Date: 20090422

Docket: IMM-3499-08

Citation: 2009 FC 393

Ottawa, Ontario, April 22, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KONSTANTINA KOROMILA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (Act) for judicial review of a decision of an Officer of Citizenship and Immigration Canada (Officer) in Rome, Italy, dated May 31, 2008 (Decision), refusing the Applicant's application based upon humanitarian and compassionate (H&C) grounds pursuant to section 25 of the Act.

BACKGROUND

[2] The Applicant resides in Greece. She is not married and does not have children. She has one sibling, a sister named Maria, who currently lives in Canada and is a Canadian citizen.

[3] The Applicant's mother died when she was three years old and her father never remarried. The Applicant and her sister were raised in Greece by their father and their aunt. Their father died of a heart attack when they were teenagers and their aunt continued to care for them.

[4] Both the Applicant and her sister pursued post-secondary studies. The Applicant went on to become an administrator with the Ministry of Social Services in Greece where she worked until her retirement.

[5] The Applicant's sister met George Pefanis while he was vacationing in Greece in 1968. George was originally from Greece but had become a Canadian citizen. Maria married George and immigrated to Canada. The Applicant remained in Greece to live with and help support her aunt. It was their intention to join Maria and George in Canada.

[6] Maria and George travelled every summer to visit the Applicant and her aunt in Greece. When Maria gave birth to her first child in 1969, a son named Constantine, the aunt travelled to Canada to help Maria and stayed for nine and a half months. When the aunt returned to Greece, Maria and Constantine went to stay in Greece for about eight months.

[7] Six months after Maria and Constantine returned to Canada, their aunt had a very bad stroke and was paralyzed on the left side of her body. At the time of the stroke, Maria was pregnant with her second son, John, but travelled to Greece to stay and help with her aunt for six months. Maria then returned to Canada and the Applicant remained in Greece to look after her aunt.

[8] Due to her aunt's condition, the Applicant could not travel to Canada for several years, but Maria and her family continued to travel to Greece and stayed every summer for a month. The Applicant was very close with Maria, George and her nephews.

[9] In 1986, the Applicant arranged for a caregiver to stay with her aunt while she travelled to Canada. When Constantine became engaged, the Applicant arranged for a caregiver to be with her aunt so she could travel to Canada for the wedding in 2000.

[10] In 2002, the aunt's condition deteriorated and Maria travelled to Greece to be with her. The deterioration continued after Maria's return to Canada and, in December of 2002, the aunt died. Maria returned to Greece and stayed for several weeks so that she and the Applicant could grieve together.

[11] In the spring of 2003, the Applicant developed a heart condition which required a pacemaker. Maria flew to Greece to assist her and the Applicant flew back to Canada with her and stayed for four months.

[12] The Applicant and Maria visit each other regularly and, when they are apart, they speak frequently on the phone. The Applicant also speaks frequently with Constantine and John. The Applicant attended John's wedding in Canada in 2005. She also made lengthy visits to Canada when Constantine's two children were born.

[13] The Applicant says that she is alone in Greece and is now an elderly woman. Although she is in good health, she is vulnerable in the way "elderly people who are on their own can be."

[14] Although Maria and George have travelled to Greece many times over the past few years, health concerns now prevent George from making the trip. The Applicant says that, as they age, it will become more difficult for her and Maria to visit each other.

[15] The Applicant applied for permanent residence in Canada in June of 2007. Her family in Canada is willing to be responsible for her welfare notwithstanding the fact that she has sufficient income on her own. John, who is now a physician, included a sponsorship application with the Applicant's Permanent Resident Application.

[16] On April 2, 2008, it is alleged that the Officer advised the Applicant that, in order to proceed with her application, she would need to provide language test results.

[17] Applicant's counsel replied to the visa office by e-mail on April 28, 2008, stating that the Applicant's application was based on H&C grounds and that no points were being claimed for

language skills. Counsel also stated that the Applicant did not live close to any of the test centres and that it would be difficult for her to travel to one. This was why she was seeking an exemption under section 25 of the Act. Counsel also requested that consideration be given to paragraph 3(1)(*d*) of the Act which deals with the reunification of families in Canada.

[18] The Officer replied by e-mail on May 21, 2008 stating that the Applicant had applied under the skilled worker category and that she had not obtained the minimum required points. As well, the fact that the Applicant lived too far from a testing centre was not acceptable. The Officer also noted that H&C factors alone could not be the sole consideration and that the Applicant's skilled worker application still had to be considered.

