Federal Court  Cour fédérale

Date: 20220721

Docket: IMM-2517-20

Citation: 2022 FC 1084

Ottawa, Ontario, July 21, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

NIRESHAN PARAMASIVAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Nireshan Paramasivam (the Applicant) seeks the judicial review of the refusal of a Senior Immigration Officer to grant an exemption to the requirement for a permanent residence in Canada to be processed from outside Canada. In other words the Applicant wants to have his permanent residence application made within Canada to be processed. He needs an exemption for that to happen and the Applicant relies on section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [herein after "the Act" or IRPA]. Section 25(1) reads:

Humanitarian and compassionate considerations – request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

The judicial review application is made pursuant to section 72 of the IRPA.

I. Facts

[2] The relevant facts are the following. The Applicant is a Sri Lankan of Tamil ethnicity who arrived in Canada at Victoria, British Colombia, on board a vessel, the MV Sun Sea, in August 2010. It is of common knowledge that the ship was carrying primarily Sri Lankan nationals of Tamil ethnicity. A civil war had been raging in Sri Lanka, which ended in May 2009. The ruling Sinhalese majority prevailed over the Tamil minority. There appears to have been various militant groups involved in the hostilities, including the Liberation Tigers of Tamil Ealam (LTTE).

[3] The Applicant was a very young man in 2010, being born on October 31, 1988. He is still a young man now at 33 years of age. He states that in spite of the civil war having ended since May 2009, his family made arrangements for him to flee Sri Lanka for Canada where, upon arrival, he made a refugee application. The refugee claim was refused on October 25, 2012. Our Court denied leave to seek judicial review on March 21, 2013. He testifies that he has not been contacted by the Canadian authorities regarding his removal from Canada.

[4] In January 2018, the Applicant submitted his application from within Canada to be granted permanent residence in Canada. As already indicated, he invokes section 25 of the IRPA which provides for humanitarian and compassionate considerations (H&C) in order to be exempted to make his application from within Canada. That is because the Act requires that the application must be made before entering Canada. The Applicant is not prevented from seeking to become a permanent resident. But, as a foreign national, he “must, before entering Canada,

apply to an officer for a visa or for any other document required by the regulations" (s 11(1) of the Act).

[5] The Applicant obtained a work permit in 2011. He has been gainfully employed, earning between $47 000 and $58 000 between 2014 and 2017; a tax assessment for 2018 showed an income of $44 500. As of July 2019, the Applicant advised that he had been "unemployed for some months", which, notes the Immigration Officer, may explain the lesser income reported for 2018. At the time of the decision under review (April 30, 2020) the Immigration Officer notes that it was not known what the Applicant's employment status was. The Applicant's affidavit of June 19, 2020 reports the same income figures starting in 2014, without any indication as to the amounts after 2017. The only indication given about the situation after 2019 is that "I continue to work there today" (affidavit of Nireshan Paramasivam, para 9). The work permit was set to expire on January 24, 2021.

II. The decision under review

[6] The Applicant states that the H&C factors he invokes are:

- Long-term successful establishment in Canada;
- Employment history;
- Canadian family connection;
- Adverse country conditions if he were to return to Sri Lanka; the Applicant claims that his profile as a young Tamil could be used to his detriment. He could be associated with the LTTE which can be taken as being a member of the diaspora trying to revive the LTTE, especially since the Applicant has been in Canada for so long.

[7] The Immigration Officer spoke in terms of the factors to be considered as being the degree of establishment in Canada, adverse country conditions in Sri Lanka and the return to the country of nationality.

[8] The decision states that the onus is on the Applicant to provide the evidence that will substantiate the grounds of this application; it is not for the decision maker "to elicit information on H&C factors" (decision, page 2 of 5).

[9] The decision says that "positive consideration is given to the applicant's employment efforts in Canada" (decision, page 3 of 5). The Officer also noted two letters of support from two uncles in Canada. The letters make the point that the nephew is a hard worker who contributes economically. They claim that the Applicant would "suffer severe harm" if he returns to Sri Lanka, but do not provide any details (type of harm, by whom, where is the information coming from). The uncles' addresses differ from that of the Applicant, such that an inference is drawn that they do not live together. There is no evidence of the degree of integration in their respective livelihoods.

[10] According to the Officer, letters of support do not present evidence that there would be hardship such that the removal of the Applicant from Canada would result in an exemption that would be justified in this particular case. That is also true of the Applicant's employer who did not indicate that the duties performed by the Applicant could not be done by others. Similarly, one of the uncles' letters speaks of "emotional problems" were his nephew to leave, but no other detail was offered. All in all, the Officer considered the Applicant's establishment as "not

exceptional compared to others who have been in Canada for a similar amount of time" (decision, p 3 of 5).

[11] On the front of the adverse country conditions, including the profile associated with the Applicant, the Immigration Officer noted that the media articles provided by the Applicant are all, except one dated January 2018, from 2017. I repeat that the decision came in April 2020. Were singled out by the Officer two opinion letters from a refugee coordinator for Amnesty International in 2017, published on the organization website, claiming that all passengers on the MV Sun Sea may face persecution, whether they are associated with the LTTE or not. The Immigration Officer notes that the opinion letters' assertions are primarily based on a quote attributed to a spokesperson for the High Commission of Sri Lanka in Canada in 2010. No other information of passengers' persecution was offered.

[12] Instead, the decision maker relied significantly on a report from the Home Office (UK) published on January 20, 2020 (UK Home Office: *Report of Home Office fact-finding mission to Sri Lanka*, January 2020). I reproduce certain paragraphs from the decision under review which refer to statements from the UK Report which were obviously given weight:

> The UK Report indicates that the International Organization for Migration (IOM) in SL states that "claiming asylum abroad is not an offence, and as such when someone returns to Sri Lanka who has been absent for a number of years or has an expired visa, they would not be questioned on this", and that "The police would only be interested in an individual if there were outstanding criminal offences".
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> The UK Report indicates that in Oct 2019 the Sri Lankan Attorney General's Department stated that while members of the LTTE with a pending criminal case would be questioned, "mere membership in the LTTE would not be of interest" to authorities. Similarly, the Criminal Investigation Department of SL has stated that "if a case

> was pending against (a LTTE member) for a criminal act. [sic] Then they would face arrest. Otherwise they are of no interest."
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> …
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> The UK Report also indicates that the Human Rights Commission of SL has noted that" prominent LTTE sympathisers who actively support the LTTE or raised funds for them in the past may be monitored or questioned although interest in them may depend of their past involvement and any current involvement with diaspora groups".
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> …
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> Lastly, the UK Report indicates that the IOM stated that returnees arriving on emergency travel documents "wouldn't necessarily be questioned; only if they'd departed illegally". The applicant has not indicated that he departed SL illegally or incurred difficulty leaving the country using his passport via regular channels. This factor would also indicate that the SL authorities did not have an interest in the applicant, either as an LTTE member or other reason.

[13] That made the Immigration Officer state that the Applicant never indicated any involvement or association with the LTTE. Indeed, he was released by the Canadian Government in December 2010, which suggests an absence of ties with the LTTE or some similar organization. Given that the Human Rights Commission of Sri Lanka spoke of prominent LTTE sympathizers actively supporting the LTTE who “may be monitored or questioned although interest in these may depend on their past involvement and any current involvement with diaspora groups”, which is evidently not the case here, the decision maker believes that the Applicant would not be associated with LTTE activities by Sri Lankan authorities.

[14] The Immigration Officer offers his rationale for relying on the Home Office report:

> Preference is given to the UK Report as it post-dates the applicant's evidence by roughly two years in addition to the credibility and

> neutrality of the author. The UK Report does not indicate that any of the agencies interviewed by the mission are currently pursing passengers of the MV Sun Sea or that there is a presumption of an association between its passengers and the LTTE. The UK Report indicates that in regards to returning nationals, SL authorities are primarily concerned with outstanding criminal issues or those with a notable history of supporting the LTTE. Having determined that these factors do not apply to the applicant, it is reasonable to conclude that he faces minimal risk by SL authorities should he be returned to SL.

[15] Considering the situation in Sri Lanka, it was found that a return to Sri Lanka is feasible: the Applicant has 11 years of formal education, he was prior to leaving Sri Lanka a self-employed farmer, his parents reside in Sri Lanka and they may assist with his integration back in his country of nationality. It is inevitable that there will be some hardship associated to having to leave Canada.

[16] The factors offered by the Applicant are not sufficiently compelling to allow the exemption sought by the Applicant. H&C applications are not an alternate means of immigrating to Canada.

[17] Considering the cumulative assessment of the evidence submitted, the application was dismissed. The H&C application to be allowed to seek permanent residence from within Canada was refused. It is not the permanent residence that is denied, but rather the exemption from the requirement of making an application before entering Canada.

III. Evidence before the Court

[18] The Applicant presented an application record which contained what was presented as evidence in support of the application. However, it became clear that the evidence was never presented to the Immigration Officer. The Respondent noted that new evidence was being submitted to the Federal Court. This new evidence, to a large extent, concerns adverse country conditions. It is inadmissible, says the Respondent. I agree.

[19] In *Devadawson v Canada (Citizenship and Immigration)*, 2015 FC 80 [*Devadawson*], Justice Boswell provided a clear exposé of the state of the law. I reproduce some of the paragraphs which make the points vividly:

> [31] The general rule in this regard is that the evidentiary record for purposes of a judicial review application is restricted to that which was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19, 428 NR 297 [*Association of Universities*]). Despite this general rule, new evidence can sometimes be admitted if it is necessary to substantiate a procedural defect not apparent in the record (*Association of Universities* at para 20). That, however, is not the case here since the procedural defect about which the Applicant complains was the Officer's decision not to grant the Applicant an interview.
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> [32] The Applicant argues that the Officer had a duty to consult the most recent sources of country condition information and is not limited to materials furnished by the Applicant, and the disputed evidence here could be relevant insofar as it shows that there was recent evidence that the Officer did not consult.
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> [33] I reject the Applicant's foregoing argument. The additional evidence adduced by the Applicant subsequent to the date of the Officer's decision cannot and will not be considered by the Court in assessing the Officer's decision. The Applicant cannot now produce new evidence which was not before the Officer in an effort to buttress and bolster her arguments that the Officer erred in assessing the Applicant's application.
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> …

> [38] The Applicant, citing *Yang v Canada (Citizenship and Immigration)*, 2013 FC 20 at para 23, [2013] FCJ No 25 (QL) [*Yang*], claims that "an officer has a duty to consult the most recent sources of information and is not limited to materials furnished by the applicant". In *Yang*, however, Mr. Justice Mosley was reviewing both a PRRA decision and an H&C decision, and it was with respect to the PRRA decision that this principle applies (*Hassaballa v Canada (Citizenship and Immigration)*, 2007 FC 489 at para 33, [2007] FCJ No 658 (QL); *Lima v Canada (Citizenship and Immigration)*, 2008 FC 222 at para 13). No such duty applies in respect of an H&C decision, for which the "applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless" (*Owusu* at para 5).
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> [39] Furthermore, the guidance set forth in Citizenship and Immigration Canada's Manual, *"IP 5: Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds"* [the Manual], does not, as the Applicant suggests, create a duty for an immigration officer to consult the most recent sources of information and go beyond the materials furnished by the applicant. Section 5.18 of the Manual makes it clear that an "H&C Officer may undertake research with respect to the issues identified in the application" (emphasis added). While this section goes on to say that applicants "can expect officers to routinely refer to the most recent information sources identified below in 5.19" (emphasis added), that simply puts applicants on notice that such information may be considered. Section 5.18 of the Manual does not make it mandatory for an officer to refer to the most recent information sources and, regardless of what sources of information the Officer may or may not have considered, there was no breach of any duty owed to the Applicant in this regard.
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> [Emphasis added.]

[20] The law on new evidence is well known. The Court of Appeal has opined again after *Devadawson.* In *Bernard v Canada (Revenue Agency)*, 2015 FCA 263; 479 N.R. 189; 9 Admin LR (6^{th}) 296 [*Bernard*], the Court of Appeal confirmed, once again, that "the general rule is that evidence that could have been placed before the administrative decision maker, here the Board,

is not admissible before the reviewing court" (para 13). It is not merely for reasons of efficiency that the rule exists, but rather for something more fundamental.

[21] Stratas J.A. explains that the role played by the reviewing court is not that of the administrative tribunal. The decisions to be made on the merits are entrusted by Parliament to the administrative tribunal. A reviewing court is limited to controlling the legality of the decision, usually by controlling its reasonableness. The Court of appeal quotes at length from *Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22, 428 N.R. 297 [*Access Copyright*]. Here are paragraphs 17 to 19:

> [17] In determining the admissibility of the…affidavit, the differing roles played by this Court and the [administrative decision-maker] must be kept front of mind. Parliament gave the [administrative decision-maker] – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for [the administrative decision-maker] – not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the [administrative decision-maker] has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.
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> [18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the [administrative decision-maker's] decision. This Court can only review the overall legality of what the [administrative decision-maker] has done, not delve into or re-decide the merits of what the [administrative decision-maker] has done.
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> [19] Because of this demarcation of roles between this Court and the [administrative decision-maker], this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary

> record that was before the [administrative decision-maker]. In other words, evidence that was not before the [administrative decision-maker] and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.
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> [Emphasis added.]

[22] To be sure, there are exceptions to that general rule. But none applies in the case at bar. Thus one exception is concerned with background information, but that kind of information is that which assists in understanding the record already before the administrative tribunal, not to offer spin or advocacy or new evidence. As was put in *Delios v Canada (Attorney General)*, 2015 FCA 117, it may be useful to a reviewing court to have an affidavit reviewing "in a neutral and uncontroversial way the procedures that took place below" (para 45). This exception does not find application either.

[23] Another is an affidavit to disclose the complete absence of evidence where the allegation is that the administrative decision is unreasonable because based on a key finding not supported by any evidence at all on the record before the decision maker. A third exception relates to procedural fairness, natural justice, improper purpose or fraud, where that evidence in support of contentions of that nature could not have been placed before the administrative tribunal.

[24] As noted by Stratas J.A., it is the role of the administrative decision maker as the fact-finder and merits-decider that must be protected as a matter of principle.

[25] Here, the Applicant seeks to introduce before the reviewing court evidence that ought to have been presented to the Immigration Officer because the role of the reviewing court does not include deciding the merits of cases. At the hearing, it was argued that, in fact, some of that evidence was already before the administrative tribunal by virtue of being posted by the Minister of Citizenship and Immigration on a website where sources of country conditions are listed "as a courtesy to stake holders". I disagree. Noting the existence of potential sources is not the equivalent to offering specific evidence and arguing one's case before the body charged with the fact-finding mission and the decision on the merits of the case. If the argument has not been made on the basis of evidence duly presented, the Applicant's suggestion results in the transfer of the fact-finding mission and the decision-making on the merits of the case to a different body, the reviewing court, whose task is not to decide these matters. As found in *Access Copyright*, close to ten years ago, and re-asserted in *Bernard*, there exists a demarcation between the reviewing court and an administration tribunal; "this Court cannot allow itself to become a forum for fact-finding on the merits of the matter" (*Access Copyright*, para 18, reproduced at para 17 of *Bernard*).

[26] The Applicant also suggested that new evidence would be admissible as the Immigration Officer had a duty to consult the most up to date sources of information. The decision of Justice Keith Boswell in *Devadawson* at paragraphs 32, 33 and 38 is, in my view, a complete answer to that contention.

[27] It follows that the *ex post facto* evidence submitted for the first time in the Application Record is not admissible in these proceedings on judicial review. They shall not be considered by the Court.

[28] As an aside, the Applicant insisted during the hearing of this judicial review application that there where elections in Sri Lanka in November 2019 which brought back to power a government where some members were in power back around 2010, when evidence of abuse of the Tamil community exists. It must be noted that the election took place five months before the decision came down where the evidence could have been presented. At any rate, the evidence appears to be largely speculative.

IV. Arguments and analysis

[29] The Applicant contends that the decision to refuse his H&C application to be exempted from seeking permanent residence from outside Canada, as is the rule (section 11(1) of the IRPA), is unreasonable. He raises the following issues in his attempt to show the decision as unreasonable:

1) the Officer viewed the application "through an elevated and incorrect legal standard of hardship";
2) the Officer "imported an incorrect threshold … of the applicant's establishment";
3) the treatment of the country conditions was unreasonable:
    a. an Amnesty International report was not properly considered; the decision maker is said to have ignored a "significant" change in the country conditions;
    b. it was illogical to03 consider that Canadian authorities having concluded that the Applicant was not involved with the LTTE meant that the same perception would be shared by the Sri Lankan authorities;
    c. the Officer ignored broaden evidence relating to country conditions in Sri Lanka, including discrimination of Tamils with the Applicant's profile.

[30] The opening proposition by the Applicant states that "[t]he Supreme Court of Canada in *Kanthasamy* instructed that officers are no longer to consider H&C applications through the limited lens of 'hardship' …" (memorandum of fact and law, para 10). I believe that, as stated, the proposition is significantly broader than what was actually decided by the Supreme Court.

[31] The Applicant's counsel have complained that the decision is unduly considering the application through the limited lens of "hardship". When asked what they meant, they referred to paragraph 33 of *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. I am afraid the paragraph does not support the contention. Here is paragraph 33:

> [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 more flexibly to the equitable goals of the provision.

As can be seen, the Supreme Court's majority speaks clearly of the "lens of the three adjectives" (unusual, undeserved and disproportionate). "Hardship" has not become a word to be avoided, some kind of a "dirty word". Indeed, it is to be part of the analysis, as that was never denied by the Supreme Court. But, it seems to me, the Court does not want for "unusual and underserved and disproportionate hardship" to be reducing the scope of the provision to these three adjectives. These would create discrete thresholds which may exclude other humanitarian and

compassionate considerations. The adjectives are instructive, not determinative. The Supreme Court signals that an intervention by a reviewing court would be warranted where a decision maker elevates the threshold under section 25 to hardship having some properties with new thresholds of “unusual”, “undeserved” and “disproportionate”, such that other humanitarian and compassionate considerations are crowded out; that has the effect of limiting the ability to give weight to other considerations.

[32] It must be remembered the context in which the Court considered the three adjectives. It had just considered in paragraphs before paragraph 33 what it thought were two schools of thought within our Court (*Kanthasamy*, at para 29). One where it seemed that our Court required that there be the “correct test” in humanitarian and compassionate applications that the Applicant satisfy the “unusual and undeserved or disproportionate hardship test”. The Supreme Court saw in that way of operating a tacit rejection of *Chirwa1* (we will get back to this test). Other cases found favour with the majority (*Kanthasamy*, at para 30) where “the Federal Court and Federal Court of Appeal have made it clear that the Guidelines and the “unusual and undeserved or disproportionate hardship” threshold merely provide assistance to the immigration officer but that they should not be interpreted as fettering the immigration officer’s discretion to consider factors other than those listed in the Guidelines” (*Kanthasamy*, at para 30). The decision maker is not limited to hardship. This second approach is said “to be more consistent with the goals of s. 25(1)” (*Kanthasamy*, at para 31).

1 *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 [*Chirwa*]

[33] In the case at hand, the Applicant faults the Immigration Officer for the use of the work "hardship".

- If the Applicant were to leave his employer, his duties could be performed by others; that would not result in undue hardship for the company;
- The two uncles do reference hardship to them if their nephew was to leave, although one of them spoke of "emotional problems". The mutual dependence with the family in Canada was not even presented;
- A reference to the word "hardship" is also found at page 5 of 5 where the Immigration Officer says that "although there will inevitably be some hardship associated with being required to leave Canada, this alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)". I note that these words are lifted from paragraph 23 of *Kanthasamy*.

As a matter of fact, the word "hardship" appears numerous times in the decision. But not once is there a reference to the three adjectives ("unusual", "undeserved", "disproportionate") in the decision. I fail to see how the Officer can be said to "look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds" (*Kanthasamy*, at para 33), with the result that the three adjectives become "a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case" (*Kanthasamy*, at para 33). The majority of *Kanthasamy* insists that section 25(1) of the IRPA must be interpreted to respond with more flexibility in order to foster the equitable goals of section 25(1). The majority never states that hardship is now out of bounds. It is rather the three adjectives that should not be seen as determinative, just instructive and descriptive. Other considerations can be presented for the decision maker to weigh.

[34] It cannot be that the facts of this case can be ignored. The Applicant presented facts relevant to his establishment in Canada, putting emphasis on his employment. He also refers to the country conditions in Sri Lanka to convince of the risk of persecution and discrimination in

view of the perception that, as a passenger on the MV Sun Sea ship, he is somehow an LTTE member or sympathiser. There is no indication in this case that there were other humanitarian or compassionate considerations that were presented, but were evacuated, thus fettering the discretion that is inherent in the application of section 25 of the Act. Facts matter. As the majority said in *Kanthasamy*, "[w]hat does warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh all relevant facts and factors before them: *Baker*, paras 74-75" (*Kanthasamy*, at para 25). I have not found what compassion factor was presented and ignored. It is rather that the record before the Officer was thin.

[35] The Applicant refers the Court to two cases. In *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 [*Mursalim*], he quotes from paragraph 37:

> [37] In my view, the officer applied the wrong test by considering hardship alone. Contrary to the direction given in *Kanthasamy*, hardship was the touchstone of the officer's analysis of each aspect of the H&C application. Put another way, the language used by the officer demonstrates that the application was viewed exclusively through the lens of hardship. At key points in the decision, the officer applied the test of "unusual and undeserved or disproportionate hardship" and did not engage in any further analysis once satisfied that this test had not been met. While the question of hardship is of course germane under s 25(1), and various forms of hardship were emphasized in the applicant's submissions, the officer used the language of "unusual and undeserved or disproportionate hardship" in a way that limited the officer's ability to consider and give weight to all relevant humanitarian and compassionate considerations in the applicant's case (cf. *Kanthasamy* at para 33; *Marshall* at paras 33-37).
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> [Emphasis added.]

As can be readily seen, there is no such reference to the "lens of the three adjectives" in the case at hand. If, as asserted in *Mursalim*, the language of "unusual and undeserved or disproportionate hardship" is used in a way that limits the ability to consider fully other factors, a reviewing court's intervention would be warranted. I have read the impugned decision numerous times and I cannot find any such limitation. The concept of hardship is not excluded from consideration. There is not a limitation on other relevant humanitarian and compassionate considerations that would have been brought to the fore. Quite the opposite: the decision maker considered the other factors advanced by the Applicant, as should be.

[36] Another case on which the Applicant tried to find support is *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72. He quotes from paragraphs 33 and 34:

> [33] In reviewing the reasons of the Officer, I am unable to detect any appreciation of the *Chirwa* approach. In my respectful opinion, H&C Officers should not only consider the traditional hardship factors, but in addition, they must consider the *Chirwa* approach. I do not say that they must recite *Chirwa* chapter and verse, nor that there are any magic formulae or special words these Officers must use. But the reviewing courts should have some reason to believe that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.
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> [34] The Applicant submits that the Minister's representative assessed every factor through the lens of hardship, and hardship to the Applicant, and that in doing so the Officer applied the wrong legal test. I have reviewed the Officer's reasons and have come to the conclusion that the Applicant is correct.

I share the view expressed at paragraph 33 that the *Chirwa* approach is the one that must be followed. But a lens that must be carefully avoided is that of the three adjectives, which has the effect of raising the bar unduly if they are not limited to a measure of intensity by making the

adjectives descriptive and instructive, as opposed to determinative as was the case according to one school of thought referred to by the *Kanthasamy* majority. There was no such limitation that can be discerned from the decision under review.

[37] At the end of the day, the Supreme Court rejected an approach that would have required a high threshold of hardship, at the exclusion of the considerations (and giving weight) to all relevant humanitarian and compassionate considerations in a given case. If it is shown that this is the approach taken that excludes other humanitarian and compassionate considerations, the *Chirwa* approach will not have been followed. But that must be shown on the basis of the record before an officer: what are the humanitarian and compassionate considerations that were presented and ignored.

[38] Hardship is part and parcel of section 25. Moreover, section 25(1) was never intended as a substitute for the immigration scheme in place. It was stated explicitly at paragraph 23 of *Kanthasamy*.

> [23] There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1): see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para. 13 (CanLII); *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206 (F.C.T.D), at para. 12. Nor was s. 25(1) intended to be an alternative immigration scheme: House of Commons, Standing Committee on Citizenship and Immigration, Evidence, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40 (Peter MacDougall); see also *Evidence*, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 9:55 to 10:00 (Joan Atkinson).

Indeed, it is implied in the *Chirwa* approach. At paragraph 13 of *Kanthasamy*, one can read:

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

There, evidence must be brought to the decision maker and it must "excite … a desire to relieve the misfortune of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provision of the *Immigration Act*". Objective evidence is required.

[39] Clearly, it is not just any misfortune, or hardship, that can bring about relief on the basis of compassionate and humanitarian considerations. Conversely, it is not only hardship that is unusual, undeserved or disproportionate that can call for special relief. It is the aggregation of humanitarian and compassionate considerations brought into evidence by an applicant that must be weighed by the decision maker to decide if the *Chirwa* test is met. But as paragraph 13 of *Kanthasamy* shows, the humanitarian and compassionate considerations must be of a definite kind and intensity. As the Supreme Court says at paragraph 14 of *Kanthasamy*, the test includes an avoidance of undue overbreadth:

> [14] The *Chirwa* test was crafted not only to ensure the availability of compassionate relief, but also to prevent its undue overbreadth. As the Board said:
>
> > It is clear that in enacting s. 15 (1) (b) (ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend s. 15 (1) (b) (ii) of the Immigration Appeal Board Act to be applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations. [p. 350].

[40] The question for the Court is therefore whether the decision in this case is reasonable. The Applicant did not attempt to discuss the role that a reviewing court can play when reviewing an administrative decision on a reasonableness standard of review. In my view, that cannot be avoided.

[41] A reviewing court plays a limited role on judicial review. It does not delve into the merits of a case to substitute its own view of what the correct outcome must be. That is the role to be played by the administrative decision maker who was selected by Parliament for that role and has the needed expertise.

[42] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court reminds us that the starting point is the principle of restraint to be observed by reviewing courts which demonstrates “respect for the distinct role of administrative decision makers” (para 13). The posture is that of respect (para 14) towards administrative decision makers.

[43] That translates into the onus being on applicants having the burden to challenge a decision (para 100). No one disputes that in our case that burden is to show that the decision under review is unreasonable. That means that the shortcomings must be shown to be sufficiently serious that the need to set aside the decision has been established.

[44] I can find nothing in this case that would justify claiming that the decision maker limited the examination of the case with a view to limiting the considerations that were in play. The issue in this case is the lack of sufficient humanitarian and compassionate considerations presented to the decision maker. The Applicant relied on his establishment in Canada, some Canadian family connections and adverse country conditions. As we shall see, the establishment in Canada was limited, the family connections were minimal and the country conditions were assessed as not generating significant concern in view of the Applicant's profile, based on documentary evidence.

[45] The Applicant took issue with the comment made by the decision maker that the degree of establishment was said to be "not exceptional compared to others who have been in Canada for a similar amount of time" (decision, page 3/5). It is argued that that constitutes an error. I disagree. It simply described that which was presented to the decision maker. The decision maker merely states the obvious: there is nothing out of the ordinary in the establishment of the Applicant. Section 25 of the Act speaks of an exemption from obligation under the Act and *Kanthasamy* endorses the comment in *Chirwa* that the exemption cannot "be applied so widely as to destroy the essentially exclusionary nature" of the Act (*Kanthasamy*, at para 14). Contrary to what was asserted in the Applicant's written case, it is not accurate to say that the years spent

in Canada “were not given any positive weight in the global assessment” (written case, para 19). In fact, positive consideration is given to the employment efforts. It is rather that the establishment did not carry great weight, because not much was said about the establishment. It boils down to someone who is said to be law-abiding, who has maintained employment in this country (six years with the same employer). He sends some money back to Sri Lanka and spends time with members of his family (two uncles) in Canada. The assessment made by the decision maker is part of the role played by a decision maker: the Applicant has not shown how the exercise of discretion was unreasonable.

[46] Our Court has on numerous occasions stated that immigration officers have the expertise and experience to assess establishment (among others, *Villanueva v Canada (Citizenship and Immigration)*, 2014 FC 585 [*Villanueva*]; *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757; *Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000). Paragraph 11 of *Villanueva* states:

> [11] Similarly, I see no error in the Officer’s analysis of the Applicants’ establishment in Canada. The Officer has the expertise and experience necessary to permit him or her to identify the level of establishment that is typical of persons who have resided in Canada for the same approximate length of time as the Applicants and, therefore, to use this as a yardstick in assessing their establishment. In that regard, the Officer stated that it is not uncommon for individuals to be employed, pay taxes, do volunteer work, participate in a church and in other activates, similar to those undertaken by the Applicants, upon moving to a new country. The Officer is to be afforded deference in this regard. There was also no error in the Officer’s assessment of the Applicants’ allegation of age discrimination. The Officer assessed the evidence that was submitted and stated why it was insufficient to support their submissions.

[47] If the standard against which the circumstances of a claimant must be measured is "would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another", there must be significant facts that must be brought to the fore. The majority in *Kanthasamy* is clear that section 25 of the Act must not be an alternative immigration scheme. The essentially exclusionary nature of the Act has not been displaced by section 25.

[48] It follows that an H&C application is by its very nature fact-intensive and specific. In effect, the difficulty encountered by the Applicant is that the facts do not support his contention. *Kanthasamy* confirms that facts, which are part of the evidence an applicant presents, must establish misfortunes that warrant the granting of special relief from the effect of the provisions of the Act. It bears repeating that the Supreme Court, at paragraph 13 of *Kanthasamy*, speaks of the notion of "compassion" covering "'sorrow or pity excited by the distress or misfortunes of another, sympathy': *Chirwa*, at p. 350".

[49] Establishment was not the only element that was studied. Indeed, as indicated, it is the aggregation of elements which must be assessed. As was rightly noted by the decision maker, only a handful of factors were raised by the Applicant as supporting his H&C application, as presented at paragraph 6 of these reasons. The facts in support of his establishment, which includes employment, were found to be thin. The family connections (letters from two uncles in Canada) are equally thin evidence when measured against the *Chirwa* test. Thus, the only factor to be considered was what the Applicant would face in going back to Sri Lanka.

[50] Here again, the burden on the Applicant is to satisfy that the administrative decision is unreasonable. The *Vavilov* guidance speaks of a reasonable decision being based on internally coherent reasoning, not based on a line-by-line treasure hunt for error (para 102). The decision must also be justified in light of legal and factual constraints that bear on the decision.

[51] Again, the evidence before the decision maker is an essential feature. We read in *Vavilov*:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

[52] With all due respect, the evidence concerning the adverse country conditions at the time the impugned decision was made was seen as lacking by the decision maker and it has not been shown that it is an unreasonable assessment in view of the evidence presented.

[53] The decision maker reviewed the evidence offered by the Applicant and noted that it was dated. The decision maker preferred information from the United Kingdom Home Office of January 2020 (the decision was made on April 30, 2020) which followed a fact finding mission in late 2019. The gist of the UK Report suggests a loss of interest toward former members of LTTE. In the case of the Applicant, the decision notes that the Applicant "has not indicated that he was, or currently is involved with the LTTE or similar groups" (decision, page 4/5).

[54] The Applicant disagrees. He seeks to rely on supplementary documentation which was not presented to the decision maker. As already found, this is unacceptable and such information, not to be found in the certified tribunal record but only in the applicant's record, must not be considered.

[55] As was seen, the rule is not new. It is somewhat puzzling that the Applicant would see fit to add information which was evidently not before the decision maker. By the Respondent's count, some 80 pages were added. At any rate, that information on which the Applicant has relied before this Court could not, and was not, considered. It is inadmissible.

[56] I have not been shown any justification offered by the Applicant as to how the preference for the UK Report could be unreasonable. Indeed, the decision maker addressed squarely that

which was raised. The Applicant sought to rely on a quote from the Sri Lankan High Commission in Canada. However, the quote was from 2010 and it is to the effect that "most (of the passengers on the MV Sun Sea) are hard core LTTE people". How the decision maker should be faulted for having preferred a report by a foreign government 10 years later was left without a convincing explanation. As is well known, it does not suffice to disagree. The test is rather that unreasonableness must be demonstrated. In fact, the Applicant tried to reverse the burden for the decision maker to justify the reasonableness of the choice.

[57] One observation should be made. I have already found that the documentation added by the Applicant in his Record is inadmissible. I would note that the Applicant sought to insert evidence about elections in November 2019 in Sri Lanka. Not only did the UK Report on which the Officer relied note the new election, but the documentation on which the Applicant sought to rely was speculative as to the impact of the changes that were anticipated. Whether more precise information has become available since April 2020 is a matter for a different decision maker.

[58] The three factors presented by the Applicant in support of his H&C application were individually and collectively insufficient to satisfy the decision maker. Was that unreasonable? I do not think so. The burden on the Applicant has not been discharged in view of the lack of probative evidence that could satisfy the *Chirwa* test: "… that humanitarian and compassionate considerations refer to those facts, established by the evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief" from the effect of the provisions of the *Immigration Act*" (*Kanthasamy*, at para 13). In my estimation, there has not been a

demonstration that the assessment of the evidence before the decision maker has been anything but reasonable.

V. Conclusion

[59] It follows that the judicial review application must be dismissed.

[60] Counsel for the Minister complained bitterly about the manner in which counsel for the Applicant tried to make the Court to certify a question in accordance with section 74 of the Act. Referring to Practice Guidelines for Citizenship, Immigration and Refugee Law Proceedings of November 5, 2018, counsel quoted from the directive that "a party make submissions regarding paragraph 74(a) in their submissions and/or orally at the hearings on the merits. When a party intends to propose a certified question, opposing counsel shall be notified at least five (5) days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question." The Guidelines exist to identify best practices and signal what the Court's expectations may be. It is of course preferable to show courtesy between counsel and best practices are something to aim for. I would not take the matter any further.

[61] From October 14, 2021 to November 11, 2021, the parties have exchanged views on a draft question the Applicant submitted for certification:

> Did the Senior Immigration officer (SIO) err in law in limiting the scope of his humanitarian and compassionate discretion by assessing the factors raised by the Applicant through a lens of hardship, by characterizing the discretion being exercised as exceptional, and by rejecting the Applicant's establishment as one element favouring relief, based on the officer's speculation that his establishment was not exceptional.

The Applicant asserted that the issues raised are of general importance. That is obviously in an attempt to satisfy the requirements of section 74(d) of the Act, which reads:

Judicial review	**Demande de contrôle judiciaire**
74 Judicial review is subject to the following provisions:	**74** Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
…	[…]
(d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	d) sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[62] The Respondent objects to the question(s). The Minister argues that the question submitted here does not satisfy the requirements of the case on appeal. This case, says counsel for the Minister, "involves the manner in which the officer assessed the H&C application presented by the applicant. This is fact specific." Counsel goes on to state that "[w]hether the officer assessed the factors through a lens of hardship, would have no application to another case as it is dependant on the factors raised in this application". Finally, counsel argues that the "statement that the officer characterized the discretion being exercised as exceptional was (1) not raised in the applicant's submissions, nor were the cases cited in footnote 3 [of the letter of counsel for the Applicant of October 14, 2021] and (ii) is consistent with the jurisprudence". To that effect, counsel refers to paragraphs 12 and 13 of *Kanthasamy*.

[63] I agree with counsel for the Minister. The test in order to certify a question is well known and has been consistent through years. Its elements were described in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229:

> [36] The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case): *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9, 446 N.R. 382; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras. 28-29, [2010] 1 F.C.R. 129; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paras. 11-12, 318 N.R. 365 [Zazai]; and *Liyanagamage v. Canada (Secretary of State)*, 176 N.R. 4 at para. 4, [1994] F.C.J. No. 1637 (F.C.A.).

[64] In my view, counsel raise in fact three questions in "the question" to be certified. The questions raised by the Applicant are not dispositive of the matter before the Court, and thus cannot be dispositive of an appeal. This case turns on its facts, and more precisely on the lack of evidence that could have satisfied the *Chirwa* test. It does not either transcend the interests of the parties as the matter is driven by the facts peculiar to the circumstances of the case. Actually, the questions do not arise from the case itself which is resolved on the basis of a decision that has not been shown to be unreasonable. In the matter of *Harkat (Re)*, 2020 FC 818, Madam Justice Roussel, then of this Court, noted that a "question in the nature of a reference or whose answer turns on the unique facts of the case cannot ground a properly certified question" (para 4). Support for that proposition is found in *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 NR 186, and *Lunyamila v Canada (Public Safety and Emergency Preparedness)*,

2018 FCA 22, 419 DLR (4th) 566, (2018) Imm L.R. 171 [*Lunyamila*]. Recently, the Federal Court of Appeal, again, found that the certification of a question is not to turn the process into some kind of reference. At sub-paragraph 7(e) of *Canada (Public Safety and Emergency Preparedness) v XY*, 2022 FCA 113, we read:

> e) The certification process is neither to be equated with the reference process established by section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, nor is it to be used as a tool to obtain declaratory judgments from the Federal Court of Appeal on questions that need not be decided in order to dispose of a particular case: *Liyanagamage v. Canada (Secretary of State)*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 at para. 4 (F.C.A.D.).

That, to my way of thinking, is exactly what the Applicant is trying to achieve.

[65] If there is to be an issue of broad significance or general importance, it must emanate from the case itself. To put it another way, there must not be a measure of artificiality (see *Lunyamila*, at para 49). The facts must give rise to the certified question. Such is not the case here.

[66] It follows that there is no question to be certified.

[67] Thus, the Court found that there was no “lens of hardship”, but rather that the factors raised by the Applicant were reasonably assessed in view of the evidence presented. The issue of “lens of hardship” was simply not dispositive of the case. Furthermore, the decision maker did not state that the exercise of discretion is exceptional. Rather, the reference was to the nature of the remedy sought. It is unambiguous that the relief of section 25 of the Act is a “special relief” (*Kanthasamy*, at para 13), that the *Chirwa* test was crafted to prevent undue overbreadth and that

the exclusionary nature of the Immigration Act is maintained (*Kanthasamy*, at para 14), that the test itself requires a measure of intensity and that H&C applications are not intended to be an alternative immigration scheme (*Kanthasamy*, at para 23). To the extent one seeks an "exemption from the applicable criteria or obligations of the Act" (section 25 of the Act), which are the rules otherwise applicable, the granting of "special relief" is an instance that does not follow the rule. That is an exception. Indeed, the first meaning of "exceptional", according to the Canadian Oxford Dictionary (Oxford University Press Canada 2001), is "forming an exception". At any rate, nothing turned in this case on the exception that constitutes the "special relief". What was dearly missing is the kind of evidence "which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another – so long as these 'misfortunes' warrant the granting of 'special relief' from the effect of the provisions of the Immigration Act" (*Kanthasamy*, at para 13). This case is decided on its facts in order to conclude that the decision made was reasonable on the record before the Immigration Officer.

JUDGMENT in IMM-2517-20

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no question to be certified pursuant to section 74 of the Act.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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