Federal Court  Cour fédérale

Date: 20110323

Docket: IMM-3047-10

Citation: 2011 FC 358

Ottawa, Ontario, March 23, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

SIVAPAKIYAM SANDRAMOORTHY, NIRANSANI SANDRAMOORTHY, ANOJAN SANDRAMOORTHY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Sivapakiyam Sandramoorthy (the principal applicant) and two of her children, Niransani Sandramoorthy and Anojan Sandramoorthy (collectively, the applicants), made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision made by an Immigration Officer (the Officer) of Citizenship and Immigration Canada (CIC), dated May 11, 2010, whereby the Officer rejected the

applicants' application for permanent residence from within Canada on Humanitarian and Compassionate (H&C) grounds.

I. Background

[2] Mrs. Sandramoorthy and her three children, Niransani Sandramoorthy (born May 9, 1984), Pirinthan Sandramoorthy (born August 11, 1986) and Anojan Sandramoorthy (born September 10, 1990), are citizens of Sri Lanka. They arrived in Canada in 1999. In October 2001, the principal applicant submitted an application for permanent residence from within Canada based on H&C grounds. She included her three children as "dependents in Canada" on her application. On March 2, 2005, CIC determined that there were sufficient H&C factors and, as such, granted the applicants stage-one approval.

[3] Later in 2005, Ponniah Sandramoorthy, husband to the principal applicant and father to the children, who lived in Sri Lanka, applied for permanent residence in Canada from Sri Lanka. On February 22, 2010, the High Commission of Canada in Sri Lanka informed him that his application had been refused on account of his being inadmissible for a period of 2 years pursuant to paragraph 40(1)(*a*) of the IRPA for having misrepresented, or for having withheld, material facts in his 2005 application.

[4] On January 22, 2010, Pirinthan, one of the principal applicant's sons, was convicted of two counts of "Failure to comply with condition of undertaking or recognizance" pursuant to subsection

145(3) of the *Criminal Code*, RSC 1985, c C-46. As a consequence, he was declared inadmissible to Canada under paragraph 36(2)(*a*) of the IRPA and a deportation order was issued against him.

II. Impugned decision

[5] In a letter addressed by the Officer to the principal applicant "and family" on May 11, 2010, the applicants were informed that their application had been rejected at the second stage, because they did not meet the statutory requirements for permanent residence under section 21 of the IRPA. The Officer concluded that the applicants were inadmissible as a result of Pirinthan's and Ponniah's inadmissibility. The Officer's reasoning appears in the following excerpt of his decision:

> Paragraph R72(1)(e)(i) of *IRPA* stipulates that to become a permanent resident of Canada, it has to be established that a foreign national in Canada, as well as their family members, accompanying or not must not be inadmissible to Canada.
>
> In addition, paragraph A42(a) of *IRPA* stipulates that a foreign national becomes inadmissible to Canada if an accompanying family member is inadmissible.
>
> As a result of Pirinthan's and Ponniah's inadmissibilites, you and your family have failed to comply with the requirements of paragraph A21 of *IRPA*.

[6] The Officer's detailed reasons, which were provided later, did not provide further information as to why he concluded that the applicants were inadmissible. However, he did indicate that a waiver would not be warranted in the applicants' case because the applicants had not significantly established themselves in Canada: neither the principal applicant nor her daughter, Niransani, had been employed since arriving in 1999, both were receiving social assistance, and the two sons, Anojan and Pirinthan, had combined salaries totalling just $9,000 in 2009. This,

combined with the fact that there were two inadmissibilities impacting the family – i.e. Ponniah's and Pirinthan's - in the Officer's opinion, militated against waiving the applicants' inadmissibility.

[7] It should be emphasized, at this point, that neither the principal applicant's husband, Ponniah, nor her son, Pirinthan, are applicants in the current matter.

III. Issues

[8] The applicants argue that the Officer's decision was based on paragraph 42(*a*) (and not on both paragraphs 42(*a*) and (*b*)) and that he erred in his application of paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. They submit that he applied an erroneous definition of "family member" for the purposes of these provisions. If he had applied the correct definition, they argue, the Officer would not have concluded that Anojan and Niransani were inadmissible, nor would he have concluded that Pirinthan's inadmissibility had any impact on the applicants at all. The applicants also take issue with the Officer's decision not to grant waiver to overcome any remaining inadmissibility – they allege that the Officer's assessment in this regard was corrupted by his erroneous application of paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations.

[9] The respondent contends that the Officer's decision was, in fact, based on both paragraphs 42(*a*) and 42(*b*) of the IRPA, and that his omission to mention paragraph 42(*b*) in his decision was merely a technical error that should not invalidate his decision. The respondent further submits that

the Officer did not apply an erroneous definition of "family member". Instead, the respondent argues that the principal applicant's children were all validly "family members" because their ages were "locked-in" as of the application date in 2001.

[10] For the reasons that follow, I find that the Officer's decision was unreasonable because it lacked justification, transparency and intelligibility. The Officer did not provide any explanation as to why and how paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations applied to render the applicants inadmissible.

IV. Analysis

[11] I find it useful, at this point, to outline the applicable legislative framework.

[12] Section 42 of the IRPA reads as follows:

Inadmissible family member	Inadmissibilité familiale
42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	**42.** Emportent, sauf pour le résident. permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :
(*a*) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	*a*) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
(*b*) they are an accompanying family member of an	*b*) accompagner, pour un membre de sa famille, un

inadmissible person.	interdit de territoire.

[13] Subparagraph 72(1)(*e*)(i) of the Regulations is similar, but instead of finding a foreign national to be inadmissible based on inadmissible family members, it requires a foreign national to establish that his or her family members are not inadmissible before that foreign national can become a permanent resident. It reads:

Obtaining status	Obtention du statut
72. (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that	72. (1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis :
. . .	[…]
(*e*) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,	*e*) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés :
(i) they and their family members, whether accompanying or not, are not inadmissible,	(i) ni lui ni les membres de sa famille — qu'ils l'accompagnent ou non — ne sont interdits de territoire,
. . .	…

[14] In essence, and with certain exceptions, under paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations, a foreign national is inadmissible if he or she has a "family member" that is inadmissible.

[15] The definition of "family member", for the purposes of both section 42 of the IRPA and section 72 of the Regulations, is found in subsection 1(3) of the Regulations. That definition reads as follows:

Definition of "family member"	Définition de « membre de la famille »
(3) For the purposes of the Act, other than section 12 and paragraph 38(2)(d), and for the purposes of these Regulations, other than sections 159.1 and 159.5, "family member" in respect of a person means	(3) Pour l'application de la Loi — exception faite de l'article 12 et de l'alinéa 38(2)d) — et du présent règlement — exception faite des articles 159.1 et 159.5 —, « membre de la famille », à l'égard d'une personne, s'entend de :
(*a*) the spouse or common-law partner of the person;	*a*) son époux ou conjoint de fait;
(*b*) a dependent child of the person or of the person's spouse or common-law partner; and	*b*) tout enfant qui est à sa charge ou à la charge de son époux ou conjoint de fait;
(*c*) a dependent child of a dependent child referred to in paragraph (*b*).	*c*) l'enfant à charge d'un enfant à charge visé à l'alinéa *b*).

[16] The definition of "dependent child" is set out in section 2 of the Regulations:

Interpretation	Définitions
2. The definitions in this section apply in these Regulations.	2. Les définitions qui suivent s'appliquent au présent règlement.
. . .	[…]
"dependent child", in respect of a parent, means a child who	« enfant à charge » L'enfant qui :

(*a*) has one of the following relationships with the parent, namely,

a) d'une part, par rapport à l'un ou l'autre de ses parents :

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) is the adopted child of the parent; and

(ii) soit en est l'enfant adoptif;

(*b*) is in one of the following situations of dependency, namely,

b) d'autre part, remplit l'une des conditions suivantes :

(i) is less than 22 years of age and not a spouse or common-law partner,

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(ii) il est un étudiant âgé qui n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(A) n'a pas cessé d'être inscrit à un établissement d'enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.	(iii) il est âgé de vingt-deux ans ou plus, n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental.

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[17] In his letter, the Officer pointed specifically to paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations as the basis for deciding that because both Ponniah and Pirinthan were inadmissible, the applicants had failed to comply with the requirements for permanent residence.

[18] The applicants argue that the Officer erred in finding that paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations applied so as to render the applicants inadmissible. They submit that the Officer arrived at this erroneous conclusion because he misapprehended the meaning of "family member" for the purposes of these provisions. They argue that neither Ponniah nor Pirinthan are "family members" with respect to the two applicants Niransani and Anojan. Instead, Ponniah is their father – not a spouse [s 1(3)(a)] and not a dependant child [s 1(3)(b) and s 1(3)(c)] – and thus, he is not their "family member" for the purposes of paragraph 42(*a*) of the IRPA or subparagraph 72(1)(*e*)(i) of the Regulations. Furthermore, Pirinthan is the brother of these two applicants – not a spouse [s 1(3)(a)] and not a dependant child [s 1(3)(b) and s 1(3)(c)] – and thus, Pirinthan is not their "family member" for the purposes of paragraph 42(*a*) of the IRPA or subparagraph 72(1)(*e*)(i) of the Regulations either. As such, the applicants argue that the Officer clearly erred when he invoked these two provisions to find that Niransani and Anojan were

inadmissible and not eligible to become permanent residents. This error, the applicants argue, is determinative of the application for judicial review with respect to Niransani and Anojan.

[19] With respect to the principal applicant, the applicants admit that Ponniah is her "family member" because he is her husband, and thus satisfies the criterion set out in paragraph 1(3)(*a*) of the Regulations. However, the applicants argue that the officer nonetheless erred because he also indicated that Pirinthan's inadmissibility impacted upon the principal applicant's admissibility. In this regard, the applicants argue that Pirinthan is not the principal applicant's "family member" because he is not her "dependant child" and, thus, does not satisfy the requirement set out in paragraph 1(3)(*b*) of the Regulations. They argue that because Pirinthan is over the age of 22, works full time, and is not financially dependant on his mother, he does not satisfy the definition of "dependant child" set out in section 2 of the Regulations. This error, the applicants argue, calls the validity of the Officer's finding with respect to the principal applicant into question.

[20] The respondent argues, for his part, that the Officer's application of sections 42 of the IRPA and 72 of the Regulations was entirely reasonable. Pirinthan, the respondent suggests, does satisfy the definition of "family member" with respect to the principal applicant because his age was "locked in" as of the application date. Thus, Pirinthan falls within paragraph 1(3)(*b*) of the Regulations with respect to the principal applicant. Furthermore, the respondent points out that there is no disagreement that Ponniah is the principal applicant's "family member" under paragraph 1(3)(*a*) of the Regulations, since he is her spouse. As such, the officer's conclusion that the principal applicant was inadmissible under paragraph 42(*a*) of the IRPA was right. The respondent further submits that since the principal applicant was appropriately deemed to be inadmissible, her

accompanying family members were also appropriately deemed to be inadmissible under paragraph 42(*b*), as opposed to 42(*a*), of the IRPA. He argues that Niransani and Anojan were appropriately considered by the Officer to be dependant children of the principal applicant because their ages were also "locked in" at the date of the H&C application. As such, Niransani and Anojan were the principal applicant's "family members" under paragraph 1(3)(*b*) of the Regulations.

[21] Turning first to consider the impact of Ponniah's inadmissibility on the principal applicant. There is no disagreement over the fact that Ponniah, as the principal applicant's spouse, is her "family member" for the purposes of the subsection 1(3) definition. There is also no disagreement that this definition is the appropriate definition to apply for the purposes of section 42 of the IRPA. Paragraph 42(*a*) indicates, in part, that a foreign national is inadmissible if, in prescribed circumstances, a non-accompanying family member is inadmissible. Section 23 of the Regulations sets out the prescribed circumstances, and subparagraph 23(*b*)(i), in particular, indicates that if the non-accompanying family member is "the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact", then the inadmissibility of that non-accompanying family member will render the foreign national, themselves, inadmissible. There is no indication that that the relationship between the principal applicant and her husband had broken down in law or in fact and, as such, it was entirely reasonable for the Officer to determine that Ponniah's inadmissibility rendered the principal applicant inadmissible due to paragraph 42(*a*) of the IRPA.

[22] The situation is not so clear, however, when we turn to consider the impact of Ponniah's inadmissibility on the two children – Niransani and Anojan. The applicants are correct to point out

that Ponniah is not a "family member" vis-à-vis Niransani and Anojan for the purposes of the definition found in subsection 1(3) of the Regulations. He is their father: not a spouse and not a dependent child. As such, neither paragraph 42(*a*) of the IRPA nor subparagraph 72(1)(*e*)(i) of the Regulations applies directly to render the two children inadmissible or ineligible for permanent residence. Since these were the only provisions cited by the Officer in his reasons, one is left to speculate as to how the Officer came to the conclusion that Ponniah's inadmissibility impacted both Niransani and Anojan.

[23] The respondent argues that the Officer likely applied the concept of age "lock-in" in combination with paragraph 42(*b*) of the IRPA, as opposed to paragraph 42(*a*), to arrive at the conclusion that the two children were both inadmissible as an indirect result of Ponniah's inadmissibility. The respondent submits that since Ponniah's inadmissibility rendered the principal applicant inadmissible, then - by virtue of paragraph 42(*b*) of the IRPA - the children were also rendered inadmissible because they were accompanying "family members" of their inadmissible mother. They were "family members" of their mother by virtue of paragraph 1(3)(*b*) of the Regulations: they were her dependent children.