[19] By e-mail on June 11, 2008, Applicant's counsel stated that the forms for skilled worker had been submitted because there were no special forms for the processing of cases abroad under section 25 of the Act and that to make the initial submission the Applicant had to use one of the existing forms in the categories of family, economic or refugee. Counsel explained that the application was being made on H&C grounds because the Applicant did not meet the requirements for eligibility in any of the three existing categories.

[20] The Officer advised by e-mail on June 11, 2008 that the final Decision had been made. A letter was received on June 11, 2008 by the Applicant which explained that the Officer had refused her application for permanent residence.

[21] The Officer was cross-examined on his affidavit on December 10, 2008.

DECISION UNDER REVIEW

[22] The Officer concluded that H&C considerations under the skilled worker category did not apply to the Applicant.

[23] He found that the Applicant's health problems did not prevent her from remaining active and that she had many friends and acquaintances in Kalamata where she lived. The Officer noted that the Applicant had travelled to Canada in the past and that her relatives had visited her in Greece. She was also in regular contact with her relatives in Canada and was financially independent and well-established. The Officer noted that the Applicant is lonely, but felt this was not sufficient to support a positive decision on H&C grounds.

[24] The Officer pointed out that nothing prevented the Applicant from visiting her relatives in Canada for half a year or more if she chose to. The Officer also noted that, although it would be convenient for the Applicant to be near her relatives, when her sister immigrated to Canada many decades ago the family was separated and the decision was accepted and understood at that time.

[25] The Officer noted that the Applicant had remained in Greece, had an active and full life, and had kept herself well informed about her relatives in Canada during the last decade. The Officer

found that section 3(1)(*d*) of the Act, which focuses on reuniting families, was not applicable to the Applicant.

[26] The Officer also found that all aspects of the H&C criteria did not apply to the Applicant's case and that she did not have the requisite points to be a skilled worker. He awarded her 46 out of a possible 100 points.

ISSUES

[27] The Applicant raises the following issues for review:

1) The Officer erred in law by misinterpreting and misstating the purpose of paragraph 3(1)(*d*) of the Act;

2) The Officer erred in law in the exercise of discretion by ignoring evidence, misconstruing evidence, and fettering his discretion.

STATUTORY PROVISIONS

[28] The following provisions of the Act are applicable to these proceedings:

3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet :
…	…
(*d*) to see that families are reunited in Canada;	*d*) de veiller à la réunification des familles au Canada;

Economic immigration	**Immigration économique**
12(2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	**12(2)** La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[29] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) are also applicable to these proceedings:

Class	**Catégorie**
75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class	**75.** (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs

is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.

qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

Skilled workers

(2) A foreign national is a skilled worker if

Qualité

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

(*a*) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la *Classification nationale des professions* — exception faite des professions d'accès limité;

(*b*) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational*

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

Classification; and

(*c*) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the *National Occupational Classification*, including all of the essential duties.

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

Minimal requirements

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

Exigences

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

Selection Criteria

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

Critères de sélection

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

(*a*) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) education, in accordance with section 78,

(i) les études, aux termes de l'article 78,

(ii) proficiency in the official

(ii) la compétence dans les

languages of Canada, in accordance with section 79,

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

(v) arranged employment, in accordance with section 82, and

(vi) adaptability, in accordance with section 83; and

(*b*) the skilled worker must

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or

(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

Number of points

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

langues officielles du Canada, aux termes de l'article 79,

(iii) l'expérience, aux termes de l'article 80,

(iv) l'âge, aux termes de l'article 81,

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) la capacité d'adaptation, aux termes de l'article 83;

b) le travailleur qualifié :

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,

(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

Nombre de points

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

(*a*) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

(*b*) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

(*c*) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

Circumstances for officer's substituted evaluation

(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(*a*) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

Substitution de l'appréciation de l'agent à la grille

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)*a*).

Concurrence

Confirmation

(4) An evaluation made under subsection (3) requires the concurrence of a second officer.	(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

STANDARD OF REVIEW

[30] The Applicant submits that questions of law invoke a standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*). She points out that, prior to *Dunsmuir*, the standard of review for discretionary decisions connected with applications based on H&C grounds was reasonableness *simpliciter*: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 61 (*Baker*).

[31] The Respondent submits that the appropriate standard of review for this Decision is the same as the standard enunciated at pages 7 and 8 of *Maple Lodge Farms Ltd. v. Canada,* [1982] 2 S.C.R. 2:

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[32] In relation to the standard of review for federal skilled worker application, *Silva v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 981 (F.C.) at paragraph 7 provides as follows:

> I adopt the view that the particular expertise of Visa Officers dictates a deferential approach when reviewing such a decision. The assessment of an applicant for permanent residence under the Federal Skilled Worker Class and a "substituted evaluation" under subsection 76(3) are discretionary decisions involving factual findings that should be given a high degree of deference. Such decisions should be reviewed on the standard of patent unreasonableness.

