Federal Court  Cour fédérale

Date: 20181108

Docket: IMM-1170-18

Citation: 2018 FC 1131

Ottawa, Ontario, November 8, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

BRYAN ALBERTO DISCUA MELENDEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Bryan Alberto Discua Melendez, (Mr. Melendez) seeks judicial review of decision of the delegate of the Minister of Public Safety and Emergency Preparedness [the Minister's Delegate], dated February 23, 2018, to refer Mr. Melendez to an admissibility hearing pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, the Application for Judicial Review is dismissed. In brief, the Minister's Delegate did not ignore any evidence and took into account the relevant Humanitarian and Compassionate [H&C] factors, within the scope of his limited discretion to do so, to reasonably decide to refer Mr. Melendez to an admissibility hearing.

I. Background

[3] Mr. Melendez arrived in Canada in 2006 from Honduras at the age of ten. He is a permanent resident of Canada.

[4] On April 15, 2015, Mr. Melendez was convicted of assault with a weapon under paragraph 267(a) of the *Criminal Code,* RSC 1985, c C-46. The offence carries a maximum term of imprisonment of 10 years. Mr. Melendez received a conditional sentence of 15 months plus 12 months of probation.

[5] A Canadian Border Services Agency [CBSA] officer prepared a report under subsection 44(1), alleging that Mr. Melendez is inadmissible to Canada on the grounds of serious criminality, pursuant to paragraph 36(1)(a) of the Act. A Minister's Delegate then referred Mr. Melendez to an admissibility hearing before the Immigration Division [ID] of the Immigration and Refugee Board [IRB]. In March 2016, Mr. Melendez requested that the CBSA withdraw the referral and issue a warning letter instead. In April 2016, a CBSA officer considered Mr. Melendez's updated submissions and again recommended that he be referred to an admissibility hearing. The Minister's Delegate accepted this recommendation.

[6] Mr. Melendez sought judicial review of the April 2016 decision to refer him to an admissibility hearing.

[7] In *Melendez v Canada (Public Safety and Emergency Preparedness*), 2016 FC 1363, [2016] FCJ No 1434 (QL) [*Melendez 1*], Justice Keith Boswell granted the judicial review and ordered that the decision to refer Mr. Melendez to an admissibility hearing be re-determined. Justice Boswell found that the decision was not reasonable because the officer's reasons and the Minister's Delegate's concurrence with those reasons lacked any analysis or even mention of the H&C factors raised. Mr. Melendez had noted his role in supporting his younger sisters and his soon to be born child.

[8] Mr. Melendez's daughter, Elena, was born in August 2016 in Canada and is a Canadian citizen.

[9] Mr. Melendez was subsequently charged and ultimately convicted of a further charge of assault. The incident involved violence in the presence of children residing at the same household. As a result of the incident, Mr. Melendez's access to Elena was restricted and Elena's mother, Ivana Santalucia, was required to live with Elena elsewhere, in accordance with a safety plan developed by the British Columbia Ministry of Children and Family Development.

[10] On April 12, 2017 Mr. Melendez's counsel provided updated submissions and supporting documents to the CBSA for the purpose of the redetermination of the request to withdraw the referral to an admissibility hearing. The submissions focussed on the best interests of the child,

Elena. The supporting documents included academic articles about the benefits of a father's involvement on a child's development and future opportunities.

[11] The supporting documents also included a note from Ivana Santalucia, Elena's mother, stating that she wants Mr. Melendez to be part of Elena's life and that she needs his support. She acknowledged that she had signed a safety plan which prevents Mr. Melendez from seeing Elena, but that she wants this to change.

II. The Decision under Review

[12] A different Minister's Delegate considered Mr. Melendez's updated submissions and rendered a decision on February 23, 2018. The Minister's Delegate again refused to issue a warning letter and referred Mr. Melendez to an admissibility hearing pursuant to subsection 44(2).

[13] The Minister's Delegate's decision is concise. The Minister's Delegate states that he reviewed and considered the submissions and the documents, the case history and the best interests of the children, noting the safety plan that restricts Mr. Melendez's access to Elena and requires that Ivana Santalucia live with Elena at a safe house. The Minister's Delegate states that he considered all of the factors in Enforcement Manual 6 [ENF 6], the operational manual setting out guidelines for the determination of a section 44 report. The Minister's Delegate lists the factors considered, including: Mr. Melendez's age when he arrived in Canada; that he has lived in Canada ever since; his family support and responsibilities; his degree of establishment; his criminal history and rehabilitative efforts; his history of non-compliance and current attitude;

and, the conditions in Honduras. The Minister's Delegate explains that he weighed the H&C considerations and Mr. Melendez's criminality; in particular, Mr. Melendez's subsequent assault charge and conviction in August 2017, the conditions imposed, and the fact that the assault took place in front of children residing at the same household.

[14] The Minister's Delegate concludes:

> After careful consideration of all of the above factors and all information regarding this case, emphasizing the best interests of the child in light of your most recent submissions, I have decided that there are insufficient humanitarian and compassionate considerations present in you client's case to overcome the serious nature of the crime committed.

III. The Issues and Standard of Review

[15] Mr. Melendez submits that the decision of the Minister's Delegate is not reasonable.

[16] Mr. Melendez argues that the Minister's Delegate failed to heed the guidance of the Court in *Melendez 1* and, more particularly, failed to consider the best interests of Elena, in accordance with the binding jurisprudence.

[17] Mr. Melendez also argues that the Minister's Delegate ignored the evidence of Ivana Santalucia, Elena's mother, which contradicts the Minister's Delegate's finding.

[18] The parties agree that a decision to refer a permanent resident to an admissibility hearing pursuant to subsection 44(2) of the Act is reviewed on the reasonableness standard (*Melendez 1*

at para 11*; Richter v Canada (Citizenship and Immigration)*, 2008 FC 806 at para 9, [2008] FCJ No 1033 (QL), aff'd 2009 FCA 73).

[19] Where the reasonableness standard applies, the Court will not intervene unless the decision is not intelligible, transparent, and justifiable, and unless the outcome falls outside the range of possible outcomes defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190).

[20] The inadequacy or briefness of reasons is not a stand-alone basis for judicial review. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at paras 14-15, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that the reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome."

IV. The Applicant's Submissions

[21] Mr. Melendez submits that section 44 of the *IRPA* provides officers and the Minister's Delegates with the discretion to consider H&C factors in determining whether to write a section 44 report or to refer the report to the ID, respectively. He submits that the only opportunity for H&C factors to be considered is at the section 44 report and referral stage because there is no jurisdiction for H&C factors to be considered at an admissibility hearing.

[22] Mr. Melendez argues that decisions pursuant to subsection 44(2) must identify and consider the best interests of affected children. He relies on the Supreme Court's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*] for the proposition that the best interests of the child are a primary consideration in all actions regarding children. Mr. Melendez also points to the jurisprudence regarding the need to be alert, alive and sensitive to the best interests of the children who are affected by a decision (including *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 32, [2003] 2 FC 555; *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 9-12, 323 FTR 181). He submits that the guidance of the Supreme Court of Canada in *Kanthasamy* should not be limited to subsection 25(1) applications and suggests that until the Supreme Court of Canada addresses the scope of its decision, this should be the approach.

[23] Mr. Melendez submits that the Minister's Delegate's statement that he had considered the best interests of the children, without identifying the interests and weighing them, demonstrates that he failed to adequately consider Elena's best interests, which were highlighted in his submissions and supporting evidence. He argues that his referral to the ID is not in Elena's best interests.

[24] Mr. Melendez further submits that the Minister's Delegate erred by ignoring evidence. He relies on the principle in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17, [1998] FCJ No 1425 (QL)[*Cepeda-Gutierrez*] that important evidence must be analyzed and the failure to mention important evidence signals that it has been ignored. Mr. Melendez submits that Ivana Santalucia's note, which states that he is

undergoing counselling, that she wants to change the safety plan to permit him to see their child, that she relies on him for support, and that their child would not be able to visit him in Honduras, was not mentioned. He adds that this evidence contradicts the Minister's Delegate's finding.

V. The Respondent's Submissions

[25] The Respondent submits that the Minister's Delegate had limited discretion not to refer Mr. Melendez to an admissibility hearing. The Respondent submits that the Minister's Delegate reasonably declined to exercise this limited discretion. The Minister's Delegate considered the material facts and all of Mr. Melendez's submissions regarding the H&C considerations but reasonably concluded that the H&C considerations could not overcome the seriousness of the offences.

[26] The Respondent submits that the Minister's Delegate was not required to conduct a full H&C analysis. The Respondent adds that even if *Kanthasamy* applied, the Minister's Delegate's consideration of the best interests of Elena respected the Supreme Court of Canada's decision. The Respondent notes that in *Kanthasamy*, the Court acknowledged that hardship may result from the operation of the Act and that H&C relief is exceptional.

VI. The Decision is Reasonable

A. *The Jurisprudence*

[27] Whether the Minister's Delegate has any discretion to not refer an individual to an admissibility hearing due to H&C factors—and if so, the extent of such discretion—has been the

subject of some divergence in the jurisprudence. In the present case, the Minister's Delegate's approach reflects the prevailing jurisprudence that the discretion is limited.

[28] In *Melendez 1*, at para 34, Justice Boswell summarized the relevant jurisprudence and set out several conclusions, including that consideration of the H&C factors presented must be reasonable in the circumstances of the case and that where the Minister's Delegate rejects H&C factors, brief reasons should be provided. Justice Boswell also clarified that the Minister's Delegate's consideration of H&C factors need not be as extensive or comparable to an H&C analysis pursuant to subsection 25(1) of the Act (i.e., where an H&C application is made to overcome a requirement of the Act).

[29] In *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, [2017] 3 FCR 492 [*Sharma*], the Federal Court of Appeal commented on the scope of discretion pursuant to section 44, but did not make a conclusive determination as it would not have affected the outcome of that case. Justice de Montigny's comments in *obiter* reflect the prevailing view that the Minister's Delegate has limited discretion to consider H&C factors where the grounds of inadmissibility are serious criminality, even with respect to permanent residents. Justice de Montigny noted that the Minister's Delegate's focus is on security and not on H&C considerations which can be addressed in other applications. Justice de Montigny explained:

> [23] . . . At the end of the day, however, the officers and the Minister or his delegate must always be mindful of Parliament's intention to make security a top priority (see paragraphs 3(1)(*h*) and (*i*) of IRPA). The following rationale offered by this Court in *Cha* in support of a limited discretion would appear to apply with equal force to both foreign nationals and permanent residents:
>
> > [37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much

> effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(a) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25(H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act . . .

[30] More recently, in *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 at para 63, [2018] FCJ No 423 [*McAlpin*], the Chief Justice considered the conclusions reached in *Melendez 1* and the Court of Appeal's *obiter* in *Sharma*. The Chief Justice noted at para 63 that the *obiter* in *Sharma* "ought to prevail over any inconsistent jurisprudence of this Court."

[31] In *McAlpin*, the Chief Justice elaborated on the summary and principles set out in *Melendez 1* regarding the scope of the decision maker's discretion pursuant to subsections 44(1) and (2) in the context of allegations of criminality and serious criminality against permanent residents. The Chief Justice stated:

> [70] Maintaining the framework adopted by Justice Boswell, I would summarize the jurisprudence as follows:
>
> 1. In cases involving allegations of criminality or serious criminality on the part of permanent residents, there is conflicting case law as to whether immigration officers and ministerial delegates have any discretion under subss. 44(1) and (2) of the IRPA, respectively, beyond that of simply ascertaining and reporting the basic facts which underlie an

> opinion that a permanent resident in Canada is inadmissible, or that an officer's report is well founded.
>
> 2. In any event, any discretion to consider H&C factors under subss. 44(1) and (2) in such cases is very limited, if it exists at all.
>
> 3. Although an officer or a ministerial delegate may have very limited discretion to consider H&C factors in such cases, there is no general obligation or duty to do so.
>
> 4. However, where H&C factors are considered by an officer or by a ministerial delegate in explaining the rationale for a decision that is made under subs. 44(1) or (2), the assessment of those factors should be reasonable, having regard to the circumstances of the case. Where those factors are rejected, an explanation should be provided, even if only very brief in nature.
>
> 5. In this particular context, a reasonable assessment is one that at least takes account of the most important H&C factors that have been identified by the person who is alleged to be inadmissible, even only by listing those factors, to demonstrate that they were considered. A failure to mention any important H&C factors that have been identified, when purporting to take account of the H&C factors that have been raised, may well be unreasonable.

[32] The Federal Court of Appeal has clarified that the principles set out in *Kanthasamy* apply only to H&C applications pursuant to subsection 25(1). In *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, at para 74, [2018] 2 FCR 229 [*Lewis*], Justice Gleason stated:

> In light of the foregoing, I disagree with Mr. Lewis and the intervener that *Kanthasamy* requires that a full-blown best interests of the child analysis be undertaken before a child's parent(s) may be removed from Canada or that such children's best interests must outweigh other considerations in the analysis. <u>In my view, the holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the IRPA and, even there, does not mandate that the affected children's best interests must necessarily be the priority consideration.</u>
>
> [My emphasis]

[33] In *Lewis*, Justice Gleason noted at para 73, that in *Kanthasamy*, the Supreme Court of Canada reiterated the principle in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75, 174 DLR (4th) 193, that the best interests of the child are an important factor, but that does not mean that they will always outweigh other considerations.

[34] The Federal Court of Appeal provided additional guidance regarding the application of section 25 in *Canada (Minister of Citizenship and Immigration) v Bermudez*, 2016 FCA 131, [2017] 1 FCR 128, and explained:

> [38] Section 25 of the IRPA includes specific delegations of the Minister's authority to a limited class of individuals to exercise H&C discretion under clearly and expressly defined circumstances. It follows that non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status (*Canada (Minister of Citizenship and Immigration) v. Varga*, 2006 FCA 394, [2006] F.C.J. No. 1828 (QL), at para. 13; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at para 47). In other words, section 25 of the IRPA "was not intended to be an alternative immigration scheme" (*Kanthasamy*, at paras. 23 and 85).
>
> [My emphasis]

B. *The Minister's Delegate considered the relevant H&C factors within his limited discretion to do so*

[35] In the present case, the Minister's Delegate was faced with the request of Mr. Melendez, a permanent resident who is alleged to be inadmissible for serious criminality, not to refer him to an admissibility hearing. To the extent that the Minister's Delegate had the discretion to consider H&C factors, he reasonably assessed the relevant factors having regard to the overall

circumstances. It must be noted that the consideration of H&C factors in this context is not the same as a full H&C application pursuant to subsection 25(1). Mr. Melendez's reliance on the jurisprudence that has interpreted subsection 25(1), in particular, *Kanthasamy*, is misplaced as this jurisprudence does not govern the consideration of H&C factors in other contexts (*Lewis*). This is the current state of the law.

[36] The recent jurisprudence clarifies that an H&C analysis is not required in every immigration proceeding and that the best interests of the child analysis required for H&C applications pursuant to subsection 25(1) does not govern the more limited H&C analysis that may arise in other contexts.

[37] The Minister's Delegate's consideration of the H&C factors reflects the guidance provided in *Melendez 1* and elaborated on in *McAlpin*. The Minister's Delegate noted that he considered all submissions, the documents on file, the case history, and the best interests of the child, including the incident of violence in front of children, the safety plan restricting Mr. Melendez's access to Elena, and the arrangements for Elena to live at a safe house with her mother. The Minister's Delegate noted the factors that he had weighed and concluded that, after considering all the factors and information and "emphasizing the best interest of the child in light of your written submissions", the H&C factors were insufficient to overcome the serious nature of the crime committed.

[38] Although the Minister's Delegate's decision does not refer to the academic research provided by the Applicant, there is no obligation on a decision-maker to refer to each piece of

evidence. Moreover, as the Minister's Delegate's function is not to conduct a "full-blown" H&C application, but to reasonably assess the factors submitted, there was no requirement for an assessment of the academic research. The most important H&C considerations, the best interests of Elena, were addressed.

[39] Contrary to Mr. Melendez's argument that the Minister's Delegate's redetermination decision made the same errors as noted by Justice Boswell in *Melendez 1*, the Minister's Delegate's reasons, although concise, conveyed that all the submissions and relevant factors were considered and weighed and that the best interests of Elena were emphasized, but did not overcome the seriousness of the offence. The decision explains the factors considered and the balancing undertaken to the extent necessary to understand how the decision was made and to support that it is reasonable.

[40] Mr. Melendez also argued that *Kanthasamy* should nonetheless apply until the Supreme Court of Canada has an opportunity to clarify its scope. As noted above, I am guided by the Federal Court of Appeal decisions in *Lewis* and *Bermudez* which explain that the principles in *Kanthasamy* apply in the context of H&C applications pursuant to subsection 25(1) and that H&C considerations are not imported into every immigration related application. I would add that in *Kanthasamy,* the Supreme Court of Canada did not go so far as to find that the best interests of a child should trump other relevant considerations.

C. *The Minister's Delegate did not ignore the evidence*

[41] The Minister's Delegate did not err by not specifically mentioning the note from Ivana Santalucia.

[42] As noted above, decision-makers need not refer to every piece of evidence. However, in accordance with the principle in *Cepeda-Gutierrez*, at para 17, "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"." In the present case, the Minister's Delegate did not fun afoul of this principle.

[43] The note is not the type of "important" evidence contemplated in *Cepeda-Gutierrez*, nor did the information in the note contradict other information relied on by the Minister's Delegate to support his findings. The content of the note was, to a great extent, included in Mr. Melendez's submissions to the Minister's Delegate. The note did not elaborate on the best interests of Elena already advanced; rather, it merely expressed Ivana Santalucia's view and wishes. Moreover, the note set out the same information that the Minister's Delegate took into account when applying the factors from ENF 6 and the best interests of the child. Ivana Santalucia states that she is currently staying at a safe house, that a safety plan prohibits Mr. Melendez from seeing Elena, that Mr. Melendez is seeking counselling to improve himself and his career opportunities and that she relies on him for support. These considerations were taken into account in the decision.

[44] In addition, the Minister's Delegate clearly stated that he had considered all the submissions. Within his limited discretion to consider H&C factors, he was not required to comment on every document submitted. As noted in *McAlpin*, even listing the factors is sufficient. In the present case, the Minister's Delegate did more than simply list the factors. The Minister's Delegate's reasons acknowledge all the factors considered and provide a rationale for finding that the H&C factors did not overcome the seriousness of the crime.

[45] As the Respondent notes, where an applicant relies on H&C considerations, the applicant bears the onus to demonstrate that the H&C considerations warrant relief against a negative outcome. In the present case, even in the context of the Minister's Delegate's limited discretion to consider H&C factors, Mr. Melendez provided very little evidence that his removal would have a significant adverse effect on Elena. I note that there was not even an affidavit from Mr. Melendez regarding his relationship with his child or his efforts to support his child or take counselling.

[46] With respect to Mr. Melendez's submission that the section 44 report and referral stage is his only opportunity to advance H&C considerations, I would point out that this judicial review focusses on the reasonableness of the decision of the Minister's Delegate to refer him to an admissibility hearing based on the record before the Minister's Delegate. The Minister's Delegate did consider the relevant H&C considerations but found that they were not sufficient to overcome the serious nature of the crime committed. Whether Mr. Melendez will have a further opportunity to advance H&C considerations would be considered by the relevant decision-maker in the context of any future proceedings.

[47] While the consequences to Mr. Melendez will be disappointing, the Minister's Delegate did not err in any way. The decision is justified, transparent and intelligible and the outcome is defensible in accordance with the facts and the law.

VII. Proposed Question for Certification

[48] Mr. Melendez proposed the following question for certification:

> What is the scope of the discretion that Minister's Delegates have in deciding whether to refer an individual for an admissibility hearing pursuant to subsection 44(2) of the Act and is a permanent resident who is subject to the referral entitled to a full scale H&C analysis of any H&C factors presented to the Minister's Delegate? Specifically, when the best interests of a child are raised as an H&C factor in a request not to refer a permanent resident to an admissibility hearing pursuant to subsection 44 (2) of the Act and the Minister's Delegate refuses such request, must the Delegate's explanation or reasons for the refusal, in order to be reasonable, identify and define the child's interests that were considered, and, also with a great deal of attention, explain how those interests were examined by the Delegate (as per the Supreme Court of Canada's decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)* 2015 SCC at para 39].

[49] Mr. Melendez argues that the proposed question meets the test for certification because higher courts have not settled the issue of the scope of the discretion pursuant to subsection 44(2). He further submits that the Federal Court of Appeal did not resolve how H&C factors are to be addressed at the subsection 44(2) stage in *Lewis,* as that case dealt only with the scope of discretion to consider the best interests of a child in the context of a decision refusing to defer removal.

[50] The Respondent acknowledges that the issue of the scope of the discretion of the decision-maker at the subsection 44(2) stage has not been definitively addressed by a higher court, but submits that the existing case law, including *Sharma,* provides guidance. The

Respondent argues that the proposed question does not meet the test for certification: the decision is based on the particular facts of the case and does not transcend the interests of the parties. The Respondent further argues that the Minister's Delegate provided sufficient reasons for his decision and the decision is reasonable.

[51] In *Canada (Minister of Citizenship and Immigration) v Qui*, 2017 FCA 84, [2017] FCJ No 399, the Federal Court of Appeal reiterated the test for a certified question, noting at para 4:

> It is well-settled law that a question should be certified only if it is a serious question of general importance which will be dispositive of an appeal (*Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, 318 N.R. 365, at paragraph 11; *Varela v. Canada (Minister of Citizenship and Immigration)* 2009 FCA 145, [2010] 1 F.C.R. 129, at paragraph 28).

[52] As I have noted above, the Federal Court of Appeal has addressed the issue raised in part of the proposed question. In *Lewis*, the Court of Appeal did not limit its comments to deferral decisions; rather the Court stated that *Kanthasamy* was confined to applications made pursuant to subsection 25(1). In *Bermudez*, the Court of Appeal explained that H&C considerations are not imported into every application.

[53] Although the scope of the limited discretion to consider H&C factors in the context of determinations made pursuant to subsection 44(2) remains to be definitively addressed, the current jurisprudence provides sufficient guidance. Moreover, in the present case, resolving the proposed question would not determine this appeal. The Court has found that the Minister's Delegate did consider the relevant H&C considerations that were presented to him—in

particular, the best interests of the child—but reasonably concluded that they did not outweigh the seriousness of the offence. As noted, the onus is on the person relying on H&C considerations to establish that relief is warranted on this basis. Mr. Melendez provided very little evidence of the child's best interests. In any event, given what was provided, the Minister's Delegate was not required to do more to define the child's interests or further explain how they had been considered.

JUDGMENT in IMM-1170-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. No question is certified.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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