Federal Court  Cour fédérale

**Date: 20151015**

**Docket: IMM-6576-14**

**Citation: 2015 FC 1166**

**Ottawa, Ontario, October 15, 2015**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**NISHANTHILAN SANTHAKUMARAN**
**SANTHAKUMARAN SELVARASA**
**KALAJOTHY SANTHAKUMARAN**
**NISHANTHILA SANTHAKUMARAN**
**NIVERTHAN SANTHAKUMARAN**
**NITHARSAN SANTHAKUMARAN**
**MUGIRTHANAN SANTHAKUMARAN**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

## I. Introduction

[1] Nishanthilan Santhakumaran has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. He challenges a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board to reject the application for permanent residence of his parents and four siblings, whom he sought to sponsor. The IAD upheld the finding of a visa officer [the Officer] that Mr. Santhamukran's father was medically inadmissible pursuant to s 38(1)(c) of IRPA. The Officer then found the remainder of the family to be inadmissible pursuant to s 42(a) of the IRPA by virtue of their joint application. The IAD concluded that humanitarian and compassionate [H&C] considerations did not overcome the findings of inadmissibility.

[2] For the reasons that follow, I have concluded that the IAD failed to consider that Mr. Santhakumaran arrived in Canada at the age of 12 as a Convention refugee, and unreasonably found that his separation from his family was a "natural by-product of the choices his parents made" and was "no different than others who have moved to Canada and are separated from their family members." In addition, the IAD failed to consider whether Mr. Santhakumaran's mother and siblings would be admissible without the father. The application for judicial review is therefore allowed.

## II. Facts

[3] Mr. Santhakumaran is 30 years old and a Canadian citizen of Sri Lankan Tamil origin. He came to Canada at the age of 12 as a Convention refugee, fearing forcible recruitment into the

Liberation Tigers of Tamil Eelam. His immediate family continues to reside in Colombo, Sri Lanka.

[4] In 2005, Mr. Santhakumaran submitted an Application to Sponsor and Undertaking on behalf of his parents and siblings. In 2007, Mr. Santhakumaran's father, as principal applicant, filed an Application for Permanent Residence. In 2011, as part of the application screening process, the Regional Medical Officer in Colombo conducted medical examinations of Mr. Santhkumaran's parents and siblings. The medical assessments revealed that Mr. Santhakumaran's father suffers from chronic renal failure and diabetes.

[5] On January 24, 2012, the Officer refused the application on the ground that Mr. Santhakumaran's father has a medical condition that might reasonably be expected to cause excessive demand on Canada's health services, and he was therefore medically inadmissible under s 38(1)(c) of the IRPA. This rendered all of the applicants, specifically Mr. Santhakumaran's mother and four siblings, inadmissible to Canada pursuant to s 42(a) of the IRPA.

[6] Mr. Santhakumaran appealed the Officer's decision to the IAD and a hearing was scheduled for August 7, 2014. Prior to the hearing, Mr. Santhakumaran's father wrote a letter to the IAD requesting that, in the event that it upheld the Officer's finding regarding his inadmissibility, the panel still consider the admissibility of Mr. Santhakumaran's mother and siblings without him.

[7] Before the IAD, Mr. Santhakumaran did not contest the legal validity of the Officer's decision to refuse the application, but argued that there were sufficient H&C grounds to warrant the granting of special relief. In the alternative, Mr. Santhakumaran repeated his request that the admissibility of his mother and siblings still be considered in the event that his father was found to be inadmissible.

[8] In a decision dated August 22, 2014, the IAD dismissed Mr. Santhakumaran's appeal. He filed an application for judicial review in this Court on September 11, 2014, and leave was granted on March 25, 2015.

## III. The IAD's Decision

[9] The IAD noted that the information concerning Mr. Santhakumaran's father's condition had not been updated since the initial medical examination in 2011, and no credible plan had been put forward to enable the family to care for the father in Canada and alleviate the burden on the healthcare system. In response to Mr. Santhakumaran's commitment to assume his father's medical costs, the IAD observed that it would be impossible to enforce such a personal undertaking since healthcare is a universal benefit to which all residents of a province are entitled (*Deol v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 271). The IAD therefore confirmed the validity of the Officer's refusal.

[10] H&C factors considered by the IAD included Mr. Santhakumaran's isolation from his family, letters of support from family and friends, and reports of country conditions in Sri Lanka. The IAD acknowledged that Mr. Santhakumaran had been separated from his family since the

age of 12, but described this as the "natural by-product of the choices his parents made that he live in Canada with another family member." The IAD concluded that Mr. Santhakumaran's circumstances were no different from those of others who have moved to Canada and are separated from their family members as a result.

[11] Mr. Santhakumaran testified to the discrimination that his family faces in Sri Lanka. However, the IAD found that there was no independent documentary evidence to support this testimony, and no explanation for why it not provided. The IAD declined to take notice of country conditions in the absence of documentary evidence.

[12] Finally, the IAD acknowledged the significant distance separating the family, but found that they have managed to stay emotionally close. The IAD remarked that family reunification will rarely constitute sufficient H&C grounds to overcome a finding of inadmissibility.

[13] The IAD concluded that H&C considerations did not warrant special relief. The IAD did not consider whether Mr. Santhakumaran's mother and siblings would be admissible without the father.

## IV. Issues

[14] Mr. Santhakumaran raised a number of issues in support of his application for judicial review. Two of these are determinative:

A. Was the IAD's characterization of the reasons for the family's separation reasonable?

B. Did the IAD improperly fail to consider whether Mr. Santhakumaran's mother and siblings would be admissible without the father?

V. Analysis

A. *Was the IAD's characterization of the reasons for the family's separation reasonable?*

[15] The IAD's assessment of H&C considerations is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at paras 57-58). Deference is owed to the IAD by virtue of its expertise and special position as trier of fact *(Khosa* at para 25). Courts will interfere with the IAD's decision only if its factual findings were "made in a perverse or capricious manner or without regard for the material before it" (*Khosa* at para 72; *Federal Courts Act*, RSC, 1985, c F-7, s 18.1(4)(d)).

[16] The IAD is presumed to have considered all of the evidence that was before it and is not required to refer to each piece of evidence in its decision (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). However, the more important the evidence that is not mentioned specifically and analyzed in the IAD's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding

of fact "without regard to the evidence" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17.)

[17] In this case, the IAD made no mention of the fact that Mr. Santhakumaran was found by the Refugee Protection Division of the Immigration and Refugee Board to be a Convention refugee. Instead, the IAD observed that the family's separation was a "natural by-product of the choices his parents made," and that this was "no different than others who have moved to Canada and are separated from their family members."

[18] In my view, the manner in which the family came to be separated should have been a central consideration in the H&C analysis. The unusual and painful circumstances in which Mr. Santhakumaran arrived in Canada at the age of 12 to live with a distant relative whom he barely knew were plainly in evidence, yet they are wholly absent from the decision. One of the stated goals of the IRPA is to "support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada" (IRPA, s 3(2)(f)). The IAD's failure to acknowledge the reasons for the family's separation leads to the conclusion that its finding was made without regard to the material before it (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 39). The IAD's reasons in this respect are not justified, transparent or intelligible, nor is its decision defensible with respect to the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

B. *Did the IAD improperly fail to consider whether Mr. Santhakumaran's mother and siblings would be admissible without the father?*

[19] The IAD is not required to address each issue and every argument raised by the parties, nor to make an explicit finding respecting each element that leads to its final conclusion. Reasons are adequate if they permit a reviewing court to understand why the tribunal made its decision, and to determine whether the conclusions fall within the range of acceptable outcomes in light of the evidence before the tribunal and the nature of its statutory task (*Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16, 18).

[20] Nevertheless, a tribunal's reasons must demonstrate that it considered the important points in issue in a given case, and the main relevant factors. A reviewable error may be found to exist where an applicant can establish that he or she raised an important and relevant point before the IAD, but the panel's reasons, taking into account the record as a whole, do not allow a court to understand why the point was disregarded (*Chopra v Canada (Attorney General)*, 2014 FC 246 at paras 191-192, citing *Turner v Canada (Attorney General)*, 2012 FCA 159 at paras 40-42, and *Stelco Inc v British Steel Canada Inc*, [2000] 3 FC 282 (FCA) at paras 22, 24-26, aff'd 2015 FCA 206). I am satisfied that the IAD made such an error in this case.

[21] The Minister relies on *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 [*Owusu*], and argues that the "alternative plea" regarding the admissibility of Mr. Santhakumaran's mother and siblings without the father was not properly raised before the IAD. I disagree. In *Owusu*, the Federal Court of Appeal held that the H&C officer was not required to consider a particular factor (in that case, the best interests of a child) because it was raised only

obliquely in one sentence in a seven-page letter. In this case, the issue was raised explicitly on two occasions. It was mentioned in the letter that Mr. Santhakumaran's father's sent to the IAD prior to the hearing, and again in Mr. Santhakumaran's testimony before the IAD. This was sufficient to raise the issue before the IAD, and the IAD was therefore obliged to address it.

## VI. Conclusion

[22] For the foregoing reasons, the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the IAD for reconsideration.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and no question is certified for appeal.

"Simon Fothergill"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6576-14 |
| **STYLE OF CAUSE:** | NISHANTHILAN SANTHAKUMARAN<br>SANTHAKUMARAN SELVARASA KALAJOTHY<br>SANTHAKUMARAN NISHANTHILA<br>SANTHAKUMARAN NIVERTHAN<br>SANTHAKUMARAN NITHARSAN<br>SANTHAKUMARAN MUGIRTHANAN<br>SANTHAKUMARAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | AUGUST 12, 2015 |
| **JUDGMENT AND REASONS:** | FOTHERGILL J. |
| **DATED:** | OCTOBER 15, 2015 |

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