[33] Whether the Officer applied the correct test in assessing risk in an H&C application is a question of law and therefore must be reviewed on the standard of correctness: *Pinter v. Canada (Minister of Citizenship and Immigration)* 2005 FC 296; *Mooker v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1029 at paragraph 16 and *Kim v. Canada (Minister of Citizenship and Immigration)*, [2008] FC 632 at paragraph 24. Besides the issues of law, however, the Applicant and the Respondent raise issues related to the Officer's exercise of discretion which should be reviewed under a reasonableness standard.

[34] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[35] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[36] In *Baker*, the Supreme Court held that the standard of review applicable to an officer's decision of whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness *simpliciter*. Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues raised, with the exception of questions of law, to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENT

The Applicant

Purpose of Paragraph 3(1)(*d*) of the Act

[37] The Applicant submits that paragraph 3(1)(*d*) of the Act can and ought to be considered in any case involving a *de facto* family member. The Applicant cites *Nalbandian v. Canada (Minister of Citizenship and Immigration)* (2006), FC 1128 at paragraph 15 for the following:

> …there is no evidence of an invalid inference drawn by her, equally, there is no evidence before the Court that she was cognisant of the principle enunciated in paragraph 3(1)(d) of the *Act* or of the considerations to be taken into account as enunciated in the elements of OP 4 quoted above in considering whether a *de facto* family member, as the Applicant undoubtedly was and is, should qualify for relief on humanitarian and compassionate considerations.

[38] The Applicant says that the Officer erred in law in concluding that paragraph 3(1)(*d*) of the Act applies only to parents and spouses and not to *de facto* family members.

Exercise of Discretion

[39] The Applicant submits that the exercise of discretion by the Officer must be reasonable. An unreasonable decision is defined in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] S.C.R. 748 at paragraph 56, which is cited in *Raudales v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 532 at paragraphs 10 and 11 (*Raudales*):

> **10** As to what is an unreasonable decision, in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R.

> 748, Mr. Justice Iacobucci at paragraph 56 wrote for the Court that:
>
> > An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence.
>
> **11** A court reviewing a decision on judicial review may not intervene in the exercise of discretion simply because the court would have weighed relevant factors differently and arrived at a different decision. The decision must, however, be able to withstand a somewhat probing examination.

[40] The Applicant says that this Court has previously considered the policy of the Respondent to allow "last remaining family members" to become permanent residents of Canada even though they do not qualify for entry: *Sitarul v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1067 (*Sitarul*). In *Sitarul*, the Court had the following to say on point:

> The policy that counsel suggests was not or was improperly defined is 1.17, which provides that:
>
> 1) Family Reunification
> Family Reunification is a stated objective of Immigration Policy as defined in A3(c). Although the provisions of R4 establish the frame work of the Family Class ... they do not adequately capture the intent of the overall policy. Historically, in administering the Immigration Act, this has been recognized; therefore, provision is made for the acceptance of certain Immigrants who cannot qualify for entry but who should, nonetheless, be permitted to take up residence in Canada on humanitarian grounds.

> 2) Last Remaining Family Members
>
> a) The Intent of this policy is to provide a procedure whereby deserving individuals who, in practice, are dependent members of the family, may benefit from the treatment accorded "accompanying family members" even though they may not satisfy the strict definition of family set out in the Family Class Regulations. Cases may be considered at the time of, or subsequent to, the migration of the family unit.
>
> b) Immigration officers in Canada and visa officers abroad will, on occasion, have family situations brought to their attention which will indicate by their nature, on the basis of the facts presented, and in the context of the social and economic environment of the persons concerned, that the admission of the relative should be facilitated. They may include persons who have never come within the legal definition of the family class but who, nevertheless, have established a long-term dependence which would make them a de facto member of the nuclear family, such as an elderly aunt or a long standing aged family servant who had resided with the family prior to its departure for Canada. The primary consideration is, and continues to be, that the Immigrant has considerable difficulty in meeting his/her financial or emotional needs without the support and assistance of the family unit who is migrating to, or is already in, Canada.
>
> (emphasis added)

[41] The Applicant submits that the applicable provisions of the Respondent's present guidelines found in *Citizenship and Immigration Canada Manual, OP-4* at page 9 (OP-4 Manual) reflect the policy recognized above. The present policy has a paragraph on *de facto* family members who can qualify to come to Canada on H&C grounds. An example of who may be eligible includes a sister left alone in her country of origin without family of her own. Although the Guidelines are not binding, the Applicant submits that they can be of assistance to the Court in reviewing discretionary decisions: *Legault v. Canada (Minister or Citizenship and Immigration)* 2002 FCA 125.

[42] The Applicant also submits that, by not considering this information, the Officer committed a reviewable error by failing to demonstrate the logical process by which his conclusions were drawn: *Nalbandian* at paragraph 15.

[43] The Applicant says that the Officer failed to adequately consider the emotional and financial needs of the Applicant. The Applicant argues that she satisfies each and every one of the criteria set out for *de facto* family members. Although the Officer indicated that he took into account the H&C considerations, the Applicant suggests that the Officer could not have been familiar with the OP-4 Manual and that his request for a language test further indicates his misunderstanding of the kind of application being made.

[44] The Applicant further submits that the Officer's reasons cannot withstand a probing examination as contemplated by *Raudales.* This application for judicial review should be allowed and the Decision set aside and the application returned for processing by another officer.

[45] The Applicant answers the Respondent's arguments by pointing out that reliance upon *Agot v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 436 (*Agot*) and *Liang v. Canada (Minister of Citizenship and Immigration)* 2006 FC 967 (*Liang*) is in error since those cases are distinguishable on their facts from the present circumstances.

[46] The Applicant did not stay in Greece to look after “other relatives” as the Officer characterized it; she stayed to look after her *de facto* mother who had no one else to care for her. In the Applicant’s view, this should not be held against her by Canadian immigration authorities.

[47] The Applicant also points out that the Respondent’s reliance upon case law dealing with unusual and undeserved or disproportionate hardship is misplaced. The Applicant is already outside of Canada and applying to enter Canada; so the jurisprudence cited by the Respondent is not instructive. Regardless, the Applicant submits that she will endure unusual and undeserved or disproportionate hardship if she is not allowed to join her family in Canada.

[48] In cross-examination, the visa officer conceded that paragraph 3(1)(*d*), which provides for family reunification, could theoretically apply to a sibling. The Officer maintained, however, that the Applicant had a legal right to enter Canada as a visitor at any time and that any application for an extension of permanent residence status could be extended, though the Officer was unable to provide the legal authority for such a conclusion.

[49] The Officer also stated on cross-examination that he had considered the difficulty of the Applicant having to travel as she gets older. The Officer was asked to point to the part in the CAIPS notes that indicated that the increased difficulty of traveling in advancing years was considered. There was nothing in the CAIPS notes on this issue.

[50] The Officer was also questioned about his conclusion that the Applicant had many friends and acquaintances in Kalamata; the Officer only had two letters from residents of Kalamata.

[51] The Applicant submits that the Officer confused the requirement of all foreign nationals having to apply formally to enter Canada with the requirement that some foreign nationals have obtained visas in advance. When Applicant's counsel tried to ask additional questions about the basis for the conclusion that the Applicant was automatically entitled to extend her status in Canada, the Respondent's counsel instructed the Officer not to answer.

The Respondent

[52] The Respondent submits that subsection11(1) of the Act provides that all foreign nationals seeking admission to Canada must first apply to an officer for a visa or for any other document that may be required by the Regulations prior to entering Canada. Pursuant to section 25 of the Act, the Minister is authorized to grant a foreign national permanent resident status or an exemption from any applicable criteria or obligation of the Act if the Minister is of the opinion that it is justified on H&C grounds.

[53] The Respondent says that the onus is on the Applicant to demonstrate that she would face unusual and undeserved or disproportionate hardship by having to apply for permanent resident status outside of Canada: *Arumugam v. Canada (Minister of Citizenship and Immigration)* 2001

FCT 985 at paragraphs 16-17. A decision made on H&C grounds is an exceptional measure and is discretionary: *Legault* at paragraph 15, leave to SCC dismissed (2002) SCCA No. 220 and *Baker*.

[54] The Respondent submits that the Applicant is not entitled to a particular outcome and, in order to successfully attack a negative decision, she must show that the Officer's Decision was unreasonable because the Officer erred in law, acted in bad faith or proceeded on an incorrect principle: *Tartchinska v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 373 (F.C.T.D.) at paragraph 17; *Baker*; *Suresh* at paragraph 34 and *Mohammed v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1508 at paragraph 20 (F.C.T.D.).

[55] The Respondent cites *Agot* at paragraph 15 which refers to *Law Society of New Brunswick v. Ryan* 2003 SCC 20 at paragraph 55 (which was adopted in *Liang*):

> 55. A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see Southam, supra, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, *supra*, at para. 79).

[56] The Respondent also submits that the OP-4 Manual referred to by the Applicant does more than describe who might qualify as a *de facto* family member; it also provides decision makers with a list of considerations to take into account in making such a determination. Section 8.3 of the OP-4 Manual provides as follows:

> *De facto* family members are persons who do not meet the definition of a family class member. They are, however, in a situation of dependence that makes them a *de facto* member of a nuclear family that is either in Canada or that is applying to immigration. Some examples: a…sister left alone in the country of origin without family of their own…
>
> Consider:
>
> - Whether the dependency is bona fide and not created for immigration purposes;
> - The level of dependency;
> - The stability of the relationship;
> - The length of the relationship;
> - The impact of a separation;
> - The financial and emotional needs of the application in relation to the family unit;
> - The ability and willingness of the family in Canada to provide support;
> - Applicant's other alternatives, such as family (spouse, children, parents, siblings, etc.) outside Canada able and willing to provide support;
> - Documentary evidence about the relationship…
> - Any other factors that are believed to be relevant to the Humanitarian and Compassionate decision.

[57] The Respondent contends that the Officer took into account the relevant factors in the Applicant's case. The Applicant had some emotional dependency on her sister and her sister's family but was also financially independent, retired and had lived her entire life in Greece. She had also been separated from her sister since her sister chose to move to Canada. The Applicant had also visited Canada throughout the years.

[58] The Respondent concludes by stating that any hardship due to the continued separation of the Applicant and her sister cannot be considered undue, undeserved or disproportionate. The Officer considered the relevant factors; the only dispute is the weight the Officer afforded to the

factors. The Respondent says that the Applicant has failed to demonstrate that the Officer's weighing of the relevant factors was conducted in bad faith or was based on irrelevant considerations.

ANALYSIS

[59] I think there are two reviewable errors in this Decision that require the matter to be sent back for reconsideration.

[60] The Decision itself is very short and it has been supplemented by the Officer's later affidavit and cross-examination. In my view, however, these subsequent rationalizations and explanations cannot substitute for the Decision itself.

[61] First of all, in the Decision the Officer's stated understanding of the scope of section 3(1)(*d*) of the Act is that "the objective of the law was to reunite parents with their children or children with parents or spouses."

[62] This means that the Officer either misunderstood the scope of section 3(1)(*d*) and so fettered his discretion or he made a mistake of law.

[63] The words of Justice Gibson in *Nalbandian* at paragraph 15 are equally applicable to this case:

> … there is no evidence before the Court that she was cognisant of the principle enunciated in paragraph 3(1)(d) of the *Act* or of the considerations to be taken into account as enunciated in the elements of OP 4 quoted above in considering whether a *de facto* family member, as the Applicant undoubtedly was and is, should qualify for relief on humanitarian and compassionate considerations.

[64] The Officer and the Respondent have, post-Decision, attempted to justify the Officer's position on section 3(1)(*d*) by suggesting that it could apply to the Applicant, but the facts of her case mean that she could never satisfy the requirements that would bring the subsection into play.

[65] My reading of the Decision, however, is that the Officer excluded subsection 3(1)(*d*) because he thought it was only applicable to the reunification of "parents with their children or children with parents or spouses."

[66] This error is compounded by the Officer's assessment that the Applicant's coming to Canada permanently was simply a matter of convenience and that the Applicant was not a *de facto* family member who had been left behind.

[67] The Officer's characterization of what has happened to this family – "…when your sister immigrated to Canada many decades ago the family was then separated and this was a decision all concerned accepted and understood" – is, in my view, a travesty of the facts that fails to take into account why the Applicant was left behind in Greece and the significant evidence of her present isolation. She may have financial means, but there is significant evidence of isolation in Greece and complete emotional and human dependency on her family in Canada. Due to her compassionate

dedication to an aging and infirm relative, she has been left alone in Greece without the benefit of close family support.

[68] To use Justice Shore's words from *Yu v. Canada (Minister of Citizenship and Immigration)* 2006 FC 956, at paragraph 15, the "visa officer ignored the evidence of emotional dependency …" and there is "a significant factual difference between living together and sharing day-to-day life and an occasional visit."

[69] Such matters seem to have been left entirely out of account by the Officer to an unreasonable extent. In addition, he did not consider the application of subsection 3(1)(*d*) of the Act to this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the matter is returned for reconsideration by a different visa officer.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3499-08
STYLE OF CAUSE:	KONSTANTINA KOROMILA
	APPLICANT
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
	RESPONDENT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 23, 2009
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	April 22, 2009

APPEARANCES:

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