Federal Court  Cour fédérale

Date: 20180212

Docket: IMM-4114-16

Citation: 2018 FC 162

Ottawa, Ontario, February 12, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SIVATHAKARAN ARIYARATHNAM AND PRASHANTHINI SUPPIAH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY

Respondents

JUDGMENT AND REASONS

[1] On August 10 , 2016, a visa officer found that Mr. Ariyarathnam was inadmissible to Canada on grounds of organized criminality, pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA]. The visa officer also concluded that humanitarian and compassionate [H&C] considerations, taking into account the best interests of

the applicants' child, did not justify granting an exemption from any applicable criteria or obligations of IRPA.

[2] The applicants, who have been married since before the male applicant was removed from Canada in September 2004, seek the judicial review of that decision in accordance to section 72 of IRPA. They have remained married and Mrs. Suppiah has tried to sponsor her husband back to Canada from exile in Malaysia since 2010. There have been in between a number of incidents and events which, in the view of the applicants, would justify the application of the doctrine of abuse of process. In my view, the particular and peculiar circumstances require that this judicial review be successful, but rather on the basis that the decision made is not reasonable.

I. The facts

[3] It is the very peculiar circumstances of this case that lead the Court to the conclusion that the decision under review must be set aside. It is therefore essential that the facts be stated in some details.

[4] Mr. Ariyarathnam, who I will refer to as the "applicant", was born in Sri Lanka in 1974 and first came to Canada in 1992. He was recognized as a refugee and became a permanent resident in 1993.

[5] Between 1997 and 2000, the applicant was convicted of multiple offences, including aggravated assault, obstructing a peace officer, failure to comply with probation order and recognizance, and driving while impaired.

[6] In 1998, the applicant met his co-applicant, Ms. Prashanthini Suppiah. They married in March 2001.

[7] In May 2001, the respondent reported the applicant as inadmissible for criminality under subsection 27(1)(d) of the *Immigration Act*, R.S.C., 1985, c. I-2 [*Immigration Act*], the predecessor to IRPA, specifically due to his conviction for aggravated assault that led to a sentence of 2 months' imprisonment following 9 months of pre-sentence custody. There was also probation imposed for a period of 12 months. At that time, an immigration officer interviewed the applicant and he denied membership in a gang.

[8] In September 2001, the respondent issued a second report alleging the applicant was inadmissible due to his alleged membership in the AK Kannan street gang. This would constitute inadmissibility on grounds of organized criminality under paragraph 27(1)(a) of the previous Act. The equivalent provision is now found at section 37 of IRPA.

[9] The respondent referred the applicant to an admissibility hearing solely based on the criminality allegation under paragraph 27(1)(d).

[10] In February 2002, the Immigration Division [ID] found the applicant was inadmissible for criminality under paragraph 27(1)(d) and issued a removal order. The ID did not make a finding with respect to organized criminality. The applicant filed an appeal with the Immigration Appeal Division [IAD] of the inadmissibility finding.

[11] In February 2003, the respondent filed an application as a preliminary matter with the IAD seeking to have the applicant found inadmissible on the grounds of organized criminality under paragraph 37(1)(a) of the present IRPA such that he would not have a right of appeal against the ID's removal order under subsection 64(1) and section 196 of IRPA. In effect, the government was attempting to bypass the ID by having the IAD entertain for the first time the matter of organized criminality.

[12] This is deserving of more extensive elaboration. The Minister of Citizenship and Immigration, when confronted with an appeal of the ID decision ordering the deportation of the applicant based on criminality grounds, sought to prevent this appeal by asking the IAD to make a determination of inadmissibility based on organized criminality. That, in the view of the government, would have pre-empted the appeal of the deportation order.

[13] In a very clearly articulated ruling on May 27, 2003, the IAD concluded to its lack of jurisdiction to determine that this applicant is a person described in subsection 37(1) of IRPA (by then, the old *Immigration Act* had been replaced by IRPA). The determination must be previously made by an adjudicator of the former Adjudication Division or a member of the ID. The record before the Court does not disclose what was the purpose of the Minister's attempt.

[14] The Minister did not pursue a second admissibility hearing at the ID for organized criminality following the IAD ruling of May 2003. As a result, the allegation of organized criminality was not adjudicated upon.

[15] In the meantime, in March 2003, the respondent issued a danger opinion against the applicant. Pursuant to section 115 of IRPA, a convention refugee may not be returned to the country, in this case Sri Lanka, the country of nationality, where the person would be at risk of persecution. However, the principle of non-refoulement does not apply when the person is inadmissible on grounds of serious criminality and constitutes a danger to the public in Canada, in the opinion of the Minister.

