



SUPREME COURT OF CANADA

CITATION: Kanthasamy v. Canada (Citizenship and Immigration),
2015 SCC 61

DATE: 20151210
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BETWEEN:

Jeyakannan Kanthasamy

Appellant

and

Minister of Citizenship and Immigration

Respondent

- and -

**Canadian Council for Refugees, Justice for Children and Youth, Barbra Schlifer
Commemorative Clinic, Canadian Centre for Victims of Torture, Canadian
Association of Refugee Lawyers and Parkdale Community Legal Services**
Interveners

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner
and Gascon JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 61)

Abella J. (McLachlin C.J. and Cromwell, Karakatsanis and
Gascon JJ. concurring)

DISSENTING REASONS:
(paras. 62 to 146)

Moldaver J. (Wagner J. concurring)

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KANTHASAMY v. CANADA (CITIZENSHIP AND IMMIGRATION)

Jeyakannan Kanthasamy

Appellant

v.

Minister of Citizenship and Immigration

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**Canadian Council for Refugees,
Justice for Children and Youth,
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Canadian Centre for Victims of Torture,
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File No.: 35990.

2015: April 16; 2015: December 10.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Judicial review — Refugee claim — Humanitarian and compassionate considerations — Best interests of child — 17-year old refugee claimant from Sri Lanka seeking humanitarian and compassionate exemption to apply for permanent residence from within Canada — Whether decision to deny relief was reasonable exercise of humanitarian and compassionate discretion — Proper role of Ministerial Guidelines used by immigration officers in determining whether humanitarian and compassionate considerations warrant relief — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25(1).

K is a Tamil from northern Sri Lanka. In April 2010, fearing for his safety after he was subjected to detention and questioning by the Sri Lankan army and police, K's family arranged for him to travel to Canada to live with his uncle. He was 16 years old. When he arrived in Canada, he made a claim for refugee protection which was refused. K's application for a pre-removal risk assessment was also rejected. K additionally filed an application for humanitarian and compassionate relief under s. 25(1) of the *Immigration and Refugee Protection Act* seeking to apply for permanent resident status from within Canada. The Officer reviewing his application concluded that relief was not justified as she was not satisfied that a return to Sri Lanka would result in hardship that was unusual and undeserved or disproportionate. On judicial review, the Federal Court found that the Officer's decision to deny relief was reasonable. The Federal Court of Appeal agreed.

Held (Moldaver and Wagner JJ. dissenting): The appeal should be allowed. The Officer's decision was unreasonable and should be set aside. The matter is remitted for reconsideration.

Per McLachlin C.J. and **Abella**, Cromwell, Karakatsanis and Gascon JJ: Section 25(1) of the *Immigration and Refugee Protection Act* gives the Minister discretion to exempt foreign nationals — individuals who are neither citizens nor permanent residents — from the ordinary requirements of the *Act* if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. Those considerations are to include the best interests of a child directly affected. The purpose of s. 25(1) is to offer equitable relief. That purpose was furthered in Ministerial Guidelines intended to assist Immigration Officers in determining whether humanitarian and compassionate considerations warrant relief under s. 25(1). They state that the determination of whether there are sufficient grounds to justify granting a humanitarian and compassionate application under s. 25(1) is done by an “assessment of hardship”. What warrants relief will vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them. An officer can take the underlying facts adduced in refugee determination proceedings into account in determining whether the applicant's circumstances warrant humanitarian and compassionate relief.

The Guidelines state that applicants must demonstrate either “unusual and undeserved” *or* “disproportionate” hardship for relief under s. 25(1) to be granted. “Unusual and undeserved hardship” is defined in the Guidelines as hardship that is “not anticipated or addressed” by the *Act* or its regulations, and is “beyond the person’s control”. “Disproportionate hardship” is defined as “an unreasonable impact on the applicant due to their personal circumstances”.

While the Guidelines are useful, they are not legally binding and are not intended to be either exhaustive or restrictive. Officers should not fetter their discretion by treating them as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion anticipated by s. 25(1). The words “unusual and undeserved or disproportionate hardship” should instead 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, officers should not look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds. This has the result of using the language of “unusual and undeserved or disproportionate hardship” in a way that limits the officer’s 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.

Section 25(1) also refers to the need to take into account the best interests of a child directly affected. Where, as here, the legislation specifically directs that the best interests of a child who is “directly affected” be considered, those interests are a singularly significant focus and perspective. The “best interests” principle is highly contextual because of the multitude of factors that may impinge on the child’s best interests. 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.

It is difficult to see how a child can be more directly affected than when he or she is the applicant. The status of the applicant as a child triggers not only the requirement that the “best interests” be treated as a significant factor in the analysis, it should also influence the manner in which the child’s other circumstances are evaluated. And since children will rarely, if ever, be deserving of *any* hardship, the concept of unusual or undeserved hardship is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief. Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief.

In this case, the Officer failed to consider K’s circumstances as a whole and took an unduly narrow approach to the assessment of his circumstances. The Officer failed to give sufficiently serious consideration to K’s youth, his mental

health, and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessing each factor to see whether it represented hardship that was “unusual and undeserved or disproportionate”. The Officer’s literal obedience to those words, which do not appear anywhere in s. 25(1), rather than looking at K’s circumstances as a whole, led her to see each of them as a distinct legal test, rather than as words designed to help reify the equitable purpose of the provision. This had the effect of improperly restricting her discretion, rendering her decision unreasonable.

The Officer accepted the diagnosis in the psychological report of post-traumatic stress disorder, yet required K to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor. In her exclusive focus on whether treatment was available to K in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. The fact that K’s mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition. And while the Officer did not dispute the psychological report presented, she found that the medical opinion

rested mainly on hearsay because the psychologist was not a witness to the events that led to the anxiety experienced by K. This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on hearsay. Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence. A psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada.

The Officer considered the discrimination K would likely endure in Sri Lanka, but effectively concluded that in the absence of evidence from K that he would be personally targeted by discriminatory action, there was no evidence of discrimination. This approach however, failed to account for the fact that discrimination can be inferred where an applicant shows that he or she is a member of a group that is discriminated against. Evidence of discrimination experienced by others who share the applicant's identity is relevant under s. 25(1), whether or not the applicant has evidence that he or she has been personally targeted.

Further, the Officer here did not appear to turn her mind to how K's status as a child affected the evaluation of the other evidence raised in his application.

This approach is inconsistent with how hardship should be uniquely addressed for children. Moreover, by evaluating K's best interests through the same literal approach she applied to each of his other circumstances — whether the hardship was “unusual and undeserved or disproportionate” — the Officer misconstrued the best interests of the child analysis, most crucially disregarding the guiding admonition that children cannot be said to be deserving of hardship.

The Officer therefore avoided the requisite analysis of whether, in light of the humanitarian purpose of s. 25(1) of the *Immigration and Refugee Protection Act*, the evidence *as a whole* justified relief. This approach unduly fettered her discretion and led to its unreasonable exercise.

Per Moldaver and Wagner JJ. (dissenting): While there is agreement with much of the majority's discussion on the meaning of the phrase “justified by humanitarian and compassionate considerations”, there is no agreement with the test proposed for granting relief under s. 25(1). The scheme of the *Immigration and Refugee Protection Act* and the intention of Parliament in enacting s. 25(1) suggest that this provision is meant to provide a flexible — but exceptional — mechanism for relief. Giving it an overly broad interpretation risks creating a separate, freestanding immigration process, something Parliament clearly did not intend. Parliament recognized that cases could arise in which the strict application of the rules would not reflect Canada's policy goals, or would lead to an arbitrary or inhumane result. That said, Parliament did not intend to provide relief on a routine basis. The test for

humanitarian and compassionate (“H&C”) relief must balance the dual characteristics of stringency and flexibility and reflect the broad range of factors that may be relevant.

The hardship test is a good test in that it achieves the degree of stringency required to grant H&C relief. If an applicant can demonstrate “unusual and undeserved or disproportionate hardship”, he or she should be granted relief. However, the test falls down on the flexibility side as it risks excluding or diminishing the weight that some factors may deserve in deciding whether H&C relief should be granted. Section 25(1) does not limit *when* the relevant H&C considerations must occur; nor does it require that they be viewed only from the applicant’s perspective. It asks only that decision makers look at H&C considerations *relating to* the applicant. Section 25(1) is framed in broad terms because it is impossible to foresee all situations in which it might be appropriate to grant relief to someone seeking to enter or remain in Canada. A more comprehensive approach is therefore required.

Bearing in mind the purpose and context of s. 25(1), and the fact that the hardship test used to date may, in some circumstances, be overly restrictive, the test for granting relief should be reframed as follows: whether, having regard to all of the circumstances, including the exceptional nature of H&C relief, the applicant has demonstrated that decent, fair-minded Canadians would find it simply unacceptable to deny the relief sought. To be “simply unacceptable”, a case should be sufficiently

compelling to generate a broad consensus that exceptional relief should be granted. This test maintains the stringency of the hardship test — but does not exceed it. At the same time, it is more flexible than the hardship test. It asks decision makers to turn their minds to all of the relevant circumstances when deciding whether refusing relief would be “simply unacceptable”. This prevents decision makers from excluding relevant H&C considerations because they do not fit within the future-oriented hardship framework or because they do not involve hardship experienced solely by the applicant. The test proposed by the majority does not provide any guidance to decision makers as to the kinds of factors outside the hardship test that would be sufficient to justify relief. Even more problematic, by introducing equitable principles, it runs the risk of watering down the stringency of the hardship test.

The Officer’s decision in this case falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, and was therefore reasonable. Decision making under s. 25(1) is highly discretionary and is entitled to deference. Care must be taken not to overly dissect or parse an officer’s reasons. Rather, reasonableness review entails respectful attention to the reasons offered or which could be offered in support of a decision. As is the case with every other court, this Court has no license to find an officer’s decision unreasonable simply because it would itself have come to a different result, lest we be accused of adopting a “do as we say, not what we do” approach to reasonableness review.

In evaluating the application, the decision maker must not segment the evidence and require that each piece either rise above the hardship threshold or be discounted entirely. Rather, the decision maker must fairly consider the totality of the circumstances and base the disposition on the evidence as a whole. Likewise, the decision maker must not fetter his or her discretion by applying the Guidelines – the “unusual and undeserved or disproportionate hardship” framework – as a strict legal test to the exclusion of all other factors. Taken as a whole, the Officer’s decision in this case denying K’s H&C application is transparent. She provided intelligible reasons for concluding that K did not meet his onus of establishing, on balance, that he should be permitted to apply for permanent residency from within Canada for H&C reasons. She did not use the hardship framework in a way that fettered her discretion or caused her to discount relevant evidence. Her conclusions are reasonable, and well-supported by the record. While aspects of K’s situation warrant sympathy, sympathetic circumstances alone do not meet the threshold required to obtain relief.

It was open to the Officer to find that the record did not justify relief under s. 25(1). While the Officer’s reasons could have engaged more fully with the psychological evidence and while it would have been helpful had she specifically addressed the issue of the impact of removal on K’s mental health, her failure to do so does not render her decision unreasonable. The Officer’s approach to the issue of discrimination was also not unreasonable, nor did it render her decision unreasonable. The applicant need only show that the denial of relief would pose a certain risk of

harm. However, that risk must necessarily be a “personalized risk”, in the sense that the applicant must fall within the category of people who, on the evidence submitted, would face that risk. When viewed in context, the Officer’s conclusion that K had failed to provide sufficient evidence to support his statements that he will be personally discriminated against simply reiterated the wording of his submissions. Lastly, the Officer’s analysis and conclusion on K’s best interests as a child were also reasonable. It was highly relevant that K was only one day away from turning 18 when he initially applied for H&C relief. K was a teenager on the verge of adulthood. On the record before her, it was open to the Officer to conclude that removal to Sri Lanka would not impair K’s best interests, because he would be returning to his immediate family rather than being separated from them.

Although the Officer applied the hardship standard from the Guidelines, she did not do so in a way that fettered her discretion. Further, had she applied the test reframed, she would inevitably have come to the same result. The Officer’s decision to deny an exemption to K was reasonable.

Cases Cited

By Abella J.

Referred to: *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470; *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338; *Baker v. Canada (Minister of Citizenship and Immigration)*,

[1999] 2 S.C.R. 817; *United States of America v. Johnson* (2002), 62 O.R. (3d) 327; *Diarra v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1515; *Love v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1569, 43 Imm. L.R. (3d) 111; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463; *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206; *Flores v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1002; *Sivagurunathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 233; *Park v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 528; *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 447, 232 F.T.R. 118; *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 621; *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2; *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *MacGyver v. Richards* (1995), 22 O.R. (3d) 481; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, 323 F.T.R. 181; *Kim v. Canada (Citizenship and Immigration)*, 2010 FC 149, [2011] 2 F.C.R. 448; *Hilewitz v.*

Canada (Minister of Citizenship and Immigration), 2005 SCC 57, [2005] 2 S.C.R. 706; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *Davis v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 97, 96 Imm. L.R. (3d) 267; *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1295, 14 Imm. L.R. (4th) 66; *Divakaran v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 633; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61; *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714; *Williams v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 166.

By Moldaver J. (dissenting)

Referred to: *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956; *Pan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1303; *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Paz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 412; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358, leave to appeal refused, [2002] 4 S.C.R. vi; *Pannu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356; *Jacob v. Canada (Minister of*

Citizenship and Immigration), 2012 FC 1382, 423 F.T.R. 1; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458.

Statutes and Regulations Cited

Balanced Refugee Reform Act, S.C. 2010, c. 8, s. 4.

Canadian Charter of Rights and Freedoms, s. 7.

Immigration Act, R.S.C. 1952, c. 325, s. 8.

Immigration Act, R.S.C. 1985, c. I-2, s. 114(2).

Immigration Act, 1976, S.C. 1976-77, c. 52, s. 115(2).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 11(1), 25(1), 25(1.3), 62 to 71, 96 and 97.

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 6.

Immigration Appeal Board Act, S.C. 1966-67, c. 90, s. 15.

Treaties and Other International Instruments

Convention on the Rights of the Child, Can. T.S. 1992 No. 3, arts. 2(1), 3, 39.

Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08, December 22, 2009.

Authors Cited

- Brown, Donald J. M., and John M. Evans, with the assistance of Christine E. Deacon. *Judicial Review of Administrative Action in Canada*, vol. 3. Toronto: Carswell, 2014 (loose-leaf updated May 2015, release 1).
- Canada. Citizenship and Immigration Canada. "IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", in *Inland Processing* (online: <http://www.cic.gc.ca>).
- Canada. Employment and Immigration Canada. *Immigration Manual*. 1986.
- Canada. House of Commons. *House of Commons Debates*, vol. XII, 1st Sess., 27th Parl., February 20, 1967, p. 13267.
- Canada. House of Commons. Standing Committee on Citizenship and Immigration. *Evidence*, No. 3, 1st Sess., 37th Parl., March 13, 2001, 9:55 to 10:00.
- Canada. House of Commons. Standing Committee on Citizenship and Immigration. *Evidence*, No. 19, 3rd Sess., 40th Parl., May 27, 2010, 15:40.
- Canada. Library of Parliament. Parliamentary Research Branch. "Bill C-11: The *Immigration and Refugee Protection Act*", Legislative Summary LS-397E, by Jay Sinha and Margaret Young, Law and Government Division, March 26, 2001, revised January 31, 2002.
- Canada. Senate and House of Commons. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy*, No. 49, 1st Sess., 30th Parl., September 23, 1975, p. 12.
- Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.
- Hawkins, Freda. *Canada and Immigration: Public Policy and Public Concern*. Montréal: McGill-Queens University Press, 1972.
- Jones, Martin, and Sasha Baglay. *Refugee Law*. Toronto: Irwin Law, 2007.
- Liew, Jamie Chai Yun, and Donald Galloway. *Immigration Law*, 2nd ed. Toronto: Irwin Law, 2015.
- Neufeld, Heather. "Inadequacies of the Humanitarian and Compassionate Procedure for Abused Immigrant Spouses" (2009), 22 *J.L. & Soc. Pol'y* 177.

APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Sharlow and Stratas JJ.A.), 2014 FCA 113, [2015] 1 F.C.R. 335, 459 N.R. 367, 372 D.L.R. (4th) 539, 77 Admin. L.R. (5th) 181, 27 Imm. L.R. (4th) 1, [2014] F.C.J. No. 472 (QL), 2014 CarswellNat 1435 (WL Can.), affirming a decision of Kane J., 2013 FC 802, [2014] 3 F.C.R. 438, 437 F.T.R. 120, [2013] F.C.J. No. 848 (QL), 2013 CarswellNat 2568 (WL Can.), dismissing an application for judicial review. Appeal allowed, Moldaver and Wagner JJ. dissenting.

Barbara Jackman and Ksenija Trahan, for the appellant.

Marianne Zoric and Kathryn Hucal, for the respondent.

Jamie Liew, Jennifer Stone and Michael Bossin, for the intervener the Canadian Council for Refugees.

Emily Chan and Samira Ahmed, for the intervener Justice for Children and Youth.

Alyssa Manning, Laila Demirdache, Aviva Basman and Rathika Vasavithasan, for the interveners the Barbra Schlifer Commemorative Clinic and the Canadian Centre for Victims of Torture.

Audrey Macklin, Joo Eun Kim and Laura Brittain, for the intervener the Canadian Association of Refugee Lawyers.

Ronald Poulton and Toni Schweitzer, for the intervener Parkdale
Community Legal Services.

The judgment of McLachlin C.J. and Abella, Cromwell, Karakatsanis and Gascon JJ.
was delivered by

ABELLA J. —

[1] The *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. One of those parts is refugee policy. Under s. 25(1) of the *Act*, the Minister has a discretion to exempt foreign nationals from the *Act*'s requirements if the exemption is justified by humanitarian and compassionate considerations, including the best interests of any child directly affected. The issue in this appeal is whether a decision to deny relief under s. 25(1) to a 17-year-old applicant was a reasonable exercise of the humanitarian and compassionate discretion. In my respectful view, it was not.

Background

[2] Jeyakannan Kanthasamy is a Tamil from northern Sri Lanka. In April 2010, fearing for his safety after he was subjected to detention and questioning by the

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

army and the police, his family arranged for him to travel to Canada to live with his uncle. He was 16 years old.

[3] When he arrived in Canada, he made a claim for refugee protection under ss. 96 and 97, which permit applicants to seek refugee status based on a “well-founded” fear of persecution. His claim was based on a fear that because he is a Tamil, the army, the Eelam People’s Democratic Party, the police, or others would arrest or harm him upon his return to Sri Lanka on suspicion that he supports the Liberation Tigers of Tamil Eelam. The Immigration and Refugee Board refused his claim in February 2011, concluding that the authorities in Sri Lanka had taken steps to improve the situation of Tamils, and that he did not have a profile that would put him at risk if he were returned to that country.

[4] In August 2011, he applied for a pre-removal risk assessment, which determines whether an applicant can safely be removed from Canada. The process assesses new risk developments arising after the refugee hearing, but is not a second refugee determination hearing: Martin Jones and Sasha Baglay, *Refugee Law* (2007), at p. 332. The Officer who decided his pre-removal risk assessment found that Jeyakannan Kanthasamy was credible and accepted the evidence that young Tamils faced discrimination and harassment in Sri Lanka. But she concluded that since this treatment did not rise to the level of persecution, his application should be rejected.

[5] Around the same time, he also filed an application for humanitarian and compassionate relief under s. 25(1) of the *Immigration and Refugee Protection Act*,

seeking to apply for permanent resident status from within Canada. He was then 17 years old. The denial of relief would result in his removal from Canada.

[6] *The Officer who reviewed the application concluded that the relief was not justified by humanitarian and compassionate considerations. Drawing on language set out in Guidelines prepared by the Minister, the Officer said she was “not satisfied that return to Sri Lanka would result in hardship that is unusual and undeserved or disproportionate”.*

[7] On judicial review, the Federal Court held that the test was whether the hardship was “unusual and undeserved or disproportionate” in accordance with the Guidelines, and found that the Officer’s decision to deny relief was reasonable. The Federal Court of Appeal largely agreed with both the test and the result. While it concluded that s. 25(1) was not intended to duplicate refugee proceedings, the evidence from those proceedings can nonetheless be considered for the purpose of determining whether the applicant will face “unusual and undeserved, or disproportionate hardship” if returned to the foreign state.

[8] For the following reasons, I do not, with respect, agree with the conclusion that the Officer’s decision was reasonable.

Analysis

[9] The *Immigration and Refugee Protection Act* governs the admissibility, eligibility and removal of non-citizens. Under the *Act* and its accompanying regulations, foreign nationals — individuals who are neither citizens nor permanent residents — seeking permanent resident status must apply for and obtain a visa before entering Canada: *Immigration and Refugee Protection Act*, s. 11(1); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 6. A permanent resident visa may be issued where the foreign national is not inadmissible and meets the requirements of the *Act*: *Immigration and Refugee Protection Act*, s. 11(1).

[10] Section 25(1) of the *Immigration and Refugee Protection Act* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the *Act* if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. Those considerations are to include the best interests of a child directly affected. At the relevant time, s. 25(1) stated:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this *Act*, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this *Act* if the Minister is of the opinion that *it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.*

A brief history helps explain the purpose of humanitarian and compassionate relief under this provision.

[11] Under the 1952 *Immigration Act*, R.S.C. 1952, c. 325, the Minister had an almost unlimited discretion to allow individuals into Canada: Freda Hawkins, *Canada and Immigration: Public Policy and Public Concern* (1972), at pp. 101-3. Although humanitarian and compassionate considerations were not explicitly part of the legislative scheme at the time, the Minister retained the authority to issue permits to allow certain applicants to remain in Canada: *Immigration Act* (1952), s. 8. These permits “introduced an element of flexibility and humanitarianism into the administration of immigration law”: *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, at p. 476.

[12] A discretion to grant relief on the basis of humanitarian and compassionate considerations became an express part of the legislative scheme in the *Immigration Appeal Board Act*, S.C. 1966-67, c. 90, which created a quasi-judicial, independent Immigration Appeal Board. Section 15(1) of the *Immigration Appeal Board Act* gave the new Board the power to stay or quash a deportation order based on “compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief”: s. 15(1)(b)(ii). The reason for this power was explained by John Munro, then Parliamentary Secretary for the Minister of Manpower and Immigration:

The law establishes general rules as to who may come to Canada and who may stay in Canada. The rules necessarily are general. They cannot precisely accommodate all the variety of individual circumstances. They must be capable of being tempered in their application, according to the merits of individual cases. *There will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rules, are inadmissible.* [Emphasis added.]

(*House of Commons Debates*, vol. XII, 1st Sess., 27th Parl., February 20, 1967, at p. 13267)

[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 of 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.

[14] The *Chirwa* test was crafted not only to ensure the availability of compassionate relief, but also to prevent its undue overbreadth. As the Board said:

It is clear that in enacting s. 15 (1) (b) (ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend s. 15 (1) (b) (ii) of the *Immigration Appeal Board Act* to be applied so widely as to destroy the essentially exclusionary nature of the *Immigration Act* and *Regulations*. [p. 350]

[15] In proceedings before the Special Joint Committee of the Senate and the House of Commons on Immigration Policy in 1975, Janet Scott elaborated on the importance of being able to guard against the unfairness of deportation in certain cases:

. . . it was recognized that deportation might fall with much more force on some persons . . . than on others, because of their particular circumstances, and *the Board was therefore empowered to mitigate the rigidity of the law in an appropriate case. Section 15 is a humanitarian and equitable section, which gives the Board power to do what the legislator cannot do, that is, take account of particular cases.* [Emphasis added]

(Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy, No. 49, 1st Sess., 30th Parl., September 23, 1975, at p. 12)

[16] In 1977, Parliament passed comprehensive immigration reforms that introduced humanitarian and compassionate discretion into other areas of the immigration scheme: *Immigration Act, 1976*, S.C. 1976-77, c. 52. Notably, under s. 115(2), the Governor in Council was given broad authority to facilitate the admission of “any person” on the basis of humanitarian or compassionate considerations:

115. (2) The Governor in Council may by regulation exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Governor in Council is

satisfied that the person should be exempted from such regulation or his admission should be facilitated for reasons of public policy or due to the existence of compassionate or humanitarian considerations.

[17] The role of this discretion was explained by this Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817:

[The] words [humanitarian and compassionate considerations] and their meaning must be central in determining whether an individual [humanitarian and compassionate] decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider [a humanitarian and compassionate] request when an application is made. . . . Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations. [Emphasis deleted; citation omitted; para. 66.]

[18] More recently, in 2001, Parliament passed another set of comprehensive reforms by enacting the *Immigration and Refugee Protection Act*. The humanitarian and compassionate discretion previously found in s. 115(2) of the *Immigration Act, 1976* was incorporated into the new s. 25(1): *United States of America v. Johnson* (2002), 62 O.R. (3d) 327 (C.A.), at para. 47; *Diarra v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1515, at para. 8 (CanLII); *Love v. Canada (Minister of Citizenship and Immigration)*, 43 Imm. L.R. (3d) 111 (F.C.), at para. 15.

[19] The Legislative Summary of Bill C-11, the Bill that led to the enactment of the *Immigration and Refugee Protection Act*, explained that s. 25 "continue[d] the

important power of the Minister to override the provisions of the *Act* and grant permanent residence, or an exemption from any applicable criteria or obligation under the *Act*, on humanitarian and compassionate grounds or for reasons of public policy”: Library of Parliament, “Bill C-11: The *Immigration and Refugee Protection Act*”, LS-397E, by Jay Sinha and Margaret Young, March 26, 2001, at p. 12 (footnote omitted); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, at para. 41. The humanitarian and compassionate discretion in s. 25(1) was, therefore, like its predecessors, seen as being a flexible and responsive exception to the ordinary operation of the *Act*, or, in the words of Janet Scott, a discretion “to mitigate the rigidity of the law in an appropriate case”.

[20] As noted, *Chirwa* was decided in the context of an appeal to the Immigration Appeal Board under s. 15 of the *Immigration Appeal Board Act*. Under the current legislative scheme, the Immigration Appeal Division can similarly exercise that discretion for a number of statutorily defined purposes: see ss. 62 to 71 of the *Immigration and Refugee Protection Act*. The exercise of humanitarian and compassionate discretion under s. 25(1) of the *Immigration and Refugee Protection Act*, on the other hand, is limited to situations where a foreign national applies for permanent residency but is inadmissible or does not meet the requirements of the *Immigration and Refugee Protection Act*.

[21] But as the legislative history suggests, the successive series of broadly worded “humanitarian and compassionate” provisions in various immigration statutes

had a common purpose, namely, to offer equitable relief in circumstances that “would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another”: *Chirwa*, at p. 350.

[22] That purpose was furthered in Ministerial Guidelines designed to assist officers in determining whether humanitarian and compassionate considerations warrant relief under s. 25(1). They state that the determination of whether there are sufficient grounds to justify granting a humanitarian and compassionate application under s. 25(1), is done by an “assessment of hardship”.

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

[24] And, as is stated in s. 25(1.3), added to the *Act* in 2010 (S.C. 2010, c. 8), s. 25(1) is not meant to duplicate refugee proceedings under s. 96 or s. 97(1), which

assess whether the applicant has established a well-founded fear of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment.

[25] What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras. 74-75.

[26] According to the Guidelines, applicants must demonstrate either “unusual and undeserved” or “disproportionate” hardship for relief under s. 25(1) to be granted. “Unusual and undeserved hardship” is defined as hardship that is “not anticipated or addressed” by the *Immigration and Refugee Protection Act* or its regulations, and is “beyond the person’s control”. “Disproportionate hardship” is defined as “an unreasonable impact on the applicant due to their personal circumstances”: Citizenship and Immigration Canada, *Inland Processing*, “IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds”, s. 5.10.

[27] The Guidelines further explain the application of the “unusual and undeserved or disproportionate hardship” standard by setting out a non-exhaustive list of factors that may be relevant:

5.11. Factors to consider in assessment of hardship

[Section 25(1)] provides the flexibility to grant exemptions to overcome the requirement of obtaining a permanent residence visa from abroad, to

overcome class eligibility requirements and/or inadmissibilities, on humanitarian and compassionate grounds.

Officers must assess the hardship that would befall the applicant should the requested exemption not be granted.

Applicants may base their requests for [humanitarian and compassionate] consideration on any number of factors *including, but not limited to*:

- establishment in Canada;
- ties to Canada;
- the best interests of any children affected by their application;
- factors in their country of origin (this includes but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in [ss. 96 and 97]);
- health considerations;
- family violence considerations;
- consequences of the separation of relatives;
- inability to leave Canada has led to establishment; and/or
- any other relevant factor they wish to have considered not related to [ss. 96 and 97]. [Emphasis added.]

(Inland Processing, s. 5.11)

[28] The Guidelines confirm that the humanitarian and compassionate determination under s. 25(1) is a global one, and that relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances:

. . . the officer should assess all facts in the application and decide whether a refusal to grant the request for an exemption would, more likely than not, result in unusual and [undeserved] or disproportionate hardship.

...

Individual [humanitarian and compassionate] factors put forward by the applicant should not be considered in isolation in a determination of the hardship that an applicant would face; *rather, hardship is determined as a result of a global assessment* of [humanitarian and compassionate]

considerations put forth by the applicant. *In other words, hardship is assessed by weighing together all of the [humanitarian and compassionate] considerations submitted by the applicant.* [Emphasis added.]

(*Inland Processing*, ss. 5.8. and 5.10)

[29] To date, there appear to be two schools of thought on how to approach the factors to be considered in assessing whether humanitarian and compassionate considerations apply under s. 25(1). A number of Federal Court decisions have implicitly rejected the language in *Chirwa* and have, instead, treated the Guidelines, and the words “unusual and undeserved or disproportionate hardship”, as setting out the test the applicant must meet in order to receive an exemption on the basis of humanitarian and compassionate grounds. In *Flores v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1002, for example, the Federal Court talks about “unusual and undeserved or disproportionate as being the “correct test” in humanitarian and compassionate applications: paras. 36-39 (CanLII). Similarly, in *Sivagurunathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 233, the Federal Court noted that it was the applicant’s burden to satisfy the immigration officer that there was unusual and undeserved or disproportionate hardship: para. 13 (CanLII). The Federal Court observed that “[t]his is the test” and that the disadvantages demonstrated by the applicant had to meet this threshold: para. 13. Also see *Park v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 528, at paras. 46-47 (CanLII).

[30] A second approach is found in decisions which treat *Chirwa* less categorically, using the language in *Chirwa* as co-extensive with the Guidelines: see *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956, at paras. 16-17 (CanLII); *Chen v. Canada (Minister of Citizenship and Immigration)*, 232 F.T.R. 118, at para. 15. In these decisions, the Federal Court and Federal Court of Appeal have made it clear that the Guidelines and the “unusual and undeserved or disproportionate hardship” threshold merely provide assistance to the immigration officer but that they should not be interpreted as fettering the immigration officer’s discretion to consider factors other than those listed in the Guidelines. In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555, the Federal Court of Appeal noted that the Guidelines are “not meant as ‘hard and fast’ rules” and are, rather, “an attempt to provide guidance to decision makers when they exercise their discretion”: para. 9. And in *Singh v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 621, the Federal Court noted that humanitarian and compassionate considerations “are not limited . . . to hardship” and that the “Guidelines can only be of limited use because they cannot fetter the discretion given by Parliament”: paras. 10 and 12 (CanLII).

[31] This second approach, which seems to me to be more consistent with the goals of s. 25(1), focuses more on the equitable underlying purpose of the humanitarian and compassionate relief application process. It sees the words in the Guidelines as being helpful in assessing when relief should be granted in a given

case, but does not treat them as the only possible formulation of when there are humanitarian and compassionate grounds justifying the exercise of discretion.

[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, *Judicial Review of Administrative Action in Canada* (2014), 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.

[34] This brings us to the fact that s. 25(1) refers to the need to take “into account the best interests of a child directly affected”. In *Agraira*, LeBel J. noted that these interests include “such matters as children’s rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections”: para. 41. As the Guidelines note, the “best interests” principle applies to all children under 18 years of age:²

In an examination of the circumstances of a foreign national under [s. 25(1)], [the *Immigration and Refugee Protection Act*] introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under this section. This codifies departmental practice into legislation, eliminating any doubt that the interests of a child will be taken into account. This applies to children under the age of 18 years as per the Convention on the Rights of the Child.

(Inland Processing, s. 5.12)

[35] The “best interests” principle is “highly contextual” because of the “multitude of factors that may impinge on the child’s best interest”: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must

² No province in Canada sets the age of majority below 18 years of age.

therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.

[36] Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, at para. 17. It means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.

[37] International human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; *Baker*, at para. 71. Article 3(1) of the *Convention* in particular confirms the primacy of the best interests principle:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*

[38] Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:

. . . 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 [a humanitarian and compassionate] decision to be made in a reasonable manner. . . .

. . . 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 [a humanitarian and compassionate] 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. [paras. 74-75]

[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.

[40] Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective: *A.C.*, at paras. 80-81. The Minister's Guidelines set out relevant considerations for this inquiry:

Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account when raised. Some examples of factors that applicants may raise include but are not limited to:

- the age of the child;
- the level of dependency between the child and the [humanitarian and compassionate] applicant or the child and their sponsor;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the [humanitarian and compassionate] assessment is being considered;
- the conditions of that country and the potential impact on the child;
- medical issues or special needs the child may have;
- the impact to the child's education; and
- matters related to the child's gender.

(Inland Processing, s. 5.12)

[41] It is difficult to see how a child can be more "directly affected" than where he or she is the applicant. In my view, the status of the applicant as a child triggers not only the requirement that the "best interests" be treated as a significant factor in the analysis, it should also influence the manner in which the child's other circumstances are evaluated. And since "[c]hildren will rarely, if ever, be deserving of any hardship", the concept of "unusual or undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9. Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief: see *Kim v. Canada (Citizenship and Immigration)*, [2011] 2 F.C.R. 448 (F.C.),

at para. 58; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, December 22, 2009.

Application

[42] In considering the standard of review, this Court “step[s] into the shoes” of the reviewing court: *Agraira*, at para. 46. This means that the question for this Court is whether the reviewing court identified the appropriate standard of review and applied it properly: *Agraira*, at para. 45.

[43] In this case, the Federal Court applied a reasonableness standard. The Federal Court of Appeal, however, concluded that the appropriate standard of review was correctness because there was a certified question. It suggested that this Court’s approach in *Agraira*, where the standard of review was reasonableness despite the presence of a certified question, was at odds with the prior case law. I respectfully disagree.

[44] The Federal Court of Appeal refers to one case from this Court to support this point: *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, [2005] 2

S.C.R. 706. This case is not particularly helpful. It was decided before *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, there was no discussion of the impact of a certified question on the issue of standard of review, and the parties asked that correctness be applied: para. 71. In any event, the case law from this Court confirms that certified questions are not decisive of the standard of review: *Baker*, at para. 58; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at para. 23. As the Court said in *Baker*, at para. 12, the certification of a question of general importance may be the “trigger” by which an appeal is permitted. The subject of the appeal is still the judgment itself, not merely the certified question. The fact that the reviewing judge in this case considered the question to be of general importance is relevant, but not determinative. Despite the presence of a certified question, the appropriate standard of review is reasonableness: *Baker*, at para. 62.

[45] Applying that standard, in my respectful view, the Officer failed to consider Jeyakannan Kanthasamy’s circumstances as a whole, and took an unduly narrow approach to the assessment of the circumstances raised in the application. She failed to give sufficiently serious consideration to his youth, his mental health and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessed each factor to see whether it represented hardship that was “unusual and undeserved or disproportionate”, then appeared to discount each from her final conclusion because it failed to satisfy that threshold. Her literal obedience to those adjectives, which do not appear anywhere in s. 25(1), rather than looking at his circumstances as a whole, led her to see each of

them as a distinct legal test, rather than as words designed to help reify the equitable purpose of the provision. This had the effect of improperly restricting her discretion and rendering her decision unreasonable.

[46] In discussing the effect removal would have on Jeyakannan Kanthasamy's mental health, for example, the Officer said she "[did] not dispute the psychological report" and "accept[ed] the diagnosis". The report concluded that he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood resulting from his experiences in Sri Lanka, and that his condition would deteriorate if he was removed from Canada. The Officer nonetheless inexplicably discounted the report:

. . . the applicant has provided insufficient evidence that he has been or is currently in treatment regarding the aforementioned issues or that he could not obtain treatment if required in his native Sri Lanka or that in doing so it would amount to hardship that is unusual and undeserved or disproportionate.

[47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis

and had the problematic effect of making it a conditional rather than a significant factor.

[48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition to* medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)*, 96 Imm. L.R. (3rd) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)*, 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthasamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthasamy's health problems in her analysis.

[49] And while the Officer did not "dispute the psychological report presented", she found that the medical opinion "rest[ed] mainly on hearsay" because

the psychologist was “not a witness of the events that led to the anxiety experienced by the applicant”. This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on “hearsay”. Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence. In any event, a psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada.

[50] The Officer applied a similarly constricted approach to her analysis of whether Jeyakannan Kanthasamy would face discrimination. The *Officer* took particular note of s. 25(1.3), which led her to decline to consider elements of his application that related to “fear of persecution, torture, risk to life or cruel and unusual treatment . . . on the basis of his race and nationality” as a young Tamil, which she suggested are part of the determination of refugee status or the pre-removal risk assessment.

[51] As the Federal Court of Appeal concluded in this case, s. 25(1.3) does not prevent the admission into evidence of facts adduced in proceedings under ss. 96 and 97. The role of the officer making a determination under s. 25(1) is to ask whether

this evidence, along with any other evidence an applicant wishes to raise, though insufficient to support a s. 96 or s. 97 claim, nonetheless suggests that “humanitarian and compassionate considerations” warrant an exemption from the normal application of the *Immigration and Refugee Protection Act*. In other words, the officer does not determine whether a well-founded fear of persecution, risk to life, and risk of cruel and usual treatment or punishment has been established — those determinations are made under ss. 96 and 97 — but he or she can take the underlying facts into account in determining whether the applicant’s circumstances warrant humanitarian and compassionate relief.

[52] The Officer agreed to consider the hardship Jeyakannan Kanthasamy would likely endure as discrimination in Sri Lanka against young Tamil men. She also accepted evidence that there was discrimination against Tamils in Sri Lanka, particularly against young Tamil men from the north, who are routinely targeted by police. In her view, however, young Tamils are targeted *only where there is suspicion of ties to the Liberation Tigers of Tamil Eelam, and* the government had been making efforts to improve the situation for Tamils. She concluded that “the onus remains on the applicant to demonstrate that these country conditions would affect him personally”.

[53] This effectively resulted in the Officer concluding that, in the absence of evidence that Jeyakannan Kanthasamy would be personally targeted by discriminatory action, there was no evidence of discrimination. With respect, the

Officer's approach failed to account for the fact that discrimination can be inferred where an applicant shows that he or she is a member of a group that is discriminated against. Discrimination for the purpose of humanitarian and compassionate applications "could manifest in isolated incidents or permeate systemically", and even "[a] series of discriminatory events that do not give rise to persecution must be considered cumulatively": Jamie Chai Yun Liew and Donald Galloway, *Immigration Law* (2nd ed. 2015), at p. 413, citing *Divakaran v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 633.

[54] Here, however, the Officer required Jeyakannan Kanthasamy to present direct evidence that he would face such a risk of discrimination if deported. This not only undermines the humanitarian purpose of s. 25(1), it reflects an anemic view of discrimination that this Court largely eschewed decades ago: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 173-74; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 318-19 and 321-38.

[55] Even the Guidelines, expressly relying on this Court's decision in *Andrews*, encourage an approach to discrimination that does not require evidence that the applicant will be personally targeted:

5.16. [Humanitarian and compassionate] and hardship: Factors in the country of origin to be considered

While [ss. 96 and 97] factors may not be considered, the decision-maker must take into account elements related to the hardships that affect the

foreign national. Some examples of what those “hardships” may include are:

...

- discrimination which does not amount to persecution;
- adverse country conditions that have a direct negative impact on the applicant.

...

Discrimination

Discrimination is: A distinction based on the personal characteristics of an individual that results in some disadvantage to that individual.

In *Andrews*, [the] Court wrote:

“Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.”

(*Inland Processing*, s. 5.16)

[56] As these passages suggest, applicants need only show that they would likely be affected by adverse conditions such as discrimination. Evidence of discrimination experienced by others who share the applicant’s identity is therefore clearly relevant under s. 25(1), whether or not the applicant has evidence of being personally targeted, and reasonable inferences can be drawn from those experiences. Rennie J. persuasively explained the reasons for permitting reasonable inferences in

such circumstances in *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714:

While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return This is not speculation, rather it is a reasoned inference, of a non-speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis [para. 12 (CanLII)]

[57] Finally, even though Jeyakannan Kanthasamy's current age makes this issue one that no longer requires intervention, the Officer's analysis of the "best interests" factor cannot be characterized as anything other than perfunctory. She simply stated, in a single paragraph, that Jeyakannan Kanthasamy's best interests lay in returning to Sri Lanka where he had grown up and where his immediate family continued to reside. In my view, this fails to accord with the "serious weight and consideration" this Court in *Baker* identified as essential to a proper appreciation of a child's best interests: at para. 65.

[58] At no point did the Officer appear to turn her mind to how his status *as a child* affected the evaluation of the other evidence raised in his application. Instead, she atomized her evaluation of each of the other elements of his application, referring to his status as a child only in isolation. In her assessment of his level of establishment in Canada, for example, she wrote:

. . . a person in Canada making a claim to refugee status is afforded the tools such as a study permit that would allow one to be self-sufficient and to integrate into the Canadian community. Therefore, in the case at hand, it is expected that a certain level of establishment would have taken place during the applicant's stay in Canada. It is understandable that [Jeyakannan Kanthasamy] would like to remain in Canada and I accept that [Jeyakannan Kanthasamy's] removal to Sri Lanka would be an inconvenience; however, *I am not satisfied that he has established himself to such a degree that return to Sri Lanka would amount to unusual and undeserved or disproportionate hardship.* [Emphasis added.]

Nowhere did the Officer ask whether the effect of separating Jeyakannan Kanthasamy from the people he was close to in Canada would be magnified by the fact that his relationships with them developed when he was a teenager. This approach is inconsistent with how hardship should be uniquely addressed for children.

[59] Moreover, by evaluating Jeyakannan Kanthasamy's best interests through the same literal approach she applied to each of his other circumstances — whether the hardship was “unusual and undeserved or disproportionate” — she misconstrued the best interests of the child analysis, most crucially disregarding the guiding admonition that “[c]hildren will rarely, if ever, be deserving of any hardship”: *Hawthorne*, at para. 9. See also *Williams v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 166, at paras. 64-67 (CanLII).

[60] Finding that no single factor amounted to hardship that was “unusual and undeserved or disproportionate”, the Officer ultimately concluded that humanitarian and compassionate relief was not warranted. But these three adjectives are merely descriptive, not separate legal thresholds to be strictly construed. Finally, the Officer

not only unreasonably discounted both the psychological report and the clear and uncontradicted evidence of a risk of discrimination, she avoided the requisite analysis of whether, in light of the humanitarian purpose of s. 25(1) of the *Immigration and Refugee Protection Act*, the evidence *as a whole* justified relief. This approach unduly fettered her discretion and, in my respectful view, led to its unreasonable exercise.

[61] I would therefore allow the appeal with costs, set aside the Officer's decision, and remit the matter for reconsideration in light of these reasons.

The reasons of Moldaver and Wagner JJ. were delivered by

MOLDAVER J. —

I. Overview

[62] Jeyakannan Kanthasamy applied for a humanitarian and compassionate (“H&C”) exemption under s. 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”). The exemption would have allowed him to apply for permanent resident status from within Canada. His application was rejected. He seeks to overturn that decision on the grounds that the Senior Immigration Officer (the “Officer”) applied the wrong legal test and unreasonably denied his application.

[63] Section 25(1) is a safety valve that supplements the two normal streams by which foreign nationals can come to Canada permanently: the immigration classes and the refugee process. It empowers the Minister of Citizenship and Immigration (the “Minister”) to grant applicants relief from the requirements of the *IRPA* when such relief is justified by H&C considerations. Properly construed, it provides a flexible means of relief for applicants whose cases are exceptional and compelling. For reasons that will become apparent, I am of the view that in deciding whether to grant relief under s. 25(1), decision makers must determine whether, having regard to all of the circumstances, including the exceptional nature of H&C relief, decent, fair-minded Canadians would find it simply unacceptable to deny the relief sought.

[64] Measured against this standard, and bearing in mind the deference that is owed to decisions made under s. 25(1), the Officer’s decision was reasonable. Accordingly, I would uphold that decision and dismiss Mr. Kanthasamy’s appeal.

II. Factual Background

[65] Mr. Kanthasamy is a Tamil who grew up in northern Sri Lanka during that country’s civil war. Although the war ended in 2009, the situation in Sri Lanka remained unstable, and young Tamil men in particular faced a heightened risk of being subjected to discriminatory security measures. Mr. Kanthasamy’s family feared for his safety and arranged to send him to Canada. He arrived here using a false passport in April 2010. He was 16 years old.

A. *Procedural History*

[66] One month following Mr. Kanthasamy's arrival in Canada, he made a claim for refugee protection. That claim was denied in February 2011. In denying his claim, the Refugee Protection Division tribunal determined that he did not have a well-founded fear of persecution in Sri Lanka, and that removal to Sri Lanka would not subject him personally to a risk of death, torture, or cruel and unusual treatment or punishment. His application seeking leave to have this decision judicially reviewed was dismissed in May 2011.

[67] In July 2011, Mr. Kanthasamy applied under s. 25(1) to be exempted from the requirement that he apply for permanent resident status from outside Canada (the "H&C application"). His H&C application was received one day before his 18th birthday. He also applied for a Pre-Removal Risk Assessment ("PRRA") in August 2011.

[68] Both his PRRA and H&C application were denied in January 2012. In the PRRA decision, the immigration officer concluded that Mr. Kanthasamy would not face "more than a mere possibility of persecution in Sri Lanka", and that, on balance, he was not likely "to face a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment". Mr. Kanthasamy initially sought leave for judicial review of his PRRA denial, but in March 2012, after securing an agreement from the Minister to reconsider his H&C application, he withdrew his application for leave.

[69] On reconsideration, Mr. Kanthasamy's H&C application was again denied. Initial reasons for decision were provided in April 2012 and an addendum was released in July 2012. These two sets of reasons comprise the Officer's decision. Mr. Kanthasamy challenged that decision by way of judicial review in the Federal Court. His application for judicial review was dismissed, as was his subsequent appeal to the Federal Court of Appeal. He now appeals with leave to this Court.

B. *Facts Underlying Mr. Kanthasamy's H&C Application*

[70] The factual record underlying Mr. Kanthasamy's H&C application can be distilled into four categories: (1) his past mistreatment by Sri Lankan authorities; (2) the conditions he would face if he were removed to Sri Lanka; (3) the psychological consequences of his return to Sri Lanka; and (4) his establishment in Canada.

(1) Mistreatment by Sri Lankan Authorities

[71] The evidence of past mistreatment focuses on two incidents which occurred shortly before Mr. Kanthasamy left Sri Lanka. In March 2010, he was arrested at his home and taken to an army camp in his village, where he was detained for one day. During his detention, he was held in a dark room for three to four hours. Soldiers visited him sporadically and touched him with their guns, kicked him, and threatened to kill him if he did not cooperate. The soldiers wanted Mr. Kanthasamy to identify supporters of the Liberation Tigers of Tamil Eelam ("LTTE"), an anti-

government militant group. He was ultimately released with the warning that he would be re-arrested if he helped to conceal LTTE supporters in his village.

[72] After his release, members of a pro-government paramilitary group came to his home, questioned him, and pressured him to join their group. They warned Mr. Kanthasamy's father to watch him, as the LTTE was trying to recruit young Tamil men. His father was concerned for Mr. Kanthasamy's safety, and arranged to send him from his home village in northern Sri Lanka to the capital, Colombo, where he could obtain passage to Canada.

[73] The second incident of mistreatment occurred in Colombo in April 2010. Mr. Kanthasamy was arrested by police and detained for one day. During his detention, he was threatened, physically assaulted, and interrogated once again about any involvement with the LTTE. He was released after paying money to the police, but was warned that he could not stay in Colombo. Shortly after this incident, Mr. Kanthasamy made his way to Canada using a false passport.

(2) Present-Day Conditions in Sri Lanka

[74] The record contains conflicting evidence about conditions in Sri Lanka and the extent to which the treatment of Tamils had improved since the end of the civil war and the defeat of the LTTE in 2009. Mr. Kanthasamy put forward evidence suggesting that young Tamil men in northern Sri Lanka still faced "frequent harassment" and "abusive behaviour" by government and paramilitary forces, and

that security measures targeted Tamils in a disproportionate and discriminatory manner. He also submitted evidence that the Sri Lankan government continued to engage in torture and that some failed Tamil asylum seekers had faced arbitrary arrest and torture upon their return to Sri Lanka. On the other hand, two research packages prepared by the Immigration and Refugee Board, which summarized reports from news, academic and other sources on the treatment of Tamils in Sri Lanka, contained evidence that the harassment and government surveillance of Tamils had decreased since 2009.

(3) Psychological Consequences of Return to Sri Lanka

[75] Mr. Kanthasamy was examined by a clinical psychologist in March 2012, and he submitted a psychological assessment in support of his H&C application. The psychologist, Dr. Kanagaratnam, outlined Mr. Kanthasamy's history in Sri Lanka, including the two instances of arrest and interrogation. Mr. Kanthasamy described to her how the ongoing immigration proceedings had caused him to experience difficulty sleeping, difficulties with concentration and recall, and a reduced appetite. She noted that he also reported symptoms of hyper-arousal and hyper-vigilance when he saw military vehicles or heard the sounds of aircraft. According to Mr. Kanthasamy, he began experiencing these additional symptoms one to three months prior to his psychological evaluation.

[76] Dr. Kanagaratnam diagnosed Mr. Kanthasamy with anxiety, depression and post-traumatic stress disorder. Noting that "events that evoke elements of past

trauma” can trigger the re-emergence of these conditions, she concluded that due to “a realistic and imminent threat to his safety, it is most likely that [Mr. Kanthasamy’s] condition [would] further deteriorate psychologically if he [were] to be deported” (emphasis added).

(4) Establishment in Canada

[77] Mr. Kanthasamy’s parents and three of his four siblings live in Sri Lanka. He had been living in Canada with his uncle, aunt and three cousins. To establish the strength of his attachment to Canada, Mr. Kanthasamy submitted evidence that he was “very close” to his Canadian relatives and they would be “very upset” if he had to return to Sri Lanka. At the time of his H&C application, he was enrolled in high school, worked part-time in his uncle’s hair salon and volunteered at a local temple. He had spent approximately 16 months in Canada.

III. Decisions Below

A. *Decision on Mr. Kanthasamy’s H&C Application*

[78] Mr. Kanthasamy raised four factors in support of his application for relief under s. 25(1): (1) personalized risk of discrimination; (2) establishment in Canada; (3) the psychological impact of removal from Canada; and (4) his best interests as a child.

[79] In her reasons for dismissing his H&C application, the Officer stated that Mr. Kanthasamy bore the burden of establishing that the “hardship . . . would be . . . unusual and undeserved or . . . disproportionate”. This test initially appeared in the Minister’s immigration processing manual some three decades ago (Employment and Immigration Canada, *Immigration Manual* (1986), s. 1.39). It has been repeatedly applied by the Federal Court since then (See, for example, *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956; *Pan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1303; *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463). The current manual employs the same hardship test and provides a non-exhaustive list of factors for immigration officers to consider when assessing applications under s. 25(1) (Citizenship and Immigration Canada, *Inland Processing*, “IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds”, ss. 5.10 and 5.11 (the “Guidelines”)). It is against this backdrop that the Officer evaluated the factors raised by Mr. Kanthasamy.

[80] The Officer accepted that young Tamil males continued to face discriminatory treatment by authorities. However, she noted that the focus of the government’s attention was on suspected LTTE supporters and that Mr. Kanthasamy had failed to present sufficient evidence that he would be personally targeted by security forces. While recognizing Mr. Kanthasamy’s establishment in Canada, the Officer observed that it had occurred while he was under a removal order, and concluded that returning to Sri Lanka would not rise to the level of hardship. In evaluating the psychological evidence, the Officer accepted Dr. Kanagaratnam’s

medical diagnoses, but was not satisfied that Mr. Kanthasamy would be unable to obtain treatment for his conditions in Sri Lanka. Regarding “the best interests of the child”, the Officer concluded that it was in Mr. Kanthasamy’s best interests to return to Sri Lanka where he would have the care and support of his parents and siblings.

[81] Reviewing the record in its entirety, the Officer was unpersuaded that return to Sri Lanka would subject Mr. Kanthasamy to unusual and undeserved or disproportionate hardship. She concluded that H&C considerations did not justify granting an exemption.

B. *Judicial Review and Appeal*

[82] On judicial review, Mr. Kanthasamy challenged the Officer’s decision on several grounds (2013 FC 802, [2014] 3 F.C.R. 438). Among them, he claimed the Officer unreasonably concluded that he would not face a personalized risk of discrimination in Sri Lanka. Further, she unreasonably discounted evidence relating to his establishment in Canada and the psychological impact of deportation to Sri Lanka. Finally, she did not adequately consider his best interests as a child.

[83] Kane J. dismissed the application for judicial review. In her view, the Officer’s conclusions on these points were reasonable. The Federal Court of Appeal unanimously dismissed Mr. Kanthasamy’s appeal (2014 FCA 113, [2015] 1 F.C.R. 335, Blais C.J., Sharlow and Stratas J.J.A.). Writing for the court, Stratas J.A. concluded that subject to this Court holding otherwise, the hardship test reflected the

appropriate standard to be applied under s. 25(1) (paras. 47-49). He cautioned against applying the list of factors in the Guidelines as a closed list, but concluded the Officer had not done so in this case (paras. 51-53). The Officer had instead weighed the evidence and come to a reasonable decision.

IV. Analysis

[84] This case raises two issues. The first issue is one of statutory interpretation: the meaning of the phrase “justified by humanitarian and compassionate considerations” in s. 25(1) of the *IRPA*. At the time of Mr. Kanthasamy’s application, s. 25(1) read as follows:

25. (1). The Minister . . . may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[85] My colleague Justice Abella has considered the meaning of the phrase in question and I agree with much of what she says. With respect, however, I cannot agree with the test she proposes for granting relief under s. 25(1). The scheme of the *IRPA* and the intention of Parliament in enacting s. 25(1) and its predecessors all suggest that s. 25(1) is meant to provide a flexible — but exceptional — mechanism for relief. Giving it an overly broad interpretation risks creating a separate, freestanding immigration process, something Parliament clearly did not intend.

[86] The second issue is whether, in light of the meaning of s. 25(1), the Officer's decision to deny Mr. Kanthasamy an exemption was reasonable. Unlike my colleague, I am respectfully of the view that it was.

A. *Standard of Review*

[87] I find it unnecessary to decide whether the standard of review applicable to the Officer's *interpretation* of s. 25(1) is correctness or reasonableness. For reasons that will become apparent, had she applied the test set out in these reasons, she would inevitably have come to the same result.

B. *The Role of Section 25(1) Within the IRPA*

[88] The *IRPA* and its regulations create a carefully tailored scheme, with two normal streams by which foreign nationals can come to Canada permanently: the immigration classes and the refugee process. Within each stream, Parliament has established a set of criteria that reflect Canada's immigration and refugee policy goals and international obligations. These criteria anticipate most circumstances in which foreign nationals should be admitted to Canada. Parliament has also established procedures for determining whether an applicant meets these criteria, and procedural safeguards designed to ensure that these criteria have been properly applied, such as internal appeals, judicial review and the PRRA process.

[89] However, as with any administrative scheme, Parliament recognized that cases could arise in which the strict application of the rules would not reflect Canada's policy goals, or would lead to an arbitrary or inhumane result. With this in mind, it empowered the Minister to grant some applicants special relief if they could convince the Minister that the relief sought was "justified by humanitarian and compassionate considerations" (*IRPA*, s. 25(1)).

[90] The legislative history of the H&C provision makes clear that the provision was not intended as a separate category for admission to Canada, but rather as a safety-valve for exceptional cases (see *House of Commons Debates*, vol. XII, 1st Sess., 27th Parl., February 20, 1967, at pp. 13267-68). Though the terms "humanitarian" and "compassionate" have remained unchanged since the provision was first enacted, the provision has been debated, revised and re-enacted multiple times (see *Immigration Appeal Board Act*, S.C. 1966-67, c. 90, s. 15(1)(b)(ii); *Immigration Act*, R.S.C. 1985, c. I-2, s. 114(2); *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 25(1); *Balanced Refugee Reform Act*, S.C. 2010, c. 8, s. 4). Notably, when Parliament amended the provision in 2010, it did so with a view to emphasizing the provision's original purpose. As Peter MacDougall, the Director General of Refugees at the Department of Citizenship and Immigration put it at the time:

. . . the original intent of the H and C provision was to provide the government with the flexibility to approve exceptional and compelling cases not anticipated in the Immigration and Refugee Protection Act. It was never intended to be an alternate immigration stream or an appeal

mechanism for failed asylum claimants. It should be reserved for exceptional cases.

But what has happened is that some failed asylum claimants use the humanitarian and compassionate provision in another process to try to remain in Canada. In fact, more than half of the humanitarian and compassionate backlog is now made up of failed asylum claimants. [Emphasis added.]

(House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40)

[91] Mr. MacDougall's comments pertained, *inter alia*, to what is now s. 25(1.3) of the *IRPA*, which reads as follows:

25. . . .

(1.3). In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

The interpretation of this provision arises in this case. In the Federal Court of Appeal, Stratas J.A. concluded that it was “not meant to change the overall standard” for granting s. 25(1) relief (para. 66). As he explained, “the evidence adduced in previous proceedings under sections 96 and 97 . . . is admissible in subsection 25(1) proceedings” (para. 73). Section 25(1.3) requires officers to “assess that evidence through the lens of the subsection 25(1) test” and “not to undertake another section 96 or 97 risk assessment or substitute [their] decision for the Refugee Protection Division’s” (paras. 73-74).

[92] I agree with Stratas J.A.'s interpretation of s. 25(1.3). This subsection reminds decision makers that the H&C provision is not meant to be a second refugee proceeding with a lower threshold for admission. However, it does not prevent decision makers from looking at the facts and circumstances raised in the ss. 96 and 97 proceedings.

[93] In keeping with this legislative history, courts have recognized the exceptional nature of the H&C provision. This Court has described it as a "plea to the executive branch for special consideration" (*Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 64) and as "involv[ing] the exercise of considerable discretion" (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 31). The Federal Court at both the trial and appellate level has emphasized that the provision is both exceptional and discretionary (see, for example, *Paz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 412, at para. 15; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (leave to appeal refused, [2004] 4 S.C.R. vi), at para. 15; *Pannu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356, at para. 29).

[94] In short, s. 25(1) is intended to provide flexibility and a means of relief for applicants who do not fall strictly within the rules governing the admission of foreign nationals to Canada. That said, Parliament did not intend to provide relief on a routine basis. Section 25(1) was meant to operate as an exception, not the rule.

C. *The Approach to Evaluating H&C Applications Requires Flexibility and Stringency*

[95] As noted, s. 25(1) empowers the Minister to grant applicants relief from the requirements of the *IRPA* when such relief is “justified by humanitarian and compassionate considerations” (*IRPA*, s. 25(1)). The Minister has described the approach immigration officers should take under s. 25(1) in the Guidelines. The Guidelines require applicants to demonstrate that denial of relief would cause them “unusual and undeserved” or “disproportionate” hardship. Though the Federal Courts have adopted this test, as I have observed, it did not originate there or in Parliament. Instead, it appeared in the Minister’s immigration manual as early as 1986.

[96] To recapitulate, the test for H&C relief must balance the dual characteristics of stringency and flexibility. The hardship test is a good test in that it achieves the degree of stringency required to grant H&C relief. If an applicant can demonstrate “unusual and undeserved or disproportionate hardship”, he or she should be granted relief. With respect, however, the test falls down on the flexibility side. Put simply, it risks excluding or diminishing the weight that some factors may deserve in deciding whether H&C relief should be granted.

[97] In the Federal Court of Appeal, Stratas J.A. described the hardship test as “requiring proof that *the applicant will* personally suffer unusual and undeserved, or disproportionate hardship *arising from the application of . . . the normal rule*” (para. 41 (emphasis added)). Read literally, this test is future-oriented and focuses solely on

the applicant. It asks how the applicant is likely to be affected in the future if relief is denied. As such, it runs the risk of excluding from consideration otherwise relevant H&C factors such as past hardship the applicant may have suffered or the impact that denying relief is likely to have on persons other than the applicant.

[98] Though the Guidelines direct decision makers to consider a broad range of factors such as family violence and establishment in Canada, the hardship lens might lead a decision maker to disregard these factors or give them less weight than they deserve. For example, a future-oriented analysis may not adequately account for the past hardship of sponsored spouses who leave abusive spouses or whose spouses become ineligible to sponsor them by virtue of a conviction involving domestic violence (H. Neufeld, “Inadequacies of the Humanitarian and Compassionate Procedure for Abused Immigrant Spouses” (2009), 22 *J.L. & Soc. Pol’y* 177, at p. 205). Likewise, a decision maker applying the hardship test literally might disregard the impact denying relief would have on other adults who are dependent on the applicant for their care and well-being (see, for example, *Jacob v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1382, 423 F.T.R. 1, at para. 33).

[99] Neither the future-oriented analysis nor the exclusive focus on the applicant flows from the statute. Section 25(1) does not limit *when* the relevant H&C considerations must occur; nor does it require that they be viewed only from the applicant’s perspective. It asks only that decision makers look at H&C considerations *relating to* the applicant. Section 25(1) is framed in broad terms because it is

impossible to foresee all situations in which it might be appropriate to grant relief to someone seeking to enter or remain in Canada. A more comprehensive approach is therefore required.

[100] Given that s. 25(1) is intended to act as a safety valve by providing flexibility to the normal operation of the *IRPA*, the test should reflect the broad range of factors that may be relevant. As the Minister is empowered to grant an exceptional remedy, the test should also convey the level of intensity that those factors must reach — that is, the stringent threshold for relief.

[101] Bearing in mind the purpose and context of s. 25(1), and the fact that the hardship test used to date may, in some circumstances, be overly restrictive, I would reframe the test for granting relief as follows: *whether, having regard to all of the circumstances, including the exceptional nature of H&C relief, the applicant has demonstrated that decent, fair-minded Canadians would find it simply unacceptable to deny the relief sought.* To be *simply unacceptable*, a case should be sufficiently compelling to generate a broad consensus that exceptional relief should be granted.

[102] This test maintains the stringency of the hardship test — but does not exceed it. The hardship test requires applicants to demonstrate “unusual and undeserved or disproportionate” hardship. If an applicant meets the hardship test, he or she should be granted relief. To do otherwise would be simply unacceptable.

[103] At the same time, it is more flexible than the hardship test. It asks decision makers to turn their minds to all of the relevant circumstances when deciding whether refusing relief would be “simply unacceptable”. This prevents decision makers from excluding relevant H&C considerations because they do not fit within the future-oriented hardship framework or because they do not involve hardship experienced solely by the applicant.

[104] The “simply unacceptable” test I am proposing should not be seen as wordsmithing; nor, in my view, will it lead to more confusion than clarity. It uses concepts that are well-understood and regularly applied in Canadian law. For example, the test for whether extradition would violate s. 7 of the *Canadian Charter of Rights and Freedoms* “on account of the penalty which may be imposed in the requesting state” is whether the penalty would be “simply unacceptable” (*Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 849). Similarly, in criminal law, abuse of process may be established where conduct would violate the community’s sense of fair play and decency (*R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 41).

[105] The appellant submits that the hardship test is too stringent and proposes that the test found in *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338, be adopted as a less stringent alternative. He argues that relief should be granted in circumstances which “would excite in a reasonable [person] in a

civilized community a desire to relieve the misfortunes of another” (*Chirwa*, at p. 350).

[106] My colleague discusses the *Chirwa* test at length. She acknowledges that it was developed for a different decision-making context than the hardship test (para. 20), but appears to conclude nonetheless that the correct approach is to import it into s. 25(1) and apply it in conjunction with the hardship test (paras. 30-33). In her view, the requirements of the hardship test — that the hardship must be unusual and undeserved or disproportionate — should be treated as “instructive but not determinative”, so that s. 25(1) may “respond more flexibly to the equitable goals of the provision” (para. 33).

[107] With respect, the test that my colleague proposes is amorphous. It does not provide any guidance to decision makers as to the kinds of factors outside the hardship test that would be sufficient to justify relief. Even more problematic, by introducing equitable principles, it runs the risk of watering down the stringency of the hardship test. Relief could be granted in cases which arouse strong feelings of sympathy in an individual decision maker, but which do not reach the stringent standard that the hardship test demands. Setting the bar this low is inconsistent with Parliament’s goal and risks turning s. 25(1) into an alternate immigration scheme, or an appeal mechanism for good faith but unsuccessful refugee claimants.

[108] The threshold that denial of relief must, in the circumstances, be *simply unacceptable to decent, fair-minded Canadians aware of the exceptional nature of*

H&C relief provides the appropriate mix of flexibility and stringency. Canada is a desirable place to live. It is a thriving democracy with a high standard of living, a relatively low rate of violent crime and a generous social safety net. Understandably, many people want to come to Canada, and it is natural to feel sympathy for those whose home countries do not have the same advantages. However, most *decent, fair-minded Canadians aware of the exceptional nature of H&C relief* would not find it *simply unacceptable* that we exclude individuals who do not meet our legal requirements, even if such persons evoke our sympathy and would be better off here than in their home countries.

[109] With these thoughts in mind, I turn to the review of the Officer's decision in this case.

D. *The Reasonableness of the Officer's Decision*

[110] Mr. Kanthasamy submits, and my colleague agrees, that the Officer did not exercise her discretion reasonably in denying his H&C application. According to my colleague, the Officer erred in her overall approach by considering the relevant factors on a piecemeal basis and by treating the hardship test, identified in the Guidelines, as an all-inclusive "distinct legal test", thereby fettering her discretion (para. 45). Additionally, she takes issue with certain aspects of the Officer's reasons, maintaining that the Officer failed to properly assess several points raised by Mr. Kanthasamy.

[111] With respect, I cannot agree. In my view, the Officer's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, and was therefore reasonable. Decision making under s. 25(1) is highly discretionary and is entitled to deference. Care must be taken not to overly dissect or parse an officer's reasons. Rather, reasonableness review entails respectful attention to the reasons offered or which could be offered in support of a decision (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 11-12).

[112] In particular, I am concerned that my colleague has not given the Officer's reasons the deference which, time and again, this Court has said they deserve. In her reasons, she parses the Officer's decision for legal errors, resolves ambiguities against the Officer, and reweighs the evidence. Lest we be accused of adopting a "do as we say, not what we do" approach to reasonableness review, this approach fails to heed the admonition in *Newfoundland and Labrador Nurses* — that reviewing courts must be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fatal (para. 17). As is the case with every other court, this Court has no license to find an officer's decision unreasonable simply because it considers the result unpalatable and would itself have come to a different result.

- (1) The Officer Considered the Evidence as a Whole and Did Not Fetter Her Discretion

[113] As I have stated, to obtain H&C relief, an applicant bears the onus of demonstrating, having regard to all of the circumstances, that decent, fair-minded Canadians aware of the exceptional nature of H&C relief would find it simply unacceptable to deny the relief sought. In evaluating the application, the decision maker must not segment the evidence and require that each piece either rise above this threshold or be discounted entirely. Rather, the decision maker must fairly consider the totality of the circumstances and base the disposition on the evidence as a whole. Likewise, the decision maker must not fetter his or her discretion by applying the Guidelines — the “unusual and undeserved or disproportionate hardship” framework — as a strict legal test to the exclusion of all other factors. In my view, the Officer’s decision does not fall down on either basis.

[114] It is true that the Officer’s reasons address each of Mr. Kanthasamy’s submissions separately, and discuss the level of hardship associated with each factor. This is not an example of improper segmentation, however, but rather an uncontroversial method of legal analysis. In fact, had the Officer *failed* to discuss each factor individually, and instead, simply listed the facts and stated her conclusion on the evidence as a whole, this appeal might well have been before us on the basis of insufficient reasons.

[115] The issue, therefore, is not whether the Officer analyzed the factors individually, but whether in doing so she failed to step back and consider the evidence as a whole. I find no such error in the Officer’s reasons. She stated that she

“reviewed and considered the grounds” raised by Mr. Kanthasamy, and “considered all information and evidence regarding this application in its entirety”. In the July addendum, she listed seven additional pieces of evidence received from Mr. Kanthasamy, and stated that she “reviewed all of the evidence mentioned [therein] in conjunction with the evidence [she] previously reviewed . . .”. It is apparent that the Officer gave careful consideration to the full record in reaching her determination.

[116] Moreover, the Officer’s use of the “unusual and undeserved or disproportionate hardship” standard to guide her analysis was entirely appropriate. As I have stated above, while the Guidelines do not establish the applicable test, the hardship analysis is neither irrelevant nor inappropriate. The degree of hardship demonstrated by the applicant is highly probative. In many cases, a hardship analysis may be dispositive. The decision maker must simply avoid applying the standard from the Guidelines in a way that fetters his or her discretion or causes relevant evidence to be improperly discounted.

[117] In my view, the Officer gave full and fair consideration to each of the factors supporting Mr. Kanthasamy’s application. On the issue of personalized risk, she recognized the conflicting evidence of present-day conditions in Sri Lanka, and accepted that challenges remained. She found that while some Tamils were singled out by the government, this attention was primarily focused on suspected LTTE supporters. She concluded that there was insufficient evidence that Mr. Kanthasamy would personally be discriminated against.

[118] On the issue of establishment, the Officer accepted the evidence of Mr. Kanthasamy's relationships with friends and relatives in Canada, his integration into his school and religious communities, and his employment. She found that his degree of establishment was "commendable", and recognized that removal to Sri Lanka would involve some hardship. However, she concluded that his establishment in Canada — for approximately two years, and all while under a removal order — was no more than would be expected under the circumstances and was not so compelling that it justified an H&C exemption.

[119] On the psychological evidence, the Officer expressed concern that the psychologist's conclusions relied heavily on Mr. Kanthasamy's own observations and explanations, which were not otherwise in the record. While the Officer ultimately accepted the medical diagnoses, she found that there was no evidence that mental health treatment would be unavailable in Sri Lanka, and therefore the psychological evidence did not establish hardship warranting H&C relief.

[120] On "the best interests of the child", the Officer concluded that it was in Mr. Kanthasamy's best interests to return to his immediate family in Sri Lanka. His relationships with friends and family in Canada might be weakened, but they could nonetheless be maintained even after his removal.

[121] Taken as a whole, the Officer's decision denying Mr. Kanthasamy's H&C application is transparent. She provided intelligible reasons for concluding that he did not meet his onus of establishing, on balance, that he should be permitted to

apply for permanent residency from within Canada for H&C reasons. She did not use the hardship framework in a way that fettered her discretion or caused her to discount relevant evidence. Her conclusions are reasonable, and well-supported by the record before her.

[122] At bottom, it was open to the Officer to find that the record did not justify relief under s. 25(1). While aspects of Mr. Kanthasamy's situation warrant sympathy, sympathetic circumstances alone do not meet the threshold required to obtain relief. I find no error in the Officer's approach requiring this Court's intervention.

(2) The Officer's Analysis of the Psychological Evidence, the Risk of Discrimination, and the Best Interests of the Child

[123] Mr. Kanthasamy alleges that the Officer failed to properly assess the psychological evidence, the issue of discrimination, and his best interests as a child. With respect, I disagree. As I have already indicated, decision making under s. 25(1) is entitled to deference, and in line with that approach, Mr. Kanthasamy's arguments do not justify setting aside the Officer's decision.

(a) *The Psychological Evidence*

[124] Mr. Kanthasamy submits that the Officer failed to adequately consider the impact of removal on his mental health. By focusing exclusively on the availability of treatment in Sri Lanka, she discounted the evidence that his return to

Sri Lanka would harm his mental health. Mr. Kanthasamy asserts that her failure to consider this aspect of the evidence rendered her decision unreasonable.

[125] I would not give effect to this submission. While I agree that the Officer's reasons could have more fully engaged with the psychological evidence, and that it would have been helpful had she specifically addressed the issue of the impact of removal on Mr. Kanthasamy's mental health, her failure to do so does not render her decision unreasonable.

[126] The Officer rejected the premise underlying the psychologist's opinion on the harm of deportation, and was therefore entitled to reject the opinion itself. The psychologist concluded that "[w]ith what seems to be a realistic and imminent threat to his safety, it is most likely that [Mr. Kanthasamy's] condition will further deteriorate psychologically if he was to be deported from Canada" (emphasis added). The phrasing of this opinion reveals that the ultimate conclusion — that Mr. Kanthasamy's mental health would deteriorate upon his return to Sri Lanka — is premised on the assumption that removal poses a "realistic and imminent threat to his safety".

[127] The Officer rejected this underlying assumption. She found that removal would not pose a serious risk to Mr. Kanthasamy's safety. There was sufficient evidence in the record on conditions in Sri Lanka to support this conclusion. Though she did not say so expressly, by logical implication, it was on this basis that she rejected the psychologist's opinion as to the impact of removal on Mr. Kanthasamy's

mental health. Immigration officers must be allowed to evaluate an expert's assumptions in the context of the other evidence. If a report rests on an assumption that is contradicted by other evidence, decision makers must be entitled to reject or give little weight to that report's conclusions.

[128] It bears repeating that reasonableness review requires this Court to give respectful attention to the reasons which, though not stated, could have been offered in support of a decision. This point is emphatically made in *Newfoundland and Labrador Nurses*, where the Court stressed that “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” (para. 12, quoting D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304). The fact that the Officer did not explicitly set out this aspect of her reasoning does not render her decision unreasonable.

[129] My colleague takes issue with the Officer's comment that Mr. Kanthasamy provided insufficient evidence that he had received or was receiving treatment in Canada for his psychological condition. She says that once the Officer accepted the diagnosis, “requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor” (para. 47).

[130] With respect, I disagree. There was no evidence before the Officer that Mr. Kanthasamy ever sought treatment in Canada. The Officer's comments on this point do not amount to questioning the diagnosis. Instead, they support her conclusion that removal from Canada would not meet the hardship test since no *existing* course of treatment would be interrupted. I fail to see how losing access to a service which Mr. Kanthasamy never attempted to access can be viewed as a hardship. This is especially so given the Officer's further finding that he could receive treatment in Sri Lanka.

[131] In my view, there are two ways in which Mr. Kanthasamy's mental health could give rise to hardship: either because returning him to Sri Lanka would aggravate his condition, or because it would affect his treatment, by interrupting an existing course of treatment or by precluding access to treatment altogether. The Officer, on the basis of the record before her, found that neither situation existed. In this context, asking for evidence regarding treatment did not improperly change the diagnosis from a "significant" to a "conditional" factor. The significance of the diagnosis always depended on the hardship that removal would cause.

(b) *Personalized Risk of Discrimination*

[132] Mr. Kanthasamy submits that the Officer's approach to the issue of discrimination was flawed. After noting the effect of s. 25(1.3), the Officer stated that "the onus remains on the applicant to demonstrate that these country conditions would affect him personally". Mr. Kanthasamy asserts that it was a legal error for the

Officer to require evidence that he would be personally targeted by discriminatory action. Rather, he submits that she should have considered more generally whether his profile as a young Tamil male from northern Sri Lanka would subject him to a risk of discriminatory mistreatment.

[133] While the Officer's reasons could perhaps have been more clearly articulated, I do not share the view that her approach to the issue of discrimination was unreasonable, nor that it rendered her decision unreasonable. With respect to the effect of s. 25(1.3), the Officer's approach is consistent with that set out by Stratas J.A., which I have endorsed. The Officer's statement that she had "not considered the applicant's risk" in the context of the refugee and PRRA factors must not be overly parsed or dissected. She engaged with the evidence relating to the treatment of Tamil males in northern Sri Lanka and analyzed it through the lens of the criteria for granting H&C relief. This approach was reasonable and did not lead her to disregard any relevant evidence.

[134] On the issue of personalized risk of discrimination, I agree with my colleague that an applicant need not produce direct evidence showing that discrimination against the applicant himself or herself had occurred or would necessarily occur. Whether in the context of an H&C application, the PRRA process or a refugee claim, certainties are rare. The applicant need only show that the denial of relief would pose a certain risk of harm.

[135] However, that risk must necessarily be a “personalized risk”, in the sense that the applicant must fall within the category of people who, on the evidence submitted, would face that risk. For example, in order to establish the harm of removal to a country where discrimination against a certain ethnic minority was alleged, the applicant would need to establish *not only* that this discrimination was ongoing and sufficiently severe, *but also* that he or she was a member (or would be perceived to be a member) of the group facing discrimination.

[136] The Officer accepted that the conditions in Sri Lanka posed some risk of discrimination to certain subsets of the Tamil population, but concluded that government harassment and surveillance was focused on those suspected of being LTTE supporters. The Officer impliedly concluded that Mr. Kanthasamy was not suspected of being an LTTE supporter. She also noted that the government had attempted to improve the situation for Tamils. As a result, she found there was insufficient evidence that he would be personally targeted or personally discriminated against. This conclusion was open to her on the record. Though, as my colleague notes, the Officer was permitted to draw inferences from the experiences of other Tamils in order to find a personalized risk of discrimination, the record did not require that she draw that inference here.

[137] I note that on this point, the Officer’s conclusion largely mirrors the finding made on Mr. Kanthasamy’s refugee claim, which he enclosed with his H&C submissions. In that decision, while the Immigration and Refugee Board accepted Mr.

Kanhasamy's description of the two incidents of arrest and detention, it noted that "[t]here were no conditions placed on the claimant before he was released by the army or the police after they had questioned him", and concluded that "[neither] the police [nor] the army would have released the claimant in the manner described" had they suspected Mr. Kanhasamy of LTTE support or sympathy. The refugee claim was rejected because "on a balance of probabilities . . . [Mr. Kanhasamy's] profile is not one that would particularly attract any undue attention or reprisal . . . if he returns to his family in Sri Lanka".

[138] In reaching a similar conclusion in evaluating his H&C application, the Officer arrived at a reasonable result that was supported by the record. Reviewing judges ought not to parse a decision maker's word choices in "a line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54). The Officer's reasons must be viewed in the context of the record as a whole, including Mr. Kanhasamy's submissions. Before the Officer, Mr. Kanhasamy submitted that he "has been personally affected by discrimination . . . and will continue to be so affected" (emphasis added). When viewed in context, the Officer's conclusion that Mr. Kanhasamy had "failed to provide sufficient evidence to support his statements that he will be personally discriminated against" simply reiterated the wording of his submissions. The Officer's word choice is not determinative. It is her reasoning that counts. I find nothing in her analysis on the issue of discrimination that warrants this Court's intervention.

(c) *Mr. Kanthasamy's Best Interests as a Child*

[139] Mr. Kanthasamy submits that the Officer's analysis of his best interests as a child was superficial and that she failed to give adequate weight to his status as a child.

[140] Again, I accept that the Officer's reasons could have been more expansive on this point. However, in my view, both her analysis and conclusion on Mr. Kanthasamy's best interests as a child were reasonable.

[141] In the context of Mr. Kanthasamy's application, it was highly relevant that he was one day away from turning 18 when he initially applied for H&C relief. Mr. Kanthasamy was not a young child, born in Canada, facing the prospect of his parents' deportation and being left here without support. He was a teenager on the verge of adulthood. Removal would reunite him with his parents and siblings in Sri Lanka.

[142] The Officer considered factors unique to Mr. Kanthasamy's status as a child, including friendships forged during his teenage years in Canada and his efforts at completing high school. She found that removal to Sri Lanka would not necessarily bring an end to these friendships. She was also unpersuaded that he "would be unable to attend school . . . upon his return to Sri Lanka". In the totality of his circumstances, she concluded that it was in Mr. Kanthasamy's best interests as a child to return to the support and care of his immediate family in Sri Lanka.

[143] On the record before her, it was open to the Officer to conclude that removal to Sri Lanka would not impair Mr. Kanthasamy's best interests, because he would be returning to his immediate family rather than being separated from them. The Officer was obliged to be "alert, alive and sensitive" to the best interests of the child factor (*Baker*, at para. 75). In my view, her reasons demonstrate that she was, and I see no basis to disturb her findings on this issue.

V. Conclusion

[144] As I have explained, the test for granting relief under s. 25(1) is not the "unusual and undeserved or disproportionate hardship" test set out in the Guidelines. Nonetheless, the Guidelines remain relevant. They can continue to serve their original purpose — describing the majority of situations appropriate for relief — and can be applied in a way that does not fetter the discretion of immigration officers.

[145] The Officer here used the hardship framework to guide her analysis. Had she applied the test that I have outlined — whether, having regard to all of the circumstances, decent, fair-minded Canadians aware of the exceptional nature of H&C relief would find it simply unacceptable to deny the relief sought — she would inevitably have reached the same conclusion.

[146] The Officer's decision to deny an exemption to Mr. Kanthasamy was reasonable. Although she separately analyzed each factor raised in support of his application, she did not improperly discount the cumulative weight of each factor.

Rather, after analyzing each piece of evidence in detail, she reached a conclusion which was grounded in Mr. Kanthasamy's circumstances as a whole. Although she applied the hardship standard from the Guidelines, she did not do so in a way that fettered her discretion. Accordingly, I would dismiss Mr. Kanthasamy's appeal, and affirm the Officer's decision to deny his H&C application.

Appeal allowed with costs, MOLDAVER and WAGNER JJ. dissenting.

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