[24] The respondent contends that despite the fact that Niransani no longer satisfied the definition of "dependant child" as set out in section 2 of the Regulations (she was 26 years old as of the date the Officer rendered his decision), she was appropriately considered to be a dependent child because her age was "locked-in" at the time of the initial H&C application: i.e. since Niransani was a "dependent child" when the applicants first submitted their application for permanent residence in 2001, she was still a "dependent child" when the Officer rendered his decision in 2010. Thus,

Niransani was an accompanying "family member" of the principal applicant as of the date of the Officer's decision and was rendered inadmissible, along with her brother Anojan, by the principal applicant's inadmissibility.

[25] This argument is problematic because not only did the Officer not mention paragraph 42(*b*) of the IRPA anywhere in his letter or his reasons, he also did not mention that age "lock-in" was being relied upon. This is of particular concern because it is not clear that age "lock-in" applies in the H&C context. It is true that this Court and the Federal Court of Appeal have recognized that it is CIC policy to "lock-in" the age of an applicant in the context of overseas applications for permanent residence (*Skobodzinska v Canada (Minister of Citizenship and Immigration*), 2008 FC 887 at para 18, 331 FTR 295; *Hamid v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 217 at para 55, [2007] 2 FCR 152; *Mou v Canada (Minister of Citizenship and Immigration)* (1997), 125 FTR 203, 69 ACWS (3d) 149 (FCTD)). However, the relevant overseas operation manuals specifically establish that age "lock-in" is to take place in those contexts (see, for example, Section 5.24 of "OP 1 – Procedures" (2010-09-23); Section 5.4 of "OP 2 - Processing Members of the Family Class" (2006-11-14); Section 9.3 of "OP 6 - Federal Skilled Workers" (2010-12-14)). In contrast, the manual associated with H&C applications made from within Canada, "IP 5 - Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" (2009-08-31), makes no mention of age "lock-in", nor has this Court ever considered such a "lock-in" in the H&C context.

[26] Even if age "lock-in" were accepted, it is not clear that it could properly be used to disadvantage an applicant in the manner suggested by the respondent.

[27] Since the Officer made no reference to either paragraph 42(*b*) of the IRPA or to age "lock-in", I find that the respondent's submissions in this regard are speculative at best. In reality, the basis upon which the Officer arrived at his determination regarding the impact of Ponniah's inadmissibility on Niransani, at least, is unclear.

[28] The Officer's rationale is similarly unclear when we turn to consider the impact of Pirinthan's inadmissibility on the applicants. As of the date the Officer rendered his decision, Pirinthan was 23 years old and had a full-time job. As such, he was not the principal applicant's "dependent child", nor was he any other type of "family member" vis-à-vis the applicants. Once again, then, it is unclear how the Officer arrived at his conclusion that paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations applied so as to render the applicants inadmissible or ineligible for permanent residence. There is nothing in the Officer's reasons to suggest that Pirinthan's age was "locked-in" at the application date, nor is there anything to suggest that the Officer relied on a "locked-in" age to determine that the applicants were inadmissible. If it were clear that the Officer had, in fact, done this, then that would raise some interesting questions to consider on this judicial review. However, it is not clear.

[29] The Federal Court of Appeal in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 16, 320 DLR (4th) 733, set out "four fundamental purposes" for the provision of reasons in the administrative law context:

> (a) *The substantive purpose*. At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision-maker ruled in the way that it did.

(b) *The procedural purpose*. The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.

(c) *The accountability purpose*. There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision-maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dunsmuir*, *supra* at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: *see, e.g., Canadian Association of Broadcasters*, *supra* at paragraph 11.

(d) *The "justification, transparency and intelligibility" purpose*: *Dunsmuir*, *supra* at paragraph 47. This purpose overlaps, to some extent, with the substantive purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision-maker has decided and why. In this case, this would include the parties to the proceeding, the employees whose positions were in issue, and employees, employers, unions and businesses that may face similar issues in the future. Transparency, though, is not just limited to observers who have a specific interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

[30] I consider that the reasons provided by the Officer in the current matter are inadequate on at least three of the four fronts. The substantive purpose was not satisfied because it is unclear why the Officer found that paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations

were engaged with respect to all three applicants. The accountability purpose was also not satisfied. There is not enough information to allow this Court, as the supervising court, to assess meaningfully, "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Finally, the reasons lack "justification, transparency and intelligibility" because they fail to explain why all three of the applicants had "failed to comply with the requirements" of the IRPA on account of the inadmissibility of Ponniah and Pirinthan. Neither this Court nor outside observers are provided with enough information to enable them to scrutinize and understand why the Officer decided the way that he did.

[31] The inadequacy of the Officer's reasons render his application of paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations unreasonable, at least with respect to Niransani. This is sufficient to grant the current application with respect to that applicant. The Officer's findings that the principal applicant and Anojan had "failed to comply with the requirements" of the IRPA, however, were adequately explained. It is clear that the inadmissibility of the principal applicant's husband rendered the principal applicant, herself, inadmissible due to paragraph 42(*a*) of the IRPA and prevented her from obtaining status under subparagraph 72(1)(*e*)(i) of the Regulations, as explained above. Although, paragraph 42(*b*) of the IRPA was not mentioned by the Officer, Anojan was clearly still the principal applicant's dependent child at the time of the Officer's decision, since he was 19 years old. As such, he was inadmissible under paragraph 42(*b*) of the IRPA for being the accompanying family member of her inadmissible mother.

[32] Therefore, I will continue to consider the issue of waiver with respect to the principal applicant and Anojan only.

[33] The applicants argue that the Officer's decision not to exercise his discretion to grant a waiver of inadmissibility was guided by his belief that there were two inadmissibility findings, which directly impacted the applicants' status. They submit that if the Officer had not erred in applying paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations, then he would have realized that there was, in fact, only one relevant inadmissibility finding (Ponniah's). Furthermore, the applicants argue that had the Officer realized that both Niransani and Anojan were not directly inadmissible, then the Officer would have considered the children's status in Canada as a factor in favour of waiving inadmissibility with regards to the principal applicant. In response to this, the respondent submits only that the applicants did not ask for a waiver.

[34] Chapter IP 5 of the CIC operations manual entitled, "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" (2009-08-31), emphasizes that an immigration officer has the discretion to waive certain inadmissibilities at stage two of the H&C application process. It indicates:

> In cases where the applicant has been granted an exemption to overcome an inadmissibility in the Stage 1 assessment, the applicant would have to have no other inadmissibilities prior to the final decision. If other inadmissibilities are discovered during Stage 2, and where the officer does not believe that the H&C factors outweigh these inadmissibilities, the application for permanent residence should be refused unless the officer chooses to grant an exemption on their own initiative.

[35] Although no specific request for waiver was made by the applicants, the Officer nonetheless considered the question of waiver in his reasons. While his decision not to waive inadmissibility was partly based on the fact that the applicants had not sufficiently established themselves in the Canadian labour market, it is clear that his decision was also based on the inadmissibility of both Ponniah and Pirinthan. This is evidenced by the following passage from the Officer's reasons:

> [TRANSLATION]
>
> It is my view, therefore, that the weak degree of establishment of the family in combination with the two inadmissibilities brings a significant negative weight in this case and that a request for ministerial relief from a finding of inadmissibility on grounds of an inadmissible family member could not be justified.

[36] I agree with the applicants that the Officer's unreasonable application of paragraph 42(*a*) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations discussed above undermines his decision not to waive inadmissibility with respect to the principal applicant. This is particularly the case with respect to his determination regarding the effect of Pirinthan's inadmissibility, since that determination was not adequately explained by the Officer's reasons.

[37] Moreover, the Officer was also clearly of the view that waiver was needed with respect to the entire family when, in fact, his reasons only provide adequate justification for an inadmissibility finding against the principal applicant and Anojan. In essence, instead of considering whether to waive the inadmissibility of all three applicants as a result of the inadmissibility of Ponniah and Pirinthan, the Officer's reasons only support a scenario where he would have had to consider waiver in respect of the principal applicant and Anojan as a result of the inadmissibility of only Ponniah.

[38] As such, I find that the Officer's application of section 42 of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations - which lacked justification, transparency and intelligibility - ultimately undermined his decision not to grant waiver.

[39] For the foregoing reasons, this application is granted and returned for reconsideration by a different Immigration Officer. Considering this conclusion, I do not find it necessary to discuss the applicant's proposition with respect to proposed questions for certification and I conclude that no such questions of general importance arise.

JUDGMENT

THE COURT ORDERS that:

1. The Immigration Officer's decision is set aside;
2. The matter is referred back to Citizenship and Immigration Canada to be determined by a different Immigration Officer;
3. No question of general importance is certified.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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