[16] On April 3, 2004, the IAD dismissed the applicant's appeal that had been filed in February 2002. The applicant had been found to be a person described in paragraph 27(1)(d) of the *Immigration Act* (criminality), which resulted in a deportation order. This appeal focused on whether the applicant could succeed in arguing that, having regard to all the circumstances of his case, he should not be removed from Canada. The IAD considered the factors recognized by the Supreme Court of Canada as being applicable in those circumstances (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3; [2002] 1 SCR 84 [*Chieu*], applying the factors known as the "Ribic factors" in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) [*Ribic*]). The first such factor is the seriousness of the offence leading to deportation and the possibility of rehabilitation (other factors are the degree of establishment in Canada, the dislocation of the family, the support available and the hardship the deportee would suffer upon returning to the country of nationality).

[17] It is under the rubric of the seriousness of the offence that the IAD received evidence of the circumstances of the offence of aggravated assault, for which the applicant served time in prison and which is at the heart of the finding of criminality leading to the deportation order. The testimony of a Toronto policeman was received.

[18] Evidently, the IAD received evidence of the participation of the applicant in a gang to help establish the seriousness of the offence at the source of the deportation order. From paragraphs 12 to 22, the IAD panel member discussed the applicant's criminal offences and gang activity in some detail. The IAD heard direct testimony from the applicant, as well as from Detective Constable Regall who worked with an entity called the "Tamil Task Force" starting in 1997. Detective Regall seems to have recounted the circumstances surrounding the June 1999 incident that led to the applicant's conviction for aggravated assault. The IAD recognized that the applicant's testimony conflicted "starkly" with that of the detective, but the IAD ultimately found the detective more credible and gave weight to his evidence on the basis of different demeanours of the two witnesses while on the stand. The applicant denied being a member of the gang whereas the detective testified "that the appellant was a core member of the A.K. Kannon gang from at least 1997 when the Tamil Task Force began its investigations." Although the detective acknowledged no involvement in criminal activities on the applicant's part since 2000 and in spite of a review of the other factors which were favourable to the applicant, the IAD rejected the appeal.

[19] Clearly, the detective's opinion about the applicant's involvement with a criminal gang was prevalent. The IAD wrote at paragraph 34 that "I have placed particular emphasis on the

serious and violent nature of the offence which led to removal order, on the fact that crime was an orchestrated attack carried out be [*sic*] members of a criminal gang and that the appellant was a core member of the gang at the time…"

[20] There is no indication from the record before the Court whether the view taken by the police detective was supported by any independent evidence presented to the IAD. He appears to have given his opinion on the gang membership without going beyond stating that he benefitted from some "source information and surveillance". Clearly, the IAD found that the detective's evidence resulted in adding to the seriousness of the aggravated assault conviction which was at the heart of the criminality finding leading to a deportation order. But there is no indication that the IAD concluded about the applicant's inadmissibility by reason of organized criminality. The Court does not have any indication that the IAD found that the threshold of "reasonable grounds to believe" had been met or that the definition of organized criminality had been considered other than a statement to that effect. What is clear is that the matter of membership in a gang was featured prominently in the IAD ruling for the purpose of establishing the seriousness of the underlying offence without concluding to organized criminality defined at section 37 of IRPA. There is no more clarity as to why the IAD panel member preferred the evidence of the detective other than the perception that the detective was forthright and the applicant was cautious and reluctant.

[21] In September 2004, the applicant was deported back to Sri Lanka on the strength presumably of the danger opinion. Following significant Sri Lankan harassment, the applicant ended up in Malaysia in May 2008 where he is now a UN-recognized refugee.

[22] The applicant and co-applicant had a son born in Canada in February 2005, a few months after the applicant's removal to Sri Lanka. The applicant's child and wife have since visited on a few occasions the applicant.

[23] In December 2008, the National Parole Board granted the applicant a pardon for all of his convictions. The effect of a pardon issued pursuant to the *Criminal Records Act*, RSC (1985, c. C-47) was the following:

Effect of grant of pardon	**Effet de l'octroi de la réhabilitation**
(*a*) is evidence of the fact	*a*) d'une part, elle sert de prévue des faits suivants:
(i) that, in the case of a pardon for an offence referred to in paragraph 4(*a*), the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and	(i) dans le cas d'une réhabilitation octroyée pour une infraction visée à l'alinéa 4*a*), la Commission, après avoir mené les enquêtes, a été convaincue que le demandeur s'est bien conduit,
(ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character; and	(ii) dans le cas de toute réhabilitation, la condamnation en cause ne devrait plus ternir la réputation du demandeur;
(*b*) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of the	*b*) d'autre part, sauf cas de révocation ultérieure ou de nullité, elle entraîne le classement du dossier ou du relevé de la condamnation à part des autres dossiers judiciaires et fait cesser toute incapacité – autre que celles imposées au titre des articles 109, 110, 161 et 259 du *Code criminel* ou du paragraphe

provisions of any Act of Parliament, other than section 109, 110, 161 or 259 of the *Criminal Code* or subsection 147.1(1) of the *National Defence Act*, or of a regulation made under an Act of Parliament.	147.1(1) de la *Loi sur la défense nationale* – que la condamnation pouvait entraîner aux termes d'une loi fédérale ou de ses règlements.
[My emphasis]	[Je souligne]

[24] In February 2010, the applicant's wife sponsored him to come to Canada as a member of the family class. He applied to become a permanent resident. The application was refused because the applicant did not produce requested documents, specifically a police clearance certificate.

[25] The co-applicant, as his sponsor, appealed this refusal to the IAD. On June 5, 2013, the IAD dismissed the appeal based on its understanding of the effect of the danger opinion which, in the view of the IAD, would deprive the IAD of jurisdiction to hear the appeal. It is noteworthy that the IAD stressed, at paragraph 15, that if it has jurisdiction "then the respondent accepts the marriage is genuine and was not entered into primarily for immigration purposes and is prepared to consent to the appeal being allowed based upon humanitarian and compassionate grounds provided that police clearance certificates necessary for processing are obtained". The IAD noted that it appears to be the Police Clearance Certificate from the Malaysian government that has proven to be elusive to get. It is not completely clear what the consent is about and its full effect. The applicant has relied before this Court on the consent that was given by the government to grant the application for a permanent visa on H&C grounds.

[26] The applicant asserts that the IAD concluded that it lacked jurisdiction in spite of the Minister and the applicant having taken the position that the IAD has jurisdiction (applicant's memorandum of fact and law, para 7; also para 29, IAD decision).

[27] The co-applicant sought judicial review, which was allowed on consent in August 2013 and the appeal was sent back to the IAD for redetermination.

[28] In May 2014, the applicant obtained a Malaysian police clearance valid for one year which addressed the lack of police certificate.

[29] The ordered redetermination by the IAD took place in January 20, 2015. According to the reasons for decision (CTR, p. 129), it is the Minister who recommended that the appeal be allowed. The IAD panel wrote:

> The Minister recommends that the panel allow the appeal. After reviewing the appellant's file in its entirety and the evidence before it, the decision of the Federal Court issued August 2013 and the respondent's position, the panel allows the appeal on humanitarian and compassionate grounds pursuant to section 67(1)(c) of the *Immigration and Refugee Protection Act*.

That too is not completely clear. However, it would appear from the juxtaposition of the IAD decisions of January 20, 2015 and June 5, 2013 that the appeal was from the refusal of an application for a permanent resident visa. If the appeal is granted, it would appear that the refusal is set aside. Nonetheless, it appears that the matter was not completely settled. Close to one year later, the visa officer, instead of issuing the visa following the successful appeal of January 2015, raised another issue.

[30] On December 1, 2015, in a letter completely devoid of any details, the visa officer asked the applicant to address allegations of involvement in organized crime, specifically street gang activity while he previously lived in Canada. The letter refers to open source information "including the decision of the Immigration Appeal Division dated April 1, 2004 regarding your appeal against the deportation order made against you on February 78 [*sic*] 2002…" Furthermore, Mr. Ariyarathnam was advised that the sponsorship application requires that the sponsor not be in receipt of social assistance for a reason other than disability. The letter goes on to state that the co-applicant, the applicant's wife, received social assistance between June 2010 and January 2013. The applicant was invited to respond to the concerns. Through counsel, the applicant responded on January 15, 2016, with an eleven-page letter. The visa was not issued in the months that followed.

[31] In April 2016, the applicants commenced an application in this Court seeking an order in *mandamus* to compel the respondent to make a decision on the applicant's landing application. The application sought a declaration that it is an abuse of process for the respondent to apply inadmissibility provisions for organized crime when it refrained from doing so 15 years earlier, and did not raise the issue from 2004 to 2016, even at the time the applicant sought a pardon in 2008 or when, starting in 2010, a sponsorship application was ongoing with the applicants fulfilling the requirements for documents and demands for certificates. The Minister avoided the *mandamus* by making a decision. The Court dismissed that *mandamus* application as moot when the respondent issued a decision in the applicant's case in August 2016.

[32] On August 10, 2016, a decision letter from the Canadian High Commission in Colombo was issued. It stated that the applicant is inadmissible for organized criminality pursuant to subsection 37(1)(a) of the IRPA. It also concluded that the H&C considerations did not justify granting an exemption from criteria or obligations of IRPA. The present judicial review focuses on this decision.

II. The Decision

[33] The decision letter of August 10, 2016 is a model of brevity. In fact, it says little more than the so-called "fairness letter" of December 1, 2015. The gravamen covers merely two paragraphs:

> In particular, based on open source information, including the decision of the Immigration Appeal Division dated April 1, 2004 regarding your appeal against the deportation order made against you on February 7, 2002, I have reasonable grounds to believe that you were a member of the AK Kannan gang, which is an organization that is believed on reasonable grounds based on open source information to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment.
>
> As requested by your representative, I have considered whether the humanitarian and compassionate considerations relating to you, taking into account the best interests of a child directly affected, justify granting you status or an exemption from any applicable criteria or obligations of IRPA. I have determined that the humanitarian and compassionate considerations do not justify granting you status or an exemption from any applicable criteria or obligations of IRPA.

[34] It appears that the immigration officer, who remains nameless, relied on the IAD decision of twelve years earlier, which was not per se about the allegation of organized criminality (it was never before the IAD) for the purpose of finding the applicant inadmissible on the ground of criminal liability. Instead, the IAD was concerned in 2004 with the issue of inadmissibility for criminality (aggravated assault and various other lesser offences committed between 1997 and 1999) leading to a deportation order to Sri Lanka in view of the "danger opinion". However, in finding that the offences were serious, as per *Ridic* and *Chieu*, the IAD considered the context in which the aggravated assault took place. It concluded that the circumstances under which the offence occurred were gang related. It is somewhat ironic that the same IAD panel that had found, barely a few months earlier, that it did not have jurisdiction to entertain an inadmissibility application based on grounds of organized criminality because the ID had first to make a determination, saw fit to consider the same grounds seemingly to assess the seriousness of the underlying offence. I note that there is no reference, in the August 10, 2016 letter, to the social security payments referred to in the December 1, 2015 letter.

[35] The reasons for an administrative decision are supplemented by the notes produced (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], at para 44). We have such notes in this case. They are quite extensive.

[36] The Global Case Management System [GCMS] notes were requested by counsel and they were produced in the applicant's application record. At any rate, they are also available in the certified tribunal record.

[37] The decision letter is completely inadequate if one is attempting to understand the justification or to ascertain transparency and intelligibility. It merely declares that Mr. Ariyarathnam was a member of an organized crime group and that the membership outweighs H&C considerations, including presumably the best interests of the child. The notes provide more information about the reasoning leading to the two conclusions.

[38] The notes make it clear that the view expressed by the visa officer on the membership in an organized crime group came from the IAD decision of April 1, 2004, concerned with the appeal against a deportation order based on the finding that this applicant had been convicted of serious criminal offences, and in particular the offence of aggravated assault. There was no new information available to the visa officer. On the other hand, the IAD relied on the evidence of a police officer to assess how serious the offences were and, in doing so, accepted that evidence that Mr. Ariyarathnam was a member of that group, despite the denial of Mr. Ariyarathnam to that effect. In fact, the notes cite the most salient paragraphs from the IAD decision, including the paragraph where the panel declares itself satisfied that the credibility of the police officer is superior to that of the applicant on the sole basis apparently of the demeanour of the witnesses.

[39] I note that the visa officer did not refer to the IAD decision where the police officer is said to have "acknowledged that the appellant has not been involved in criminal wrongdoing since his last conviction in July 2000. He said that the appellant still remains a gang member, but that he is no longer a core member" (para 18). The IAD decision does not try to justify the basis for the assertion that the applicant was still involved with the gang more than three years after the conviction.

[40] There is no doubt that the IAD decision of April 1, 2004, relied heavily on the alleged gang membership in order to assess the seriousness of the offences which led to the deportation order. The notes refer specifically to paragraph 34 of the IAD decision (to which I refer at para 19 of these reasons) which makes the point vividly and unequivocally.

[41] The notes also refer to the fact that a pardon has been granted, yet the author relies on the convictions because they "may still be considered as part of the facts leading to a finding of reasonable grounds to believe that the applicant is inadmissible pursuant to A37(1)(a)". There is no further explanation. In essence, in 2004, the IAD took into account – and maybe that constituted the essential finding – the membership in a gang; in the decision under review, although the convictions had been pardoned, the visa officer still relied on the convictions for the purpose of finding inadmissibility on a basis already used some twelve years earlier. There is no explanation given for the "bootstrapping" at both ends, in 2004 and again in 2016; there is no explanation either for having discounted the pardon granted in 2008.

[42] Quite surprisingly, the GCMS notes declare that, in spite of the denials, one as late as January 15, 2016 (reply of January 2016 to the fairness letter of December 15, 2015, page 12) that he has ever been a member of a gang, "I prefer the evidence of the police officer as set out in the IAD decision of April 1, 2004 and the evidence of the applicant's history of convictions, and give more weight to those pieces of evidence than to the applicant's denial of membership". The issue is not so much that the visa officer expresses a preference but rather why he prefers one over the other since he does not appear to have reviewed the evidence other than reading the IAD decision. The visa officer would have to favour the detective's officer on the basis of the IAD

ruling; however, the preference given to the detective's evidence by the IAD appears to be predicated solely on the demeanour on the stand (open, forthright and thoughtful witness). The visa officer did not have the benefit of having the witness testify, indeed there is no indication whatsoever that the evidence was reviewed.

[43] The visa officer also reviewed the H&C considerations. Having referred briefly to the elements, the officer simply concludes that the protection of the safety of Canadians outweighs what would appear to be serious H&C issues, including a boy of 12 who has met his father on a few occasions when he and his mother have been able to visit him abroad. Furthermore, this part of the analysis does not appear to factor in that the Canadian state has already granted a pardon for offences close to 20 years old and where the police officer's testimony confirms that there has not been a conviction since 2000.

[44] Finally, the visa officer addressed the allegation of abuse of process made by the applicant. As I understand the visa officer's response to the allegation, the officer concluded that the matter of inadmissibility by reason of membership in an organized crime group was never the subject adjudicated on despite the alleged gang membership having been rather prevalent in the April 1, 2004, IAD decision concerning the issue of inadmissibility for serious criminality. It is, in my view, rather odd that the visa officer relies very heavily on that decision to conclude to organized criminality without independent evidence, but disposes of the allegation of abuse of process on the basis that the issue has not been decided by the IAD. No explanation was offered.

[45] The notes are rather terse. They merely state that the Minister never subjected the organized criminality issue to final adjudication. The matter may have been raised, but it never received a final adjudication. Thus, “it was within the Minister’s discretion to choose to pursue one avenue over another in pursuing a danger opinion rather than pursuing the report regarding organized criminality in order to remove the applicant from Canada, especially because there was already a removal order issued against the applicant on February 7, 2002 by an adjudicator”.

[46] The applicant had also argued that the inadmissibility for organized criminality was not raised at the time the initial sponsorship application was made or later as the matter was being litigated. The visa officer’s response is simply that these issues are addressed *seriatim*, one after the other; “(u)ntil the application for permanent residence in Canada as a sponsored spouse reached the present stage of processing, inadmissibility under the inadmissibility sections of IRPA was not considered by the visa office”.

[47] I could not find in the notes any consideration being given to decisions reversed on consent, the *mandamus* application which became moot when a decision was finally made, or the use that was made of organized criminality in the decision of April 1, 2004.

[48] The visa officer declined to discuss and decide the sponsor’s eligibility because she may have been the beneficiary of some form of social assistance at some point.

III. Standard of review and analysis

[49] In my view, it is not necessary to reach the abuse of process issue in order to dispose of this peculiar case. The remedy sought is that the matter be remitted for reconsideration and that the remedy ought to be granted solely on the basis that the visa officer's decision must be set aside. The record is in my view inadequate and it would not be wise to address the abuse of process issue if there is no need for that. However, the matter has to be remitted in view of the decision made which is unreasonable.

[50] I note that, although the doctrine of abuse of process applies in administrative proceedings, there appears to be the requirement to have "a process tainted to such degree that it amounts to one of the clearest cases" (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44; [2000] 2 SCR 307 [*Blencoe*], at para 120). I note further that some of the arguments in this case seemed to bear more than a passing resemblance to those disposed of in *Yamani v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482; 241 FTR 320, including *res judicata* and *issue estoppel*. Nevertheless, the use made in this case of the evidence of membership in a gang was, in my estimation, a distinguishing feature worth some careful consideration. The process followed was also somewhat troubling, including for the applicants having to seek an order in *mandamus* after the government had consented to the appeal before the IAD. That prompted the visa officer into action; however, the visa officer did not issue the requested visa, but rather found a new inadmissibility ground out of an IAD decision of twelve years earlier. Actually, there were a few trips to the IAD in this whole process. It is as if, at every step of the way, new objections were raised. In *Blencoe*, Bastarache J., for the majority, states

that "(a)buse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive" (para 116). He went on to define the test at paragraph 120:

> 120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux−Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux−Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra,* at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[51] One difficulty encountered here is that some possibly important facts cannot be ascertained with a measure of clarity. For instance, it is unclear what was the implied effect of the consent to an appeal on H&C grounds before the IAD, especially in view of the refusal of the visa officer to give effect to H&C considerations. Similarly, the episode around the obtaining of police certificates abroad is somewhat shrouded in mystery. The various trips to the IAD remained unclear, in spite of my best efforts to decipher what actually took place and why. That may have shed some light on the possible oppressiveness of proceedings. More clarity around the facts would allow for a more appropriate examination to decide whether this case may be one of those extremely rare cases.

[52] Be that as it may, this case turns on the decision made which addresses two issues: (1) the membership in an organized crime group, and (2) H&C considerations, including the best interests of the child. With respect to both issues, the standard of review is reasonableness (*He v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 391; 367 FTR 28, at para 24; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61; [2015] 3 SCR 909 [*Kanthasamy*]).

[53] It follows that the Court will be concerned with what makes a decision reasonable. Thus, it is worth referring directly to paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190:

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

Thus, the Court must seek to find the existence of justification, transparency and intelligibility. These cannot be found in the decision letter of August 16, 2016. However, the GCMS notes may come to the rescue, at least to some extent.

[54] I am of course aware that the adequacy of reasons by itself does not constitute a basis for quashing a decision. The test is rather that "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; [2011] 3 SCR 708, at para 16). In my view, the decision, even with a full consideration of the GCMS notes, is dearly missing to the point of being unreasonable.

A. *H&C considerations*

[55] I begin with the H&C considerations. The interests of the child are not adequately dealt with. Since at least *Baker*, it is known that a decision is not reasonable if the best interests of the child are not sufficiently accounted for:

> 74 […] Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.
>
> 75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests

> are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[56] More recently, in *Kanthasamy*, the majority re-asserted the importance of the best interests of the child. Lip service will not suffice; merely stating the interests will not suffice either; stating that the interests have been taken into account will not suffice. Rather, the interests of the child "must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence" (para 39).

[57] I have certainly not found this level of attention to the best interests of the child in the decision and the notes. It falls instead in the category of "lip service", if that. Without any identification or definition of those interests, and even less of the great deal of attention required in the examination of the interests of the child, the notes seem to conclude that the child has lived, up to now, without his father, except for some visits abroad. It seems to be implied that he can continue to live without his father's presence. What is rather galling is the preoccupation of the visa officer with the balancing of H&C considerations against protecting the safety of Canadians without any evidence that the safety would be in jeopardy in some fashion or another. The best interests of the child are not considered, or at least are significantly discounted, against the safety of Canadians. The visa officer has to be deemed to have reviewed the file. It is to be assumed that the appeal to the IAD which brought the matter to the visa officer was known to have been allowed on the recommendation of the Minister on H&C grounds. Surprisingly, the visa officer did not discuss the issue. It is only mentioned that the decision "allows the appeal on H&C grounds without instructions or findings." One would expect a decision-maker to explain

what would appear at first blush to be a discrepancy, if not a contradiction. The visa officer does not appear to have inquired as to what the appeal was about, which seems to be the refusal of an application for a permanent resident visa, and what the H&C considerations were. In matters of this nature and importance, ignorance is not bliss.

[58] Thus, not only is there a complete deficiency in the consideration of the best interests of the child, which would be enough to set aside the decision as unreasonable, but the whole issue of the H&C considerations not being sufficient to outweigh the danger posed by someone, who has been out of the country for more than 12 years, is problematic. That calls for an explanation, a justification in order to make the process intelligible. That outcome is not acceptable and defensible in light of the reasons given or implied.

[59] That is, of course, compounded by the fact that this applicant has been granted a pardon by Canadian authorities, by the fact that the police detective on whose testimony this visa officer relies exclusively said that the applicant, as of 2004, was free of convictions since 2000, and by the fact the visa officer never reviewed the “evidence” of gang membership which is argued would support a conclusion that the applicant was associated some twenty years ago with organized criminality.

[60] In other words, the lack of a minimally adequate examination of the best interests of the child is enough to send the matter back. However, there is more. The balancing of the H&C considerations against the safety and security of Canadians is also inadequate. In view of the pardon granted and its meaning in law, one could well ask, danger, what danger?

[61] It is impossible for this Court to gauge if the decision could fall within the range of possible, acceptable outcomes defensible in respect of the facts and the law in view of the reasons given or even implied. On the one hand, there may be at this stage a weak case of organized criminality to be compared with, on the other hand, H&C considerations that have not been appropriately assessed.

B. *Organized criminality*

[62] Then, there is the issue proper of the decision to conclude to organized criminality. This too does meet the standard of reasonableness. The visa officer, in order to establish minimal facts, relied exclusively on the decision of the IAD of April 1, 2004. The notes do not refer to the testimony of the police officer, but rather to what the panel drew from the testimony. For a reason unknown, the visa officer gave more credibility to the police officer, than to the applicant, without reading the evidence. To make things worse, the evidence of the officer was not for the purpose of establishing organized criminality as the notion is defined in IRPA; the government had already chosen by then not to pursue the matter. The purpose of the testimony can only have been to suggest that the offences for which the applicant had been found guilty, and notably aggravated assault, were sufficiently serious if gang related to counterbalance the positive features favouring the applicant against deportation. There is no analysis as to how the visa officer came to the conclusion that the requirements of section 37 of IRPA were met.

[63] In effect, the government is going back to the well for a second serving, but in slightly different circumstances. The visa officer is now satisfied that there is organized criminality

without having anything more to do than receive the results of what was accepted in a different context by a panel of the IAD for a different purpose in law and in facts.

[64] Furthermore, the visa officer does not accept the legal effect of a pardon granted; it is as if it never happened. The pardon is mentioned and quickly forgotten it seems. Inexplicably, the visa officer asserts that the convictions for aggravated assault and failure to comply with a probation order are directly connected to the grounds for believing in organized criminality, convictions which have been "expunged" in the words of the officer, yet the visa officer concludes, without a hint of an explanation, that the two offences "may still be considered as part of the facts leading to a finding of reasonable grounds to believe that the applicant is inadmissible pursuant to A 37(1)(a)". The effect of the pardon deserved better. It could not simply be ignored. Merely stating that they can now be used does not make it so. Some justification was required.

[65] The decision of April 1, 2004 was not, and could not be, equated with a finding of organized criminality. Otherwise, it runs into the operation of *issue estoppel/res judicata* (*Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44; [2001] 2 SCR 460, at para 25). It was therefore a live issue, twelve years later, whether the pardoned convictions could in any way be used and, if so, to what effect.

[66] Perfection of the reasons given by the decision-maker is not the standard to which one is held. But there must be justification, transparency and intelligibility in the decision-making process for the decision to be reasonable. The Court finds that it is lacking on that front. Other

than reading in an IAD decision that a police officer declared that the applicant was involved in a gang in the late 90's, there does not appear to be anything to support the view, taken by the visa officer, that reasonable grounds to believe in facts, leading to the conclusion that section 37 of IRPA is satisfied, exist. It would seem that it is not the facts that establish the belief, but what is said by the IAD panel of what the officer concluded. The visa officer did not review the testimony itself or, for that matter, any evidence. The facts on which the opinion is offered are not discernible.

[67] Moreover, it is impossible to assess how the visa officer can declare that "I prefer the evidence of the police officer as set out in the IAD decision of April 1, 2004 and the evidence of the applicant's history of convictions, and give more weight to those pieces of evidence than to applicant's history of convictions, and give more weight to those pieces of evidence than to the applicant's denial of membership." Preference based on what? In 2004, the IAD preferred the testimony of one over the other on the basis of their demeanour on the stand, something that the visa officer was incapable of doing.

[68] I do not dispute that it is possible that the applicant was involved in organized criminality, as defined in section 37 of IRPA. The point is rather that it was not established back in 2004 that there was inadmissibility on the ground of organized criminality as defined in IRPA. Indeed, the government chose not to pursue that avenue. The IAD merely heard a police officer claim the involvement of the applicant in a gang in support of the seriousness of the offence which led to a finding of criminality sufficient for a deportation order to be sustained. What is less than clear is what were the facts to support the opinion that the applicant was a member of a

gang. Other than the opinion offered by the police officer, there were no facts ascertained by the visa officer. To put it another way, the visa officer accepted the opinion as sufficient to satisfy the requirements of section 37 in spite of the fact that the opinion was not offered for the purpose of establishing organized criminality and did not produce the facts that could underlie an opinion.

[69] It was for the visa officer to make a determination, in 2016, of organized criminality going back to 2000. In order to reach that conclusion, the visa officer could not rely exclusively on the expressed preference for the testimony of a police officer the visa officer did not see. In fact, the visa officer had to accept the assessment of the testimony made by the IAD. However, that preference was based on demeanour, not witnessed by the visa officer.

[70] It is certainly true that section 33 of IRPA requires the existence of reasonable grounds to believe the facts that constitute inadmissibility, which is less than the standard of proof in civil matters (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 ; [2005] 2 SCR 100, at para 114). As long as there are reliable facts, membership can be established on the basis of reasonable grounds, not on a balance of probabilities. Similarly, section 37 also speaks of reasonable grounds to believe that the organization has been engaged in activity that is part of a pattern of criminal activity planned and organized. But the threshold of reasonable grounds to believe does not justify an absence of facts to ground the reasonable belief.

[71] Reasonable grounds to believe involve a credibly based probability. In *R v Chehil*, 2013 SCC 49, [2013] 3 SCR 220, the Supreme Court had to establish the difference between reasonable grounds to suspect and reasonable grounds to believe. One reads at paragraph 27:

> [27] Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.
>
> [My emphasis]

[72] At any rate, it is the visa officer that must have the facts that constitute inadmissibility, which include facts for which there are reasonable grounds to believe have occurred. Similarly, facts are required to establish grounds to believe that an organization has been engaged in an activity that is part of a pattern of criminal activity planned and organized by persons acting in concert. The visa officer is making the determination that an applicant is inadmissible on grounds of organized criminality, no one else.

[73] In this case, the decision-maker does not have the facts to conclude to reasonable grounds to believe. The visa officer had the opinion of the detective gleaned from the decision of a panel of the IAD that preferred his opinion because of the demeanour on the stand. In effect, the inadmissibility decision, without facts supporting membership in a gang, is made by a witness, based on the story he told, seen through the prism of a different decision-maker, the IAD, whose remit was not to decide on the admissibility on grounds of organized credibility. Without the facts supporting the conclusion, as opposed to accepting the opinion given, the decision on

inadmissibility becomes that of a police officer instead of that of the visa officer: *delegatus non potest delegare*.

[74] I would not wish to be taken to require that the facts be established as if the matter were before a court of law. That would impose an undue burden. It would be possible for one witness to recount the facts, even if there is hearsay involved. Cross-examination could be conducted to ascertain the quality of the facts and their recount. But the facts leading to reasonable grounds must be available if the reasonable grounds are to be those of the decision-maker; such is not the evidence on the record constituted for the review of this case.

[75] The decision lacks justification and intelligibility. It is not possible to ascertain whether is constitutes a possible, acceptable outcome defensible in respect of the facts and the law. Indeed, it appears that it is the decision for someone else that is accepted without the benefit of the facts.

[76] It follows that the matter must be returned to a different visa officer for a new determination.

[77] I add that it would be unfortunate if a new visa officer chose to resurrect the sponsor's eligibility at this very late stage. That may show vindictiveness and, at any rate, that could very well be overtaken by H&C considerations. After all, if the co-applicant, Mrs. Prashanthini Suppiah, found herself in financial straits, it is probably as a function of her status as a single-parent family with a child.

IV. Certified question

[78] At the end of the hearing, the Court invited submissions in writing by counsel on their view whether a serious question of general importance emerged such that a question ought to be stated pursuant to section 74 of IRPA.

[79] Part of the parties' submission addressed the issue of delay and the prejudice that would have ensued. Finding inspiration in *R v Jordan*, 2016 SCC 27; [2016] 1 SCR 631 [*Jordan*], counsel for the applicants argues that the period of time between when the government alleged it had a case for inadmissibility by reason of organized criminality and the decision made in this case constitutes an unreasonable delay. Counsel for the Crown vigorously argued against the passage of time alone giving rise to a remedy.

[80] Given that the Court has already concluded that the abuse of process issue is not reached in this case, it is not necessary to address the issue. I would nevertheless offer this comment.

[81] Both *Jordan* and *Blencoe* were concerned with delays between the launch of proceedings, in the *Jordan* case before de criminal courts (which brings into play section 11(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), and, in the *Blencoe* case, complaints of discriminatory conduct before the British Columbia council of Human Rights (now the British Columbia Human Rights Commission). In other words, the issue was the time it took to process charges and complaints. Such is not the fact situation in this case as the Minister did not seek

adjudication on inadmissibility on grounds of organized criminality in 2004. It is difficult to see in this case why, and how, the Minister would have sought to have the applicant declared inadmissible by reason of organized criminality after he had already been deported for being inadmissible by reason of serious criminality.

[82] Furthermore, the Court in *Blencoe* found that "delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period" (para 101). Although the testimony of a police officer on the involvement of the applicant in gang-related activities muddies somewhat the waters, that in and of itself does not turn the April 1, 2004 decision by the IAD into an adjudication of inadmissibility on the basis of organized criminality.

[83] On the issue of stating a certified question, counsel for the applicants proposed four questions. Counsel for the Minister argues that no question should be certified.

[84] The decision to certify questions under section 74 of IRPA is not to be taken lightly. As the Federal Court of Appeal stated again recently, it has jurisdiction only if the question meets the well-established criteria for a certification (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 [*Lunyamila*]; *Sran v Canada (Citizenship and Immigration)*, 2018 FCA 16). The conditions are summarized in *Sran*, at para 3:

> [3] The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the

> appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case): *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras. 35-36; *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 at para. 16, 485 N.R. 186; *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9, [2014] 4 F.C.R. 290; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras. 28-29, [2010] 1 F.C.R. 129; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paras. 11-12, 318 N.R. 365; and *Liyanagamage v. Canada (Secretary of State)*, 176 N.R. 4 at para. 4, [1994] F.C.J. No. 1637 (A.D.).

[85] As Laskin J.A. found in *Lunyamila*, it may be that "underlying the certified question may well be a serious legal question of general importance that […] calls for further judicial consideration" (para 3). But that is not enough.

[86] It must also be dispositive of the appeal. It cannot be a disguised reference to the Court of Appeal (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178); it cannot be either based on an issue that does not need to be decided (*Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21).

[87] The first three questions proposed by the applicants are all concerned with an aspect of the doctrine of abuse of process, including *res judicata*. As the issue does not form the basis of the Court's decision and did not need to be decided, they are not questions appropriate for certification. The fourth question relates to the effect of a pardon. This is not an issue that could be dispositive as the pardon, and its effect, was one element ignored by the visa officer that contributes to rendering the visa officer's decision unreasonable. That one question does not

dispose of the case. Indeed, the visa officer considered other "evidence" in reaching the conclusion on organized criminality. As in *Lunyamila*, I readily acknowledge that there may be a serious legal question of general importance; however, also as in *Lunyamila*, the proposed question in this case equally fails also because the "question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application" (para 46).

[88] This case turns on its peculiar facts and circumstances; it is grounded on its particular facts. Accordingly, the Court declines to state a certified question.

V. Conclusion

[89] The judicial review application is granted. The matter is to be returned to a different visa officer for a new determination. The applicants sought their costs on a solicitor-client basis. Section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (SOR/93-22) provides that costs shall not be awarded, save for special reasons. None exists in this case. Accordingly, there shall not be an award for costs.

JUDGMENT in IMM-4117-16

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;

2. The matter is returned to a different visa officer for reconsideration in accordance with these reasons. The said reconsideration must take place within 60 days of the date on which this judgment is rendered;

3. There is not an award of costs.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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