his brother as a member of the Family Class. His application was rejected for two reasons: his brother did not satisfy the criteria to qualify as a brother under *IRPR* paragraph 117(1)(*f*); and Mr Bousaleh could not sponsor his brother under paragraph 117(1)(*h*) because he may otherwise sponsor his mother and father under paragraph 117(1)(*c*). A visa officer found no H&C grounds to justify waiving paragraph 117(1)(*h*). For present purposes, Justice Gauthier observed, at para 33:

> With respect to foreign nationals who may not qualify as members of the family class or <u>when a sponsor may not qualify as a sponsor within the meaning of the Regulations</u>, the Minister of Citizenship and Immigration (the Minister) may waive certain requirements set out in the IRPA or the Regulations by virtue of subsection 25(1) of the IRPA on the basis of humanitarian and compassionate considerations.

[Emphasis added.] See also para 78.

[56] Two additional cases decided by the Federal Court of Appeal shed additional light on the present interpretation issue, albeit while the Court was deciding other issues. Like *Bousaleh*, both decisions relate to *IRPR* s. 117. In *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180, [2015] 3 FCR 327, Ms Habtenkiel's father applied to sponsor her for a permanent resident visa. However, he could not sponsor her because he had not declared her when he applied for his permanent resident visa and she had not been examined as a non-accompanying family member. She was therefore excluded from the family class due to *IRPR* paragraph 117(9)(*d*). The Federal Court of Appeal noted that Ms Habtenkiel could "only overcome the

effects of this exclusion" by persuading the Minister to exercise his discretion to grant H&C relief under subs. 25(1) (at para 14).

[57] Later in the *Habtenkiel* decision, the Court again noted Ms Habtenkiel's exclusion from the family class by virtue of paragraph 117(9)(*d*) and also her inability to meet the requirements of *IRPR* paragraphs 70(1)(*a*), (*c*) and (*d*), all of which turned on membership in a prescribed class such as the family class (at para 28). In the next paragraph, the Court of Appeal observed that *IRPA* subs. 25(1) allows the Minister, upon request of the foreign national, to examine the latter's circumstances and to grant an exemption from any applicable criteria or obligations of the Act on H&C grounds (at para 29). At paragraph 33, Justice Pelletier stated:

> […] in a case where a foreign national is excluded from the family class by paragraph 117(9)(*d*) of the Regulations, different considerations apply. The exclusion from the family class means that unless the Minister is willing to exempt the foreign national from the requirement of applying as a member of a class, he or she will be ineligible for a permanent resident visa since it is unlikely that he or she will qualify for entry as a member of another class.
>
> [Emphasis added.]

[58] *Habtenkiel* had a companion case called *Seshaw v Canada*, 2014 FCA 181. In *Seshaw*, the applicant applied for a permanent resident visa, sponsored by his wife. Mr Seshaw was also found to be excluded from the family class under *IRPR* s. 117(9)(*d*). Justice Pelletier observed as follows:

> [22] It is important to keep in mind that the application in issue in these proceedings is Mr. Seshaw's application to be exempted from the requirement that he apply as a member of the family class on humanitarian and compassionate grounds. Like many, if not most, of the people who find themselves in this position, Mr. Seshaw does not require an exemption because of his behavior; he requires it because of something his sponsor did or failed to do.

> His sponsor's failure to declare him as her husband at the relevant time now means that he must ask the Minister to exercise his discretion to allow him to enter Canada to rejoin his wife.
>
> [23] In those circumstances, it is tempting for the sponsor to think that explaining why he or she did not declare the non-accompanying family member will go a long way towards satisfying the Minister's concerns. In some cases, this may be true. Where the facts are such as to suggest a deliberate attempt to manipulate the system, providing an innocent explanation for one's behavior may indeed have a positive effect. But in most cases, by the time one is at the stage of assessing an application for humanitarian and compassionate consideration, the focus has shifted from the sponsor's behaviour to the foreign national's personal circumstances. This is apparent from the fact that section 25 requires the foreign national, and not the sponsor, to apply for humanitarian and compassionate relief. What, then, is it about Mr. Seshaw's personal circumstances that would make granting an exemption a humanitarian and compassionate thing to do?
>
> [Emphasis added.]

[59] The cases surveyed immediately above show that the scope of the exemptions made under subs. 25(1) has included other provisions of the *IRPR* in relation to the eligibility of sponsors.

[60] I emphasize, however, that it was not the sponsor who was seeking to be exempted from a provision in the *IRPR* in these decisions. It was the foreign national who made the H&C application under subs. 25(1). That is consistent of course with the provision itself: the Minister must examine "the circumstances concerning the foreign national" and "may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national" [emphasis added.]. By contrast, in this case Mr Khandaker is seeking an exemption *for his sponsor:* he seeks an exercise of Ministerial

discretion exempting her from the 5-year residency requirement in *IRPR* subs. 130(3), but based on humanitarian and compassionate considerations that apply to him.

(a) *Salient Provisions in the* IRPR *Part 7, Divisions 2 and 3*

[61] The relevant provisions of the *IRPR*, namely Part 7, Divisions 2 and 3, have been set out above. No provision in these two Divisions excludes or restricts subs. 130(3) from being considered in respect of an application under *IRPA* subs. 25(1). Indeed, nothing in the language of subs. 130(3), s.130 as a whole, or elsewhere in Division 3, makes any reference to subs. 25(1). Further, the Regulatory Impact Analysis Statement that accompanied the passage of subs. 130(3) in SOR/2012-20 made no reference to subs. 25(1).

[62] How does subs. 130(3) operate within Divisions 2 and 3 of *IRPR* Part 7? Here we arrive at the submissions made by the respondent. Under subs. 130(3), the eligibility of a spouse to be a sponsor is limited by the five-year rule. The provision places a limitation on a possible sponsor, not on the foreign national to be sponsored. However, according to the respondent, the sponsor's ineligibility under subs. 130(3) has direct implications for the foreign national under *IRPR* s. 124. As noted already, that provision provides that a foreign national is a member of the SCLPC Class if three conditions are met: they (a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada; (b) have temporary resident status in Canada; and (c) are the subject of a sponsorship application. The respondent's submission was that there is no sponsorship application under paragraph 124(*c*) if there is no eligible sponsor; specifically, if a spouse is not eligible to be a sponsor due to subs. 130(3), then there is no valid sponsorship application under paragraph 124(*c*).

[63] In simpler terms, the Minister argued on the basis of these provisions in Division 2 that without an eligible sponsor to make a sponsorship application, the foreign national is not a member of the SCLPC Class and therefore cannot benefit from the provisions that apply to the SCLPC Class when applying for permanent resident status.

[64] To support its legal position, the respondent referred to several publications, including an immigration processing manual entitled "IP 8: Spouse or Common-law partner in Canada Class" (Canada, Citizenship and Immigration Canada (current to May 15, 2015)) ("IP 8"), and certain operations bulletins, operational instructions and policy statements posted on IRCC's website. While these documents are not legally binding, they may be useful in interpreting a provision of the *IRPA*: see *Kanthasamy*, at para 32; *Agraira*, at para 85; *Baker*, at paras 16-17, 72 and following.

[65] The current version of IP 8 states as follows in s. 15.3, entitled "Applications not processed under the Spouse or Common-law Partner in Canada class":

> Specified eligibility requirements of the Spouse or Common-law Partner in Canada class are not met
>
> All applicants under the Spouse or Common-law Partner in Canada class who request H&C consideration but who do not meet the requirements of R124(a) or R124(c) will be placed in the H&C queue, based on the date of receipt, and processed in accordance with existing H&C procedures. Applications identified at the eligibility screening stage will be transferred to the H&C queue by the case analyst at the Case Processing Centre in Mississauga (CPCM). Those identified later will be transferred by the officer responsible for the processing of the case. Applicants will be informed by letter that their application has been transferred to the H&C queue for processing.

[66] The respondent also referred to "Operations Bulletins 126 – July 9, 2009" taken from the *Operational instructions and guidelines* pages of IRCC's website. This webpage concerns the "[p]rocessing of spouse or common-law partner in Canada class applications when humanitarian and compassionate consideration is requested". The webpage states that it contains "policy, procedure and guidance used by [IRCC] staff" which is "posted on the Department's website as a courtesy to stakeholders". Operations Bulletin 126 states as follows:

> The exercise of discretion based on humanitarian and compassionate consideration is provided for in section 25 of the *Immigration and Refugee Protection Act* (IRPA). A25 requires the Minister's delegate to examine the circumstances concerning the applicant's in-Canada request for H&C consideration. If, in the opinion of the Minister's delegate, it is justified by humanitarian and compassionate considerations relating to the applicant, an exemption from any applicable criteria or obligation of the Act or Regulations may be granted. In the context of an in-Canada request for H&C consideration, R66 requires that an H&C request be made in writing and that it accompany an application to remain in Canada as a permanent resident. While applicants requesting H&C consideration are generally encouraged to complete an H&C application form and pay the H&C processing fee, they may also include a request for H&C consideration with an application for permanent residence as members of the SCLPC class.
>
> In order to maintain the intent of the SCLPC class and ensure that the benefits associated with the class are limited to those who are sponsored by and cohabiting with a spouse or common-law partner in Canada, the following policy approach has been adopted:
>
> SCLPC applicants who satisfy the SCLPC eligibility requirements set out in R124(a) and (c), in that they are sponsored by and cohabit with a spouse or common-law partner in Canada, and who request H&C consideration to exempt them from inadmissibilities or other applicable requirements, such as the requirement to have temporary resident status, a passport or other documentation, will be processed as members of the class. Since these applicants will be processed as members of the class, they will benefit from R72, the concurrent processing of overseas dependents, and an exemption from both R133(4), the minimum necessary income and A38(2), the medical requirements with respect to excessive

> demand on health and social services, if their application is successful.
>
> SCLPC applicants who do **not** satisfy the SCLPC eligibility requirements set out in R124(a) and (c) and who request H&C consideration will not be processed for permanent residence as members of the class. Their applications will be transferred to the H&C queue for processing in accordance with current H&C procedures.
>
> [Original bolding; underlining added.]

See also the webpage relied upon by the respondent entitled "Humanitarian and compassionate (H&C) considerations for applicants in the spouse or common-law partner in Canada class" (Canada, Citizenship and Immigration Canada (current to January 4, 2019), online: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-determining-spouse/spouse-canada/humanitarian.html).

[67] For the interpretation issue here, I make the following observations from these passages in IP 8 and the other guidance above. First, there is no express restriction on the nature of the "criteria and obligations" that may be the subject of an application under *IPRA* subs. 25(1) on H&C grounds. These documents do not expressly exclude H&C consideration under subs. 25(1) based on the ineligibility of a spouse to be a sponsor, or specifically in relation to subs. 130(3).

[68] Second, the guidance indicates that foreign nationals who do not satisfy the SCLPC class eligibility requirements in *IRPR* paragraph 124(*c*) will not be processed as members of the class if they request H&C consideration. Instead, their applications are addressed in the H&C queue. In practice, therefore, there are some requests for exemptions that are considered at the stage

when the foreign national is considered to be a member of the Spouse in Canada class. In those cases, the foreign national obtains certain benefits (namely, "they will benefit from R72, the concurrent processing of overseas dependents, and an exemption from both R133(4), the minimum necessary income and A38(2), the medical requirements with respect to excessive demand on health and social services, if their application is successful"). There are also requests for exemptions under *IRPA* subs. 25(1) that are considered *after* a determination that the foreign national is not the subject of a sponsorship application within the meaning of paragraph 124(*c*).

[69] Third, the purpose of the divided approach to processing H&C applications is to maintain the "intent" of the SCLPC class and "ensure that the benefits associated with the class are limited to those who are sponsored by and cohabiting with a spouse" in Canada. This process has the effect of sequestering the SCLPC Class which, in the respondent's submission, prevents H&C applications from becoming a "back door" or alternative means of apply for permanent resident status. This position seems to echo the statements made by Justice Abella and Justice Moldaver in *Kanthasamy* at paras 23-24, 63, 85 and 88-90.

[70] Put another way, while there is a broad interpretation of the "criteria and obligations" that may be the subject of an H&C application under *IPRA* subs. 25(1), only some applicants in the Spouse in Canada Class are able to have their applications for exemptions based on H&C considerations processed *as members of the class* (i.e., if they are married to a spouse in Canada and are the subject of a sponsorship application, under IRPR paragraphs 124(*a*) and (*c*) respectively). Under this regime, other applicants such as Mr Khandaker are not, because his spouse is not eligible to make a sponsorship application under paragraph 124(*c*).

[71] I pause to note that Mr Khandaker's position is that he is sponsored by and cohabitating with his spouse – a genuine spouse – in Canada. I also note that the parties did not address, in any significant way, the impact or effect of granting an exemption to the ineligibility requirement in subs. 130(3) and treating Mr Khandaker as a member of the SCLPC class with all the "benefits" of being a member of that class. While I have noted the mention of such "benefits" in the documents (including as quoted in these Reasons), they were not the subject of argument by either party.

[72] From this review, I find that IP 8 and the other documents in evidence do not expressly restrict the broad scope of the possible "criteria and obligations" in the *IRPR* from which subs. 25(1) can provide relief. Specifically, the public guidance relied upon by the respondent does not preclude consideration of a subs. 25(1) exemption from the ineligibility of a foreign national's genuine spouse with whom they cohabitate in Canada. The documents contemplate that such H&C applications are considered in the regular H&C queue.

(3) **Conclusion on the Scope of the Language in *IRPA* subs. 25(1)**

[73] The language used in subs. 25(1) provides the Minister with discretion to grant "an exemption from any applicable criteria or obligations of this Act" on H&C grounds [emphasis added]. In their ordinary sense, these words give a very wide discretion to grant H&C relief that exempts an applicant from criteria or obligations in the *IRPA*. There is nothing in the language or purposes of subs. 25(1), the language of the relevant provisions in the *IRPR*, or in the decided cases under subs. 25(1) that, as a matter of law, precludes an applicant from seeking H&C relief owing to a sponsor's non-compliance with the requirements of *IRPR* subs. 130(3). An

interpretation of ss. 124 and 130 of the *IRPR* and the publications that formed the basis of the respondent's position on this application do not lead to a different view in law.

[74] To be clear, however, I do not conclude that a successful H&C application under *IRPA* subs. 25(1) would grant an exemption from *IRPR* subs. 130(3) to a sponsor. An H&C application under subs. 25(1) is made by the applicant, not by the sponsor. If an H&C application is successful, the sponsor is not exempted from the requirements of the *IRPA*. The applicant foreign national is granted relief from the strict requirements of the *IRPA* or the *IRPR* on H&C grounds.

[75] Accordingly, the wording of the applicant's submission – that he applied for permanent residence as a member of the SCLPC class and requested that his sponsor be exempted from the ineligibility requirement in *IRPR* subs. 130(3) on H&C grounds – is faulty. The Ministerial relief under subs. 25(1) is granted to the foreign national who applies, not to the sponsor.

[76] In my view, however, a proper interpretation of subs. 25(1) does enable the applicant in this case to seek H&C relief based on the fact that his wife is technically unable to sponsor him due to *IRPR* subs. 130(3).

[77] Given my conclusions below on the circumstances of this case, I do not need to make any determinations as to the effect of subs. 124(*c*) and the various forms of public guidance issued on the government's websites.

[78] I now turn to the decision made by the officer on Mr Khandaker's application for an exemption from *IRPR* subs. 130(3) based on H&C grounds.

D. *Was the Officer's Decision Unreasonable under the* Vavilov *Principles?*

[79] The applicant made a number of arguments that the officer's decision contains various reviewable errors. I note at the outset that on H&C applications, the onus of establishing that an H&C exemption is warranted lies with the applicant: *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para 45. In addition, lack of evidence or a failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at paras 5 and 8.

[80] The first argument by the applicant on unreasonableness was that his application was assessed under the wrong criteria, as has been explained above. In my view, the officer did not make the error alleged by the applicant – failing to treat him as a member of the SCLPC Class. However, the officer did fail to expressly consider the nature of the exemption being requested by the applicant.

[81] To elaborate, the applicant originally took the position that he was a member of the SCLPC Class in his counsel's letter dated November 6, 2018, which enclosed his application under subs. 25(1). He submitted on this application that the officer erred in law by failing to consider his request for permanent residence as a member of the SCLPC Class, coupled with a

request for an exemption from the sponsor's ineligibility under *IRPR* subs. 130(3) based on H&C grounds.

[82] This application for judicial review challenged the officer's H&C decision dated September 26, 2019, made under subs. 25(1). It did not challenge the contents of IRCC's letter dated May 3, 2019 to Mr Khandaker that transferred his application to the "regular" H&C queue for consideration. That May 3, 2019 letter advised Mr Khandaker that an officer had "determined" that he did not meet an eligibility requirement of the SCLPC class and that he was not a member of that class because he did not have a valid sponsor. The applicant cannot now seek judicial review of the determination in the May 3, 2019 letter that he was not a member of the SCLPC class due to his spouse's ineligibility. He is long out of time: *Federal Courts Act*, RSC 1985, c F-7, subs. 18.1(2).

[83] The IRCC's letter dated May 3, 2019 to Mr Khandaker also confirmed that in his application, Mr Khandaker requested an exemption from "that eligibility requirement(s) under subsection 25(1)" of the *IRPA* (i.e. his spouse's ineligibility under subs. 130(3)) and "[a]s such, we are transferring your application" to the Vancouver office "who will make a final decision on your application for permanent residence". As I read it, this letter confirmed that the Vancouver office would consider the H&C application with the exemption requested by Mr Khandaker in mind.

[84] The parties have agreed that in the course of his H&C assessment, the officer did not consider the exemption in subs. 130(3) but instead considered a different exemption (from

applying from abroad). As I have concluded that an exemption from *IRPR* subs. 130(3) may be considered as a matter of law on H&C grounds under subs. 25(1) of the *IRPA*, the question becomes whether the officer's decision dated September 26, 2019 was unreasonable due to that error.

[85] On that narrower issue, the officer stated in his reasons that Mr Khandaker's spouse, Ms Akter, was a national of Bangladesh and "became a permanent resident of Canada in 2017 through a sponsorship by her former spouse, who has since passed away." The officer stated that she was "ineligible to sponsor the applicant under the Family Class immigration program because she does not meet the five year requirement." It is therefore apparent that the officer was aware of the circumstances that led to the need for the exemption from subs. 130(3). In addition, the officer assumed the marriage was genuine. As well, there was of course another exemption at issue for the applicant, namely the requirement to apply for permanent resident status from outside Canada.

[86] Given the role and purposes of an H&C application under subs. 25(1) as discussed in *Baker, Agraira* and *Kanthasamy* and specifically, the focus on the humanitarian and compassionate reasons to grant relief rather than on the technical exemption, I am satisfied that the officer's decision was, in the circumstances, not unreasonable due to a failure to consider expressly the exemption requested by the applicant. The officer considered the substance of the applicant's position on the exemption to subs. 130(3), including as advocated on this application. The officer was therefore sufficiently alert and sensitive to the substance of the issue: see *Vavilov*, at para 128. On this basis, he committed no reviewable error.

[87] The applicant's second argument concerned the officer's finding that the applicant's spouse, who is a permanent resident of Canada, would move to Bangladesh with the applicant if the application failed. This would require her to abandon her life in Canada and potentially breach the residency requirement and permanently lose permanent resident status in Canada. The applicant submitted that a permanent resident of Canada cannot reasonably be expected to abandon her status and finances in Canada to keep her family together, having regard to the family reunification objective of the *IRPA*.

[88] The respondent sought to reframe the applicant's position, contending that, in essence, the applicant was arguing that he should be allowed to stay in Canada because he and his wife have become accustomed to living here. The question, in the respondent's submission, is not which country is preferable to live; it must be recognized that typically there will be some level of hardship associated with leaving Canada.

[89] In *Lopez Bidart v. Canada (Citizenship and Immigration)*, 2020 FC 307, Justice Pentney considered several arguments that he concluded rendered an officer's H&C decision unreasonable. Justice Pentney concluded that the officer's analysis did not demonstrate the hallmarks of reasonableness required by *Vavilov* - justification, transparency and intelligibility - because it failed to indicate how the officer analyzed evidence at the heart of the applicant's request for H&C relief. Referring to *Vavilov*, at paragraph 127, one concern was that the officer did not engage with the core basis of the claim for relief, namely the hardship arising from the separation of spouses:

> [29] … The officer notes that the couple have a close relationship, but finds that the Applicant's wife had not indicated that she would

> be unable to support him if he was forced to go to Uruguay while his application for permanent residence was in process. I find that this analysis misses the main point, which is that the Applicant's claim for H&C relief is based on the hardship that separation of the spouses would cause.
>
> [30] The hardship caused by separation of spouses has been recognized as an important consideration in other cases, yet it is given almost no attention in this decision… The officer does not describe how the impact of spousal separation for this particular couple has been weighed. In this regard, it is relevant to consider that the couple met in Canada, the Applicant's wife is a permanent resident and so her ability to travel is limited by the residency requirements for her to obtain citizenship, and therefore the separation would have significant consequences on the couple.

See also para 35.

[90] The officer in this case noted that the applicant wished to remain in Canada with his spouse, and recognized that Ms Akter was pregnant and due to have the couple's first child in March 2020. The officer found that while it was reasonable that the applicant "wishes to be with his pregnant spouse, his evidence does not demonstrate that this can only occur in Canada. He has not provided evidence to support that he is unable to return to Bangladesh or that he will incur undue hardship as a result". In addition, the officer noted that the applicant's spouse did not testify "that she is unable or unwilling to return to Bangladesh with the applicant or that they would incur hardship in doing so. Absent evidence to the contrary, the applicant and his spouse can raise a family and continue their life together in Bangladesh; the evidence is in support insufficient to support that it amounts to undue hardship for him to do so."

[91] The officer inferred in this case that there would be no separation and that the couple would return to Bangladesh together, as they did not provide evidence otherwise. In particular,

Ms Akter provided no evidence about hardship to her as a consequence of leaving Canada and returning to her home country with her husband, or about a possible loss of her permanent resident status in Canada. The officer was aware of Ms Akter's permanent resident status. Neither the applicant nor his spouse provided evidence as to the hardship that would arise from their separation. Considering the applicant's submissions, the onus on the applicant on an H&C application, and the absence of evidence on loss of permanent resident status or hardship arising from spousal separation or submissions that would make either issue a core part of the applicant's position on the H&C application, I am unable to conclude that the officer's analysis of this factor rendered his assessment untenable in light of the factual and legal constraints arising in this case: Vavilov, at para 99.

[92] Third, the applicant contended that the officer erred in assessing the applicant's degree of successful establishment. The applicant contended that the officer placed insufficient weight on the fact that the applicant was married to a permanent resident of Canada. On this issue, in my opinion, the officer's assessment of establishment contained no error of law and was reasonable given the evidence before him on the issue. It is not this Court's role to reweigh the evidence of establishment: *Vavilov*, at para 125.

[93] Finally, the applicant argued that the officer set too high a test for an H&C application, by requiring that he show that his situation is "extraordinary". The applicant submitted that an officer's use of words such as "exceptional" or "extraordinary" placed too high a burden on an applicant for H&C relief, given the equitable and humanitarian goals of subs. 25(1) and the test set out in *Kanthasamy*: see *Apura v. Canada (Citizenship and Immigration),* 2018 FC 762

(Ahmed, J.). The applicant referred to the officer's statement in his decision that the "purpose of section 25 of the IRPA is to give the Minister the flexibility to deal with extraordinary situations unforeseen by the IRPA where humanitarian and compassionate grounds compel the Minister to act. The applicant's evidence does not support that his situation is extraordinary such that an exemption is justified in his particular case" [emphasis added].

[94] A similar argument was made before Justice Pentney in *Lopez Bidart*. The applicant submitted that the officer applied the wrong test by indicating that the purpose of section 25 is to give the Minister "the flexibility to deal with extraordinary situations unforeseen by the IRPA…", which is the same phrase used by the officer in this case. Justice Pentney agreed with the applicant's submissions generally but did not express an explicit conclusion on this point.

[95] I have read the entirety of the officer's H&C assessment in the specific light of the officer's statements and Justice Ahmed's observations about subs. 25(1) in *Apura*, at paragraph 23. I am also aware, as Justice Ahmed was, of additional decisions of this Court on exceptionality under subs. 25(1). Looking at the officer's H&C assessment as a whole, I do not believe the assessment contains a reviewable error. On the evidence and submissions before the officer, the denial of H&C relief was not untenable: see *Vavilov*, at paras 90, 99, 101 and 105.

V. Conclusion

[96] For these reasons, the application is dismissed. In my opinion, there is no question for certification. There will be no order as to costs.

JUDGMENT in IMM-6695-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no question for certification under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
3. There is no order as to costs.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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