A-308-09

FEDERAL COURT OF APPEAL

B E T W E E N:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

-and-

KAMADCHY SUNDARESWARAIYE GURUMOORTHI KURUKKAL

Respondent

-and-

CANADIAN COUNCIL FOR REFUGEES

Intervener

INTERVENER'S MEMORANDUM OF FACT AND LAW

OVERVIEW

Section 25 of the *Immigration and Refugee Protection Act* (IRPA) is the central means by which Canada, and Canadians, express their humanitarian tradition to those without status in Canada. It is, by virtue of its very existence, meant to be a flexible tool by which Canada can respond to the

myriad situations that arise and that are not contemplated in immigration legislation.

In this context, the Intervener argues that it is anathema to the nature of humanitarian and compassionate discretion to constrain immigration officers from reconsidering their decisions where it is in the nature of both justice and humanitarianism to do so. Thus, while the doctrine of *functus officio* finds application in other administrative contexts, the Intervener argues that the Applications judge correctly found that it does not apply to decisions made under s.25 of the IRPA.

PART I – STATEMENT OF FACTS

1. The respondent, Mr. Kurukkal, is a citizen of Sri Lanka, of the Tamil ethnic community, born and raised in Jaffna in the north of Sri Lanka.

2. In 2001, Mr. Kurukkal came to Canada to make a refugee claim based on his experience of persecution at the hands of the Sri Lankan security forces and the LTTE. His refugee claim was refused.

   Affidavit of Kamadchy Sundareswaraiye Gurumoorthi Kurukkal ("Kurukkal Affidavit"), Appeal Book, Vol I, Tab 3, p. 17, para. 2.

3. In 2006, Mr. Kurukkal filed an application for permanent residence in Canada on humanitarian and compassionate (H&C) grounds based on his establishment in Canada and his son's undertaking to sponsor him.

Kurukkal Affidavit, Appeal Book, Vol I, Tab 3, p. 17, para. 2.

4. Mr. Kurukkal's wife had died in Sri Lanka in 2000. While stating in his visa application (in 2001) that his wife was alive, once arriving in Canada, he clarified to the authorities that she had passed away in 2000.

Kurukkal v. Canada (MCI), 2009 FC 695, Appeal Book, Vol II, Tab 17, p. 321, para. 5.
Kurukkal Affidavit, Appeal Book, Vol I, Tab 3, p. 17, para. 3.

5. The immigration officer with carriage of Mr. Kurukkal's H&C application requested confirmation of his wife's death. On October 29, 2007, Mr. Kurukkal's son requested a 15 day extension of time, believing that to be sufficient in order to obtain the death certificate. Mr. Kurukkal was given until November 17, 2007 to provide the certificate.

Kurukkal Affidavit, Appeal Book, Vol I, Tab 3, p. 18, para. 4.

6. Unfortunately, hostility in the ethnic conflict in Sri Lanka increased at this time, leading the Sri Lankan government to walk away from the six year old cease fire. Mr. Kurukkal was therefore not able to obtain his wife's death certificate in time.

Kurukkal Affidavit, Appeal Book, Vol I, Tab 3, p. 18, para. 4.

7. Mr. Kurukkal's H&C application was refused by letter dated November

26, 2007, communicated to Mr. Kurukkal on December 14, 2007. The principal reason for refusing the Mr. Kurukkal's H&C application was the absence of his wife's death certificate.

Kurukkal Affidavit, Appeal Book, Vol I, Tab 3, p. 18, para. 5.

8. The next day the death certificate arrived in the mail. On December 18, 2007, Mr. Kurukkal submitted to the immigration officer the death certificate along with a request for reconsideration of his H&C application.

Kurukkal Affidavit, Appeal Book, Vol I, Tab 3, p. 18, para. 6.

9. On January 9, 2008, the client service unit at CIC Montreal responded by stating that the decision maker had no further authority on the matter.

Kurukkal Affidavit, Appeal Book, Vol I, Tab 3, p. 19, para. 6.

10. Mr. Kurukkal filed an application for leave and for judicial review against CIC Montreal's decision not to reconsider his H&C application. He also brought a motion to stay his removal from Canada and made a second H&C application. Mr. Kurukkal's motion was denied on March 3, 2008. He was returned to Sri Lanka that month.

Application for Leave and for Judicial Review, Appeal Book, Vol I, Tab 1, pp 1 - 3.
Notice of Motion, Appeal Book, Vol I, Tab 3, pp 8-9.
Order dismissing motion, Appeal Book, Vol I, Tab 5, pp. 154-

155.
Kurukkal, *supra*, Appeal Book, Vol II, Tab 17, p. 323, para. 13.

11. Leave to judicially review CIC's refusal to reconsider Mr. Kurukkal's H&C decision was granted on January 21, 2009 and the judicial review application was heard on June 4, 2009.

Order granting leave, Appeal Book, Tab 12, pp. 273 – 275
Order rescheduling hearing, Appeal Book, Tab 16, p 319a.

12. On July 3, 2009, the Federal Court granted Mr. Kurukkal's application for judicial review, finding that the doctrine of *functus officio* does not apply in the context of H&C decisions. In so doing, the applications judge certified the following question of general importance:

> Once a decision has been rendered in relation to an application for a humanitarian and compassionate exemption, is the ability of the decision-maker to reopen or reconsider the application on the basis of further evidence provided by an applicant limited by the doctrine of *functus officio*?

Kurukkal, supra, Vol II, Tab 17, pp. 320 – 343

13. On August 7, 2009, the Minister of Citizenship and Immigration brought this appeal against the Federal Court's decision.

Notice of Appeal, Appeal Book, Vol II, Tab 18, pp. 344 – 345.

14. On January 12, 2010, the Canadian Council for Refugees brought a Motion to intervene in the appeal. By order dated February 24, 2010,

that motion to intervene was granted.

> Motion Record, Filed January 12, 2010
> *Canada (MCI)* v *Kurukkal* (24 February 2010), A-308-09 per Sharlow J.A.

PART II – POINT IN ISSUE

15. The applications judge did not err in concluding that the doctrine of *functus officio* does not apply to bar immigration officers from reconsