Federal Court  Cour fédérale

Date: 20190614

Docket: IMM-4279-18

Citation: 2019 FC 818

Ottawa, Ontario, June 14, 2019

PRESENT: Mr. Justice Roy

BETWEEN:

JOAO HENRIQUE SILVEIRA DE SOUSA
CARLA SORAIA SOUSA
JACQUELINE SORAIA SOUSA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The three applicants in this case constitute a young family that came to Canada in 2012. They gained access to Canada through visitor visas. However, their intention was quite different from being merely visitors. The record shows that the principal applicant, Joao Henrique Silveira De Sousa, established in June 2012 his own roofing enterprise, two months after he had arrived in this country.

[2] Since their arrival in Canada, the applicants have made three applications invoking humanitarian and compassionate [H&C] considerations. The first two were dismissed and this case relates to the third such application. The first two applications were denied in May 2015 and February 2016, while the third one made in February 2017 was rejected on July 4, 2018.

[3] The judicial review application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA or the Act]. The applicants contend that the senior immigration officer made an error of law applying the wrong test to their application and by assessing it in an unreasonable fashion. They argue that the question of law is reviewable on a standard of correctness and the assessment of the application is subject to a reasonable standard.

I. The facts

[4] The applicants are respectively 34, 29 and 10 years old. They are all nationals of Portugal. We learned that the principal applicant came to Canada with his parents when he was still a young boy because of the lack of employment opportunities for his father in their country of nationality. It is therefore not by accident that he chose to come to this country.

[5] Creating his own company, two months after his arrival in Canada, the principal applicant has been able to support his family without state intervention in Canada. His wife has been a dedicated volunteer at the school attended by their daughter as well as volunteering at the local food bank. The family has developed a network of friends and they appear to be well appreciated by the members of their community. Furthermore, the principal applicant is supporting, at least to some extent, his parents who are in Portugal but cannot afford, we are told,

needed medication. It is also indicated that the principal applicant is contributing to paying off a debt left by his brother when he passed away.

[6] The couple's child has now attained the age of 10 years old, but she was 9 when the decision of the immigration officer came down. She is attending school and it is said that her primary language is English, as she remembers little about Portugal having left at a very young age. The Memorandum of fact and law submitted on behalf of the applicants indicates that the applicants "also note that while here, they are able to enrich her life with extra-curricular activities, such as drawing and sketching class, ballet and swimming classes; if they return to Portugal, they are concerned that they won't be able to "put food on the table for [their] daughter" " (Memorandum of fact and law, para 9).

[7] As becomes evident when considering the whole application, the applicants left Portugal because of a lack of employment with a view to immigrating to Canada. They came to Canada, established themselves quickly and are self-reliant. They are resisting going back to Portugal because of the difficult economic conditions in the area where they are from. They have already been denied attempts at H&C applications.

II. The arguments

[8] The applicants argue that the three considerations they have submitted in their application were unreasonably assessed. The three considerations are the following:

- their establishment in Canada;
- the situation in Portugal where the economic conditions are such that, in the area where they are from (the Azores), unemployment is endemic and jobs few and far between and;
- the best interests of the child who has integrated nicely in Canada.

[9] The applicants complain that the officer applied a "hardship-centric" analysis to the considerations, which they claim is inappropriate; the immigration officer also came into an unreasonable conclusion as to the hardship they will suffer if returning to Portugal; and the immigration officer made an unreasonable determination regarding the best interests of the child.

III. The decision under review

[10] The decision maker notes that the applicants are seeking to obtain permanent residence from within Canada by invoking humanitarian and compassionate considerations. Evidently, they rely on section 25 of the Act. The onus is on the applicants to satisfy the decision maker that an exemption from the applicable criteria and obligations of the Act is justified by these humanitarian and compassionate considerations.

[11] The applicants raised three factors for consideration and the officer examines them one after the other (establishment; hardship if returning to Portugal and the best interests of the child).

[12] As regards the establishment of the applicants, favourable weight is originally given to that factor. The principal applicant has established his own enterprise, they have made many

friends in Canada and have integrated in their community, and it appears that the principal applicant's brother and family who live in Canada have close ties with the applicants. Nonetheless, the weight to be given to this factor is discounted as the decision maker finds the establishment to be unexceptional, noting that it is not uncommon to be employed and to become integrated in the communities. This kind of unexceptional establishment is even discounted further due to the fact that the applicants have shown "a disregard for the Immigration laws in Canada and as such, I give negative weight to the circumstances surrounding her establishment". Furthermore, as for the network of friends established in the last 6 years, the decision maker notes that geographical locations do not constitute a barrier to maintaining friendships and relationships. At any rate, those relationships are not characterized by a degree of interdependency and reliance sufficient to grant an exemption for humanitarian and compassionate considerations.

[13] The decision maker then considered the hardship of having to return to Portugal where finding employment is a challenge. Three points are made by the decision maker. First, the quality of the evidence about the unavailability of employment in the Azores is less than sufficient. The immigration officer notes that the excerpts produced as evidence relating to unemployment rates in Portugal are from dated publications. Moreover, the attempts made by the applicant, or on his behalf, at finding employment do not provide sufficient objective evidence as to what skill sets or employment profiles were represented to prospective employers. I noted at the hearing of this case that there appears to have been four or five letters sent by the applicants while perhaps as many as fifteen attempts were made by family members in Portugal. It is less than clear from this record how valiant an effort there was effectively. Second, the decision

maker stated that the applicants could, and probably should, seek employment in other parts of Portugal or somewhere in the European Union. The applicants have access to the labour market in most of Europe and an alternative to being unable to find employment anywhere in Portugal would be to first attempt to secure employment in the European Union before resorting to a country like Canada. Third, the officer notes the applicants' personal characteristics which favour them being able to establish themselves elsewhere. Thus, is noted the fact that the applicants are reasonably well educated, that they had the wherewithal to travel to Canada and set up their own residence and roofing business; the principal applicant has developed skills in Canada which would be transferable to Portugal or elsewhere. In other words, the applicants have a number of options available to them.

[14] As for the best interests of the child, the officer acknowledges that this consideration carries significant weight, although it is not a determinative factor. In the view of the decision maker, there is insufficient objective evidence that the best interests of the child would be compromised by a return to Portugal. The decision states that:

> The applicants did not adduce any objective evidence that their daughter would be unable to attend school, obtain health care, participate in extra-curricular activities or that her best interests would be compromised or that she would be denied any rights if they were to return to Portugal. While I acknowledge that their daughter has spent the majority of her life in Canada given her age, it is reasonable that she would be able to adapt to changing situations with the continued support of her parents.
>
> [Decision, p. 5 of 6.]

[15] In the last three paragraphs of the 6-page decision, the decision maker takes a global look at the three considerations raised by the applicants to conclude that "(a)fter reviewing the factors

and evidence presented herein, I am not satisfied that the applicants have established that a positive exemption is warranted on H&C grounds".

IV. Analysis

[16] The first argument presented by the applicants is that the decision maker applied the wrong test to their H&C application. That, they say, requires a standard of review of correctness. Irrespective of whether the standard of review is correctness or reasonableness, I have not found any indication that the decision maker applied the wrong test. As I understand it, the applicants rely on *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. *Kanthasamy* stands for the proposition that it is inappropriate to turn the ministerial guidelines, that are designed to assist officers in determining whether humanitarian and compassionate considerations warrant relief under section 25 of the Act, to become the test to be followed. The Court finds that the humanitarian and compassionate considerations are not limited to hardship as described in the guidelines.

[17] According to the guidelines, an applicant has to demonstrate hardship of a nature that would be unusual and undeserved, or a hardship that would be disproportionate. Without making that demonstration, relief under section 25 would not be granted in many cases before *Kanthasamy*. The *Kanthasamy* Court disagreed that such should be the test. Instead, the Court went back to the origin of the humanitarian and compassionate considerations and the view expressed by the first chairperson of the Immigration Appeal Board:

> [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.

The *Chirwa* test that is applied is therefore to grant equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another".

[18] This is obviously a more generous test than the assessment of hardship test, that is unusual and undeserved hardship, or disproportionate hardship. However, in applying that test one must consider that the *Kanthasamy* Court acknowledges that "(t)he *Immigration and Refugee Protection Act*[1] consists of a number of moving parts intended to work together to ensure a fair and humane immigration system for Canada" (para 1, footnote omitted). That includes that "(t)here 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): … Nor was s. 25(1) intended to be an alternative immigration scheme" (para 23, authorities omitted). In fact, the *Kanthasamy* Court did not disavow the assessment of hardship considerations. Rather, that consideration has been put back to where it belongs:

> [32] There is no doubt, as this Court has recognized, that the Guidelines are useful in indicating what constitutes a reasonable interpretation of a given provision of the *Immigration and Refugee*

> *Protection Act*: *Agraira*, at para. 85. But as the Guidelines themselves acknowledge, they are "not legally binding" and are "not intended to be either exhaustive or restrictive": *Inland Processing*, s. 5. Officers can, in other words, consider the Guidelines in the exercise of their s. 25(1) discretion, but should turn "[their] mind[s] to the specific circumstances of the case": Donald J. M. Brown and The Honourable John M. Evans with the assistance of Christine E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 12-45. They should not fetter their discretion by treating these informal Guidelines as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion granted by s. 25(1): see *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, at p. 5; *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195 (C.A.), at para. 71.
>
> [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.
>
> [Italics in original.]

[19] I have not found anywhere in the decision under review that the decision maker applied the "unusable or undeserved" or "disproportionate" hardship test that was used in some decisions, including decisions of this Court, in the past. It is not so much that the applicants can complain about the use of the wrong test because there is no indication that the wrong test was applied. Rather, they are entitled to argue that the application that was made of the *Chirwa* test by the decision maker was erroneous to the point of being unreasonable. It is therefore on that basis that the decision has to be considered by a reviewing court. Was it unreasonable to conclude that the evidence in this case did not rise to the level of exciting in a reasonable person

in a civilized community a desire to relieve the misfortunes of another? Such is the burden that must be discharged by the applicants. Although the facts of the case make the applicants sympathetic, and that they might be candidates to immigrate to Canada if a proper application is made, it cannot be said that the decision maker made an unreasonable decision requiring this Court's intervention.

[20] The applicants suggest that an intervention by a reviewing court is warranted if the decision is not " "justifiable, transparent or intelligible" and does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" " (Memorandum of fact and law, para 28).

[21] I am somewhat concerned that this articulation of the test may convey the wrong impression that there is one justification that will satisfy a reviewing court. It is in my view preferable to come back to the articulation of the test found in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. There are two aspects to the notion of reasonableness as articulated by the Court. One is concerned with the process and the other is concerned with the outcomes (*Canada (Attorney General) v Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 SCR 80, at para 18). The reference to "possible, acceptable outcomes" indicates that there are more than one outcome that may be reasonable. By referring to "justifiable, transparent or intelligible" without the proper context, the notion can be conveyed that there is one justification that will be justifiable. I do not believe that such is the case. To my way of thinking, room must be made for deference for the decision made. I prefer to refer directly to paragraph 47 of *Dunsmuir* which, in my view, is perhaps more nuanced than what has been presented:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [My emphasis.]

As long as there is the existence of justification, transparency and intelligibility within the decision making progress, the test of reasonableness concerning process would have been met.

The Court went on in *Dunsmuir* to define what is meant by deference. One can read in paragraph 48 the following:

> [48] … What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and

> Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

The reviewing court does not substitute its view for that of the decision maker. It is not an appeal or a *de novo* hearing. It is not for the reviewing court to parse words in a search for errors. In *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458, the Court admonished against a treasure hunt for error:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.

[22] The reference to *Newfoundland and Labrador Nurses* in paragraph 54 invites a return to paragraph 12 of that decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses*]:

> [12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its

> expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.
>
> [Emphasis added in original.]

[23] We were skillfully invited in this case to perform the parsing of the words that should be avoided. The applicants seemed to treat the word "hardship" as if it were a word to be avoided in polite company. The word does not have that pejorative connotation. Even when used with adjectives such as "unusual" or "undeserved" or "disproportionate", these are seen as descriptive. What is clear is that they should not be seen as creating three thresholds for relief. But, surely, the notion of a hardship has its place when the decision maker is considering whether humanitarian and compassionate circumstances warrant an exemption from the requirements of the Act. The *Kanthasamy* Court in fact endorsed that proposition (*Kanthasamy*, para 33 as reproduced at para 18 of these reasons).

[24] In this case, the applicants contend that the decision maker applied a "hardship-centric" analysis. They say that the decision maker applied a silo approach to the consideration of the H&C grounds.

[25] These applicants submitted three sets of considerations for the decision maker to assess: their establishment in Canada, the hardship of having to return to Portugal where unemployment is at very high levels and the best interests of the child. It is hard to understand how an examination of these three considerations, as performed by the decision maker, can become a silo approach to the consideration of H&C grounds. Had the decision maker not examined these considerations one after the other, the applicants could have complained that it was impossible to

ascertain whether the conclusion is within the range of acceptable outcomes. Analysis implies, it seems to me, that the proposition be broken into its essential elements. Here, the applicants contend that the test to be satisfied is that their circumstances would excite in a reasonable person in a civilised community the desire to relieve the misfortune of another. I agree. In order to apply such a test, one has to analyse various circumstances that are invoked. That is what the decision maker did.

[26] The applicants argue that the officer "systematically discounted" the considerations put forth. I have reviewed with a great deal of attention the reasons given by the officer and I cannot reach such a conclusion. There was no systematic discounting that was done in this case. Indeed the Court should resist the underlying invitation to re-weigh the evidence: that is the province of the decision maker.

[27] The applicants submit that the decision maker set a high bar for his consideration of the establishment by requiring that it be "exceptional" (Memorandum of fact and law, para 31). I do not believe that this parsing of the words is a reflection of what was actually found by the decision maker. He did not set a threshold at the level of exceptional. The decision merely assessed the establishment as being unexceptional. As a matter of fact, when the sentence is read in its entirety, it becomes clear that the decision maker was simply saying that "it is not uncommon for individuals who reside in Canada to be employed, to become integrated into their community, form friendships, pay their taxes, volunteer their time, and maintain good civil record". That is certainly true. Indeed, the decision maker gave some favorable weight to the establishment in Canada. There is no doubt that these applicants are making a contribution to

their community and they have not been a drain on resources. But the point is that such establishment is not so out of the ordinary that it would carry very significant weight.

[28] That being said with great respect, I fail to see how regular, ordinary establishment in Canada can be given significant weight as a decision maker must decide whether the evidence rises to the level of exciting in a reasonable person in a civilized community a desire to relieve the misfortunes of another. The fact that the establishment is not extraordinary should not be held against an applicant. It is merely neutral. The presence of establishment that is in line with reasonable expectations can hardly excite the desire to relieve the misfortunes of someone. On the other hand, a special contribution to the community ought to be noted. Establishment is but one factor to be considered, together, for instance, with hardship. Thus, if there is no hardship, it is doubtful that it would be easy to convince that the evidence excites a desire to relieve the misfortunes of someone. Not impossible, but difficult. But the severity of hardship will count, whether unusual and undeserved, or disproportionate. The same is true with the measure of establishment in a particular set of circumstances.

[29] Where there is more of a discounting of the establishment is in taking into account that the establishment in this case came as a result of, in the words of the decision maker, showing “a disregard for immigration laws in Canada” (Decision, p. 3 of 6).

[30] As indicated earlier, it is clear that the decision maker found that these applicants came to Canada for the purpose of immigrating. The evidence clearly points in that direction. As such, they are treating section 25 of the Act as if it was intended to be an alternative of immigration

scheme. Such is not the purpose of section 25 as acknowledged by the *Kanthasamy* Court. It seems to me that the decision maker was reacting to that general consideration by discounting the establishment because of the particular circumstances. Although establishment is a factor, its relative weight will vary depending on the quality of establishment and other considerations. Thus one can understand that being established in Canada makes having the return to one's country of nationality difficult. But that is the natural consequence of removal if someone does not have status in Canada. It is hard to fathom that simply showing establishment does by itself generate a positive H&C decision, no more than the interests of the child are the be-all and end-all.

[31] The applicants also took issue with the treatment made by the decision maker of the social network they have been able to establish in the six years they have spent in Canada. In fact, they tried to make hay out of the fact that the decision maker used the word "hardship" in the sentence reading "(r)elationships are not bound by geographical locations and while the hardship of being physically separated from family and friends here in Canada will cause some dislocation, it does not mean that they would be unable to contact one another" (Decision, pp. 3-4 of 6). In the view of the applicants, that demonstrates a "hardship-centric" approach. That argument has no merit. The sentence is only reflective of the fact that hardship alone, which is necessarily associated with leaving Canada, does not warrant relief on humanitarian and compassionate grounds (*Kanthasamy*, para 23). It is also worth mentioning that the decision maker went so far as to qualify the relationships in stating that "I find insufficient evidence has been put forth to support the aforementioned relationships are characterized by a degree of interdependency and reliance to such an extent that if separation were to occur would justify

granting an exemption under humanitarian and compassionate considerations" (Decision, p. 4 of 6). In other words, relationships vary in terms of their intensity and that is to be taken into account. I cannot see how that could be said to be unreasonable. In their parsing of the words, the applicants stressed the use of the word "hardship" in the sentence quoted above. To them, the use of that word signifies a threshold against which to measure relationships. Such is not the case. It is obvious that the word is used to designate the suffering or privation that the departure from Canada would entail. There is no indication whatsoever that the word "hardship" in the context in which it is used is associated with unusual, undeserved or disproportionate. Hardship is hardship.

[32] Somewhat ironically, the applicants invoke the "hardship" of returning to Portugal as a ground to be considered in their H&C application. The applicants argue that the rejection of the alleged difficulty in finding employment in the Azores is arbitrary, capricious and lacking logic. As such, it is unreasonable.

[33] It seems that the attempts at finding employment appeared to have been through letters sent and received. The applicants criticized the decision maker because he points out that the attempts were made by family members and that the quality of the information supplied to potential employers is lacking. That criticism is not well placed. In the factum, the applicants indicate that they received letters from five potential employers that were a response to a direct contact made by the principal applicant. Surprisingly, the responses are with respect to contacts made in 2015. Furthermore, the applicants seem to concede that the attempts lacked important information about what they had to offer, which may suggest a lackadaisical effort, yet the

applicant argues that "(a)lthough there may be no information as to what skills sets were put forward, the main information provided in the letters is that there are no vacancies or employment possibilities at all" (Memorandum of fact and law, para 39). I failed to see how the conclusion reached by the decision maker is unreasonable as not falling within the range of possible acceptable outcomes: he said that he did not "have sufficient objective evidence as to what skill sets or employment profiles were presented to prospective employers nor do I have sufficient objective evidence that persons seeking employment canvassed employers throughout Portugal" (Decision, p. 4 of 6). This in my view is unassailable.

[34] The applicants take issue with the possibility of seeking employment outside of the Azores, in Portugal or elsewhere in the European Union. It has not been shown on this record what is unreasonable in indicating that employment opportunities can be found elsewhere than in Canada where the applicants have tried to immigrate without submitting themselves to the statutory requirements. As a matter of fact, the applicants have shown resilience and resourcefulness which may be used if they so wish.

[35] Finally, the Immigration Officer considered the best interests of the child. The applicants have argued that it is not in the best interests of their child for her to go back to her country of nationality. The role to be played by the best interests of the child in H&C application was described in the following fashion in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]:

> 74 … Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner.

> While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.
>
> 75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.
>
> [Underline in original.]

Kanthasamy followed in the footsteps of *Baker*. Indeed, the paragraphs just reproduced are also quoted at length in *Kanthasamy*. It seems to me that the further guidance provided by *Kanthasamy* is reflected in paragraph 39 of the decision. It reads:

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[36] In my view, the analysis of the best interests of the child could have been more fulsome. It is nevertheless sufficient (*Newfoundland and Labrador Nurses*, para 12). Here, the decision maker did not simply state that the best interests of the child have to be taken into account. He examined them and came to a conclusion. The decision maker was alert, alive and sensitive to the best interests of this child.

[37] In a sense, the applicants argue that a child will be better off staying in Canada. In effect, it is an agreement that can be made in most cases. If it were to become determinative, there would be no need to consider any other issue. It is certainly true that this child has been in Canada for six years and we are told that her proficiency in Portuguese is less than ideal as English has become her primary language. She is involved in her school and she inevitably will be moved away from her other activities. The officer found that there was a lack of objective evidence that the best interests would be compromised if she were to return to Portugal in the company of her parents, to the point of granting relief pursuant to section 25 of the Act. There is a lack of evidence that relocating to Portugal and resettling there would have a negative impact on this child. In the end, the officer found that it is reasonable that the daughter would be able to adapt to changing situations with the continued support of her parents.

[38] As I understand the applicants' argument, the best interests of the child is to stay in Canada where she has lived for the past six years. That appears to be the long and short of it. As was found by the immigration officer, there does not appear to have been any special circumstances raised that would have required consideration. The officer writes: "(t)he applicants did not adduce any objective evidence that their daughter would be unable to attend school,

obtain health care, participate in extra-curricular activities or that her best interests would be compromised or that she would be denied any rights if they were to return to Portugal" (Decision, p. 5 of 6). Instead, the applicants rely on the fact that English would have become her primary language, that she remembers little about Portugal and that she has lived in Canada for six of her nine years. It is difficult to see how the officer could be faulted for having addressed these issues by finding that being with her parents in Portugal, the child will be able to adjust. Neither in their factum nor in the presentation made before the Court by their counsel do we find what has been missing in the consideration of the best interests of the child.

[39] If one is willing to assume that a child will be better off if she benefits from the *status quo* as appears to be suggested by the applicants, that does not resolve the issue. What was raised by the applicants in this case is no different than what would be the situation for any child whose parents have to leave Canada. The officer in this case tried to articulate that the best interests of the child are to be with her parents in her country of nationality where she will benefit from their continued support. Accepting the applicants' arguments would signify that the presence of a child who has spent some time in Canada has to be determinative of the H&C application. Such is not the state of the law.

[40] The applicants seek to fault the officer for having seemingly considered two options: either the child leaves Canada with her parents or she stays in Canada without them. That is of course in the nature of a Hobson's choice which is probably more rhetorical than real. Their preferred possibility is for maintaining the *status quo*, that is for the family to stay in Canada. That third option does appear to run counter to what was acknowledged by the applicants to be

the state of the law to the effect that "a child's best interest [sic] will not always be [sic] outweigh other considerations in an H&C applicant [sic]" (Memorandum of fact and law, para 48), and "it is well settled that the presence of children does not call for certain results" (Further Memorandum of fact and law, para 54). That suggestion by the applicants to maintain the *status quo* would compel a particular result in every case involving a child. Nothing was raised in this case that could add to the understanding of the best interests of this child other than the life she has led in this country is the preferred option.

[41] The applicants have complained that the decision considered their three submissions in a silo. As indicated earlier, I disagree. What was done is a consideration of each submission to figure out what weight can be given to it. In the last three paragraphs of the decision, the decision maker puts the three submissions in the balance to conclude that they are not sufficient to warrant an exemption to the obligations that exist under our law if someone seeks to become a permanent resident of this country.

[42] It is essential in my view that the grounds invoked in support of an H&C application be examined to establish their relative weight. It is not for this Court to reassess the weight given to these grounds, as Parliament has chosen to leave that matter to the Minister as long as he acts reasonably. The Court must intervene where a decision is unreasonable as not falling within the range of possible, acceptable outcomes or where the existence of justification, transparency and intelligibility within the decision making process is not present. In the case at hand, the outcome falls within the appropriate range. The process followed by the decision maker is also adequate. There is justification for the decision and there is transparency and intelligibility within the

decision-making process. The case is obviously very sympathetic. But that cannot suffice and the burden on the applicants was to show that the facts, established by the evidence, would excite in a reasonable person in a civilized community a desire to relieve the misfortune of another – so long as this misfortune "warrants the granting of special relief from the effect of the provisions of the Immigration Act" (Kanthasamy, para 13). Here, the Minister concluded that such was not the case and the applicants have not satisfied this Court that the decision was unreasonable.

[43] As a result, the judicial review application must be dismissed. I agree with the parties that this case's outcome is a function of its particular facts and there is no serious question of general importance that would require that a question be certified.

JUDGMENT in IMM-4279-18

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. There is no serious question of general importance.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4279-18
STYLE OF CAUSE:	JOAO HENRIQUE SILVEIRA DE SOUSA, CARLA SORAIA SOUSA, JACQUELINE SORAIA SOUSA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 18, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	JUNE 14, 2019

APPEARANCES:

Daniel Kingwell	FOR THE APPLICANTS
Norah Dorcine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT