Federal Court  Cour fédérale

Date: 20141203

Docket: IMM-1389-14

Citation: 2014 FC 1165

Ottawa, Ontario, December 3, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

PRATHEEPAN SOMASUNDARAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision made by a Senior Immigration Officer (Officer) of Citizenship and Immigration Canada (CIC) on January 10, 2014, wherein the Officer rejected the Applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds (H&C) made pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

Background

[2] The Applicant is a 34 year old citizen of Sri Lanka and is of Tamil ethnicity. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada determined by its decision dated November 15, 2011 that the Applicant was neither a Convention refugee pursuant to s. 96, nor a person in need of protection pursuant to s. 97, respectively, of the IRPA. An application for leave and for judicial review of the RPD decision was denied by the Court on March 15, 2012.

[3] The Applicant submitted an application for exemption from the permanent residency requirements on H&C grounds on May 23, 2012 which was denied on January 10, 2014. He filed an application for leave and for judicial review of the negative H&C decision on March 6, 2014 (IMM-1389-14).

[4] On December 17, 2012 he made a PRRA application which was denied on January 10, 2014. He filed an application for leave and for judicial review of the negative PRRA decision on March 6, 2014 (IMM-1390-14).

[5] On September 4, 2014 the PRRA and H&C applications were heard together by this Court. This is the decision pertaining to the H&C matter.

Decision Under Review

[6] Pursuant to s. 25(1) of the IRPA the Applicant sought an exemption from the requirement that, as a foreign national, he apply for a permanent resident visa from outside Canada. Such relief can be granted if the Minister is of the opinion that the exemption is "justified by humanitarian and compassionate considerations relating to the foreign national…" (IRPA, s. 25(1)). The Applicant's H&C application was premised on: his establishment in Canada; the fact that as an ethnic Tamil he would face harm if he returned to Sri Lanka; his exploration of Christianity; and, his lack of establishment in Sri Lanka.

[7] In considering the Applicant's hardship relating to risk, harm and adverse country conditions, the Officer noted that at the time of his refugee hearing the Applicant claimed that in 1991 he travelled to India with his mother and two siblings. His mother and two siblings returned to Sri Lanka in 2000 but the Applicant remained in India until 2005, when he completed his Bachelor's degree. He claimed that upon his return to Sri Lanka in 2005 he was detained and tortured for two days by the police on suspicion of involvement with the Liberation Tigers of Tamil Eelam (LTTE). He was released when a bribe was paid. In April or May of 2006 he travelled to India to pick up his diploma and then returned to Sri Lanka. One month later he travelled to the United Kingdom (UK) as a student. In November 2010, when his UK student visa was not renewed, he made arrangements to travel to Canada, arriving on December 13, 2010.

[8] The Officer noted that the RPD found that the determinative issue in the Applicant's refugee claim was credibility, including a lack of subjective fear. The RPD did not accept that the Applicant was interrogated on suspicion of engaging in activities with the LTTE while abroad, nor that he would be suspected of this in the future. The RPD noted, with respect to his lack of subjective fear, that the Applicant had not satisfactorily explained why he did not seek asylum in either the UK, or France when he visited there, or why in 2006 he had returned to Sri Lanka from India after collecting his diploma after the alleged torture in 2005.

[9] The Officer noted that before the RPD, the Applicant claimed that his mother had experienced extortion in 2009 and 2010 by the Eelam People's Democratic Party and members of the Karuna Group due to accusations that while abroad he and his brothers were involved in LTTE activities, but that the RPD did not accept this. The RPD had also found that the Applicant's profile was not one that would cause him problems if he were to return to Sri Lanka where he faced a generalized risk.

[10] The Officer stated the Applicant continues to fear returning to Sri Lanka for the same reasons as indicated at the time of his refugee hearing, being detention and harm upon return. The Officer also stated that the Applicant had provided country condition reports in support of his stated hardship relating to discrimination and/or adverse country conditions upon return to Sri Lanka. However, that having considered these, the Officer found that they did not support that the Applicant is of such a profile that would cause him to face hardship in returning to Sri Lanka.

[11] The Officer also considered a letter submitted by the Applicant's mother, which she assigned low weight; a copy of the Applicant's grandmother's death certificate, which she noted was not linked to the claim of hardship; a statutory declaration of Patricia Watts, a law clerk and social worker in the office of the Applicant's counsel, which the Officer found was not supported by the objective evidence, nor was it evident that the deponent had a particular expertise in Sri Lankan country conditions; and, a PRRA decision involving another Sri Lankan national, of which the Officer noted it could not be determined if the Applicant was of the same profile.

[12] The Officer also noted that in conducting the assessment she had considered the most current, publicly available documentary evidence regarding country conditions and human rights issues in Sri Lanka but that the Applicant's claim of hardship upon return to Sri Lanka, unaccompanied by objective corroborative evidence, did not overcome the credibility concerns of the RPD. Aside from the Applicant's Tamil ethnicity, the evidence did not support that he was of such a profile that he faced those conditions. Further, the Officer found that the information provided by the Applicant did not support that he faced a direct, personal impact due to discrimination, including the practice of his Christian faith, or adverse country conditions that could not be redressed, and that his assertions of the hardships relating to risk or harm in returning to Sri Lanka were not unusual and undeserved or disproportionate.

[13] As to the Applicant's claim based on establishment in Canada, the Officer reviewed the information pertaining to his employment history, information supporting that he has maintained his finances in Canada in a satisfactory manner, paid his taxes, was involved in his community

through volunteering and faith based activities, and positive letters of support, but noted that the test is not whether the Applicant would be a welcome addition to the Canadian community.

[14] The Officer also noted that the Applicant has two brothers in Canada who are both supportive of him remaining in this country and had provided letters to that effect. The younger of these brothers, Thayaparan, wrote that he suffers from a major depressive disorder, diabetes and high blood pressure. He is unable to work and receives Ontario Disability Support Program (ODSP) financial assistance. The Applicant now resides with this brother and assists him with cooking and cleaning and takes him to medical appointments.

[15] The Officer noted that the younger brother indicated that there was no one else to assist him and that his condition had significantly improved since the Applicant had moved in with him. Further, that the Applicant's submissions also included information concerning a shortage of homecare in Ontario. However, that no information had been submitted to support that such care had been denied to Thayaparan or that his elder brother or other family were unwilling or unable to care of him. The Officer also questioned the extent of care actually required, given the Applicant's employment in two jobs and his other activities.

[16] As to the Applicant's submission that he sends money to his mother in Sri Lanka, the Officer found that the Applicant had not provided evidence to support that his other siblings do not or were unwilling to provide such support or that the funds are essential to his mother's well being.

[17] The Officer concluded that the evidence did not support that the Applicant has become established in Canada to the extent that severing his ties here amount to unusual and undeserved or disproportionate hardship.

Issues

[18] The Applicant had initially submitted that the Officer had erred in law in misinterpreting the scope of the statutory discretion which she was authorized to exercise. Specifically, that the Officer required the unusual, undeserved or disproportionate hardship test to be personalized and to rise to the level of persecution, the "personalization" being a carry over from s. 97 of the IRPA that is not supported by the wording of s. 25. Further, that H&C grounds were required to be more broadly applied (*Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1).

[19] However, given the recent decision of the Federal Court of Appeal in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy*], at the hearing before me the Applicant's counsel advised that the only issue now before the Court pertains to the reasonableness of the decision, including the sufficiency of the Officer's reasons.

[20] Accordingly, the sole issue in this matter is whether the Officer's decision was reasonable.

Standard of Review

[21] The Federal Court of Appeal has recently confirmed that a standard of reasonableness applies when reviewing an officer's decision under s. 25(1) of the IRPA. This includes the Court's review of the Officer's interpretation of s. 25 and the test or legal principles to be applied in making H&C decisions (*Kanthasamy*, above, at para 30; *Lemus v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 at para 18; *Charles v Canada (Minister of Citizenship and Immigration)*, 2014 FC 772 at para 22 [*Charles*]).

[22] A decision-maker is not required in its reasons to make an explicit finding on each constituent element leading to its final conclusion. Perfection is not the standard. Rather, the reasons are adequate if, when read in light of the evidence before the tribunal and the nature of its statutory task, they allow the reviewing court to understand why the tribunal made its decision and to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16 and 18 [*NL Nurses*]). Sufficiency of reasons is no longer a stand alone ground for review but may be subsumed within a reasonableness analysis (*NL Nurses*, above, at paras 14, 22).

[23] Accordingly, in this case the standard of review is reasonableness.

Parties' Submissions

The Applicant's Position

[24] The Applicant submits that the Officer, who also wrote the PRRA decision concerning the Applicant which was issued on the same day as the H&C decision, carried over and applied s. 97 restrictions to the hardship analysis in her H&C decision. For example, the Officer accepted that there are continuing issues with discrimination and human rights violations perpetrated against members of the Tamil community in Sri Lanka, but found that, aside from his Tamil ethnicity, the Applicant does not fit the profile of persons at particular risk of torture and unlawful killings detailed in the US Department of State Country Reports on Human Rights Practices 2012, Sri Lanka (USDOS Report). This at least demonstrates an improper restriction of the hardship assessment where evidence of discrimination based on ethnicity is highly relevant. The improper importation of a s. 97 test or analysis is also illustrated by the Officer's cutting and pasting of large sections of her PRRA decision into her H&C hardship analysis including her assessment of the statutory declaration and a PRRA decision that was submitted in the Applicant's PRRA but was not submitted with his H&C application. The Applicant submits that the Officer's reasons are unclear and demonstrate that she did not appreciate that her analysis should have focused on hardship, rather than risk, and that she failed to properly consider the discrimination that the Applicant would face if returned to Sri Lanka.

[25] The Applicant submits that the Officer failed to address or improperly discounted the evidence before her and the Applicant's particular circumstances, which are that he is a Tamil born in the north of Sri Lanka who has spent the majority of his life outside Sri Lanka, causing

him to be particularly vulnerable and leading to the perception that he is wealthy and therefore a prime target for extortion.

The Respondent's Position

[26] The Respondent submits that although the Applicant disagrees with the outcome of his H&C application, he has failed to demonstrate a reviewable error. The Applicant failed to provide sufficient evidence to support his allegations of personal hardship. The Officer reviewed and considered all of the evidence before her and reasonably concluded that sufficient H&C grounds did not exist that would warrant the granting of this extraordinary remedy. Accordingly, deference is owed to the Officer's decision.

Analysis

[27] An appropriate starting point for this decision is the Federal Court of Appeal's recent decision in *Kanthasamy*, above.

[28] There the applicant was a 17 year old Tamil male from the north of Sri Lanka who came to Canada and claimed refugee status. The RPD denied the claim, finding that the Sri Lankan authorities had taken measures to improve the situation for Tamils and that the applicant would not be at risk upon his return to Sri Lanka. This Court denied the applicant's application for leave to judicially review that decision. The applicant then made an H&C application pursuant to s. 25(1) of the IRPA, which was denied. That decision was upheld by this Court, which also certified the following question: What is the nature of the risk, if any, to be assessed with respect

to humanitarian and compassionate considerations under s. 25 of the IRPA, as amended by the *Balanced Refugee Reform Act*?

[29] Writing for the Federal Court of Appeal, Justice Stratas stated that in considering the applicant's s. 25(1) application, the Minister had to have regard to the instructions given by the recently added s. 25(1.3). This states that in examining an H&C application, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under s. 96, or a person in need of protection under s. 97(1) of the IRPA but must consider elements related to the hardships that affect the foreign national.

[30] Justice Stratas acknowledged that s. 25(1) is an exceptional provision and has repeatedly been interpreted as requiring proof that the applicant will personally suffer unusual and undeserved, or disproportionate hardship arising from the requirement to seek a visa from outside Canada as is the normal process under the IRPA (*Kanthasamy*, above, at para 41; *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11). Further, that the unusual and undeserved, or disproportionate hardship must affect the applicant personally and directly and the applicant must show a link between the evidence of hardship and his or her individual circumstances (*Kanthasamy*, above, at para 48; *Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 at para 1). As to the meaning of the unusual and underserved, or disproportionate hardship test, the jurisprudence shows that the factors set out in section 5.11 of the Citizenship and Immigration (Canada) processing manual, *Inland Processing Manual, Chapter IP5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (CIC Manual) are a reasonable enumeration of the types of matters that an Officer must

consider when assessing an H&C application. The CIC Manual states that the test is whether it would be a hardship for the applicant to leave Canada in order to apply for permanent residence abroad, that hardship is assessed by weighing together all of the H&C considerations submitted by the applicant and that such requests may be based on any number of factors including: establishment and ties to Canada; factors in their country of origin (including but not limited to medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships not described in ss. 96 and 97 of the IRPA); consequences of the separation of relatives, etc. Justice Stratas cautioned, however, that this is not a closed list (*Kanthasamy*, above, at paras 51-55):

> [55] Officers must always scrutinize the particular facts before them and consider whether the applicant is personally and directly suffering unusual and undeserved, or disproportionate hardship, regardless of whether the type of hardship is specifically mentioned in the processing manual.

[31] As to the role of s. 25(1.3), Justice Stratas stated that s. 25(1) applicants have not met the thresholds for relief under s. 96 or s. 97 in that they have not met the risk factors under those sections, being the risk of persecution, torture, or cruel and unusual treatment or punishment upon removal. Subsection 25(1.3) must not duplicate the s. 96 and s. 97 assessment of risk factors but this does not mean that the facts that were adduced in those proceedings are not relevant to a H&C application. While those facts may not have provided relief under s. 96 or s. 97, they may still form a part of the "constellation of facts" that give rise to H&C grounds warranting relief under s. 25(1). Evidence adduced in previous proceedings under s. 96 and s. 97, together with whatever other evidence the applicant may wish to adduce, is admissible in a s. 25(1) proceeding: "Officers, however, must assess that evidence through the lens of the

subsection 25(1) test – is the applicant personally and directly suffering unusual and undeserved, or disproportional hardship?" (*Kanthasamy*, above, at paras 66-75):

> [74] The role of the officer, then, is to consider the facts presented through a lens of hardship, not to undertake another section 96 or 97 risk assessment or substitute his decision for the Refugee Protection Division's findings under sections 96 and 97. His task is not to perform the same assessment of risk as is conducted under sections 96 and 97. The officer is to look at facts relating to hardship, not factors relating to risk.
>
> [75] Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3) but the facts underlying those factors may nevertheless be relevant insofar as they relate to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.

[32] Justice Stratas also agreed with Justice Hughes' comments in *Caliskan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190 at para 22 that in interpreting s. 25 of the IRPA, the Courts are to move away from language and "…jurisprudence respecting personalized and generalized risk and focus upon the hardship to the individual. Included within the broader exercise in considering such hardship is consideration of "adverse country conditions that have a direct negative impact on the applicant"" (*Kanthasamy*, above, at para 76).

[33] Applying that backdrop to the matter before me, it is of note that in her decision the Officer stated that the Applicant's H&C application had been assessed on the basis of unusual and underserved, or disproportional hardship. Further, she stated that one of the factors to be considered in the H&C application was hardship relating to discrimination and/or adverse country conditions in Sri Lanka. She then described the RPD's decision, including its finding

that the determinative issue was credibility, including a lack of subjective fear. She noted that despite the RPD's refusal, the Applicant continues to fear returning to Sri Lanka for the same reasons as indicated at the time of his refugee claim, being that he fears he will be detained and harmed upon return. The Officer then states that:

> The applicant and his counsel have provided country condition reports advising the generalized country conditions in Sri Lanka in support of his stated hardship relating to discrimination and/or adverse country conditions in returning to Sri Lanka. I have read and considered these documents in conducting this assessment and find that they do not support that the applicant is of such a profile that he would face a hardship in returning to Sri Lanka.

[34] The Officer stated that she had considered the most current, publicly available documentary evidence regarding country conditions and human rights issues in Sri Lanka and quoted from the USDOS Report. She then concluded that:

> While the US report cites continuing issues with discrimination and human rights violations perpetrated against members of the Tamil community in Sri Lanka, it is noted that the applicant has spent a small portion of his life residing in Sri Lanka. The majority of his life was spent residing in India and the United Kingdom prior to his arrival in Canada, and absent evidence to the contrary, he has been able to reside with his family in Sri Lanka quite freely in the past. I find that the scenario asserted by the applicant involving the hardship involved in the applicant's return to Sri Lanka, as it was previously determined not credible by the RPD panel, and unaccompanied by objective corroborative evidence, does not overcome the credibility concerns of the RPD. Aside from his Tamil ethnicity, the evidence before me does not support that he is of such a profile in Sri Lanka that he faces the conditions noted above.

[35] The Applicant raises several concerns about this statement and interprets the Officer's last sentence as a finding that, apart from his Tamil ethnicity, the Applicant does not fit one of the profiles at particular risk of torture and unlawful killings as detailed in the USDOS Report.

The Applicant asserts that this demonstrates that the Officer imputed s. 96 and s. 97 restrictions to the hardship analysis. Further, that the imputed s. 97 restrictions included a requirement that the evidence be personalized, and that the hardship rise to the level of persecution or risk to life or cruel and unusual treatment or torture.

[36] As is clear from *Kanthasamy*, above, the Officer did not err by seeking evidence of a link between the adverse country conditions and the Applicant, or of a personal and direct negative impact. Further, in my view, the Officer's statement does not necessarily import the requirement that the hardship rise to the level of persecution or risk to life, torture, or cruel and unusual treatment or punishment. This would have amounted to the error s. 23(1.3) was designed to avoid. Rather, by referring to the "conditions noted above," the Officer may have been referring to any or all of the human rights problems listed in the USDOS Report such as attacks on and harassment of activists, LTTE sympathizers and journalists, torture and unlawful killings, arbitrary arrest and detention, denial of fair public trials, restrictions on freedom of speech, press, assembly, association and movement, as well as discrimination against the disabled, those of ethnic Tamil minority, and based on sexual orientation or HIV/AIDS status. Thus, this statement does not necessarily demonstrate that the Officer was considering only the s. 96 and s. 97 factors of torture and unlawful killings in the H&C analysis.

[37] However, it also is not clear that the Officer was considering the underlying facts in relation to hardship rather than risk.

[38] On reading the H&C decision as a whole, it appears that the RPD's credibility findings, when viewed in combination with the excerpts that were cut and paste from the Officer's PRRA decision, were determinative for the Officer. The RPD's credibility findings were largely concerned with the Applicant's assertions that he had been interrogated on suspicion of engaging in activities with the LTTE while abroad and the RPD's finding that the Applicant was not at risk of persecution or risk to life or cruel or unusual treatment or punishment, or danger of torture as a result of such suspicion, as well as his lack of subjective fear, in the context of a s. 96 and s. 97 analysis. The RPD found that the Applicant's profile was not one that would attract undue attention or reprisal if he returned to Sri Lanka. Yet, instead of looking at whether the adverse country conditions in the documentation submitted in the H&C application would result in an unusual and undeserved or disproportionate hardship for him should he return to Sri Lanka (*Vuktilaj v Canada (Citizenship and Immigration*), 2014 FC 188 at para 36), the Officer appears to rely primarily on the credibility findings of the RPD in reaching her conclusion that the Applicant would not face any of the conditions in the USDOS Report.

[39] As to the Applicant's profile, it may be that the Officer was suggesting that because the evidence does not support that the Applicant is an activist, LTTE sympathizer or journalist, he does not fit the profile described in the quoted extract from the USDOS Report as being at risk of attacks and harassment. Alternatively, the Officer may have been relying on the Applicant's profile as depicted by the RPD in its decision. In any event, this is unclear and does not address the question of discrimination based on his Tamil ethnicity if he were to return to Sri Lanka. Further, while the Officer need not have accepted the Applicant's depiction of his profile, given that the RPD had not accepted that he was or would be suspected of LTTE association, she was

obliged to clearly identify what she determined his profile to be for the purposes of the H&C application and to consider whether as a young Tamil male from the north, in his particular circumstances, he would personally suffer discrimination amounting to unusual and undeserved, or disproportionate hardship.

[40] In other words, despite her words to the contrary, the Officer's focus was on the RPD's credibility findings in her analysis of the adverse country condition evidence, which findings were primarily concerned with risk, and she did not assess the evidence through the lens of the s. 25(1) test, being whether the Applicant would personally and directly suffer unusual and undeserved, or disproportionate hardship if returned to Sri Lanka.

[41] In this regard it is also of note that the Officer referenced the statutory declaration of Patricia Watts, law clerk and social worker in the office of counsel for the Applicant. However, the declaration was filed in the PRRA application but not in support of the H&C application. The Officer discounted, in part, the declaration as unsupported by objective evidence to indicate that the Applicant is of the same profile as individuals described in the declaration. Similarly, she referred to and discounted a positive PRRA decision involving another Sri Lankan national on the basis that it could not be determined that the Applicant was of the same profile as the person referred to in that PRRA decision. That PPRA decision was also filed by the Applicant only in the Applicant's PRRA application. While it may be that the Officer simply made a cut and paste error by transposing this section of her PRRA decision into her H&C decision, it adds further uncertainty to her consideration of the Applicant's profile in the context of the H&C decision.

[42] Similarly, it is unclear how the fact that the Applicant has spent only a small portion of his life residing in Sri Lanka is relevant to any discrimination based on ethnicity that he might face if returned to Sri Lanka.

[43] In short, the Officer's reasons do not permit an understanding of how she reached her conclusion that the adverse country conditions, in particular the existence of discrimination against Tamils, did not meet the hardship test. I am unable to determine whether or not the decision is outside the range of defensible outcomes, therefore I find it to be unreasonable.

[44] Given my above finding it is not necessary for me to address the Officer's establishment analysis. However, I will note one issue, being the Officer's treatment of the evidence concerning the care the Applicant provides to his brother.

[45] In this regard the Applicant submits that the Officer discounted the value of the homecare the Applicant provides for his brother, Thayaparan, as described by Thayaparan in a letter dated January 12, 2013. The Applicant submits that the Officer found that there was no evidence that Thayaparan had been denied care by the Ontario Disability Support Program, despite evidence of the failure of the public system in this regard and despite the fact that no publicly funded option could be equivalent to daily care by a family member. The Applicant further submits that the Officer also found that their older brother in Canada could assist, despite evidence establishing that he and Thayaparan are not in contact and that the older brother is often out of town working as a truck driver. Finally, the Officer found that because the Applicant worked two jobs and volunteered, the level of care he provided for his brother was not firmly established. The

Applicant submits that this is a veiled credibility finding and that if the Officer had concerns about the Applicant's credibility, she should have convened an interview with him.

[46] The Respondent points out that the Officer noted the submissions about the shortage of homecare and the needs of the Applicant's brother but found an absence of evidence that public care has been denied and an absence of evidence regarding the extent of care the Applicant is able to offer his brother while working two jobs. The Applicant failed to meet his burden of submitting objective corroborating evidence to establish the hardship alleged: he did not provide documentation to establish that public homecare was requested and denied; that family members other than the older brother cannot take care of Thayaparan; or, the actual extent of care required by Thayaparan.

[47] In my view, it is difficult to reconcile the evidence that was before the Officer with her findings. The Officer found that no information had been provided that their older brother in Canada or their family members were unable or unwilling to care for Thayaparan. However, there was evidence that the older brother is not in close contact with Thayaparan, that he works as a truck driver and is usually out of town (Applicant's Affidavit, Certified Tribunal Record (CTR), p 66 at para 10; Letter from Thayaparan, CTR, p 26). The Decision itself also indicates that no other family members reside in Canada (H&C Decision, CTR, p. 5).

[48] The Officer also found that, given the Applicant's employment with two jobs and his community involvement, the Applicant had not firmly established the extent of care actually required by Thayaparan. However, the Officer had a letter from Thayaparan stating that he was

living alone and in a miserable state with nobody to help him before the Applicant began to assist him, later moving in with him. In the letter, Thayaparan listed the tasks the Applicant performs for him and expressed anxiety about the Applicant leaving the country as he would be left alone and would fall back into the state he was in before (CTR, p 26). In addition, the Officer had a doctor's note confirming Thayaparan's medical condition and stating that the Applicant's help is very necessary for Thayaparan at this time (CTR, p 28).

[49] The Officer found that no information had been provided to support that public homecare had been denied to Thayaparan. While this is true, the Officer had before her evidence that Thayaparan could not work and receives ODSP financial assistance, as well as the Ontario Health Coalition report entitled "Still Waiting: An Assessment of Ontario's Home Care System After Two Decades of Restructuring", dated April 4, 2011, which states that 10,000 people in Ontario are currently on waitlists for home care (CTR, pp 313, 323). The report brings into question the quality and timeliness of public care available to replace the care that the Applicant provides (CTR, pp 329-330).

[50] Finally, I would note that in *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 899, the officer noted that the applicants had become reasonably established in Canada and acknowledged the support they offered to certain members of the community and two children with special needs. However, she considered that the support could be otherwise provided. Justice Noël held that whether or not someone else could equally fulfill the role was not the proper question:

> [16] I think, in light of the above IP-5 Guidelines and the decisions in *Jamrich* and *Raudales*, the officer did not reasonably

> assess the best interests of the children or the degree of establishment the Applicants have achieved in the community. For instance, the officer stated that she was "not satisfied that there is no one else available for the families that have expressed need for the applicants to remain in Canada" (see page 1 of her decision). This is not the proper test. The question is not whether someone else would equally be able to fulfill the role should the Applicants be removed from Canada, but whether their removal will cause undue hardship. This was not properly assessed by the officer.

[51] I also agree that the Officer's finding that the extent of care actually required by Thayaparan was not firmly established, given the Applicant's employment and community involvement, appears to be a credibility finding.

[52] For these reasons, it is my view that the Officer's conclusion on establishment in Canada was unreasonable because she did not properly consider the evidence of the hardship that would be caused to the Applicant's brother, Thayaparan, if the Applicant were to return to Sri Lanka.

Certified Question

[53] The Applicant submits that the *Kanthasamy* decision has application to the issue of the scope of the Officer's H&C discretion which is also at issue in this matter. As leave to appeal that decision has been sought, but the Supreme Court of Canada has not yet made a leave determination, the Applicant submits that my decision in this matter should be reserved until the Supreme Court of Canada finally decides the *Kanthasamy* matter, or, that I certify the following questions:

> Is the appropriate standard to be applied under ss. 25(1) of the IRPA the "unusual and undeserved, or disproportionate hardship" test?

> Is it appropriate to require that a risk of discrimination or other such treatment, falling short of persecution as set out in s. 96, or torture and other forms of cruel treatment as set out in s. 97 of the IRPA, be personalized?

[54] The Respondent opposes this request.

[55] Given my decision that the Officer's decision was not reasonable, the Applicant's request may no longer be relevant. In any event, it is my view that it would be inappropriate to reserve a decision in one matter simply because leave to the Supreme Court of Canada is being sought in an unrelated matter. Such a delay is not in the public interest (see *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 19 at para 11). Further, even if I had decided that the decision was reasonable, this would only have resulted in the Applicant having to seek a visa from outside Canada, as is the normal procedure. Finally, in my view, the proposed questions were fully addressed by the Federal Court of Appeal in *Kanthasamy*, above.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the matter will be remitted back for re-determination by a different officer;

2. There shall be no order as to costs; and

3. No question will be certified.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1389-14
STYLE OF CAUSE:	PRATHEEPAN SOMASUNDARAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 4, 2014
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	DECEMBER 3, 2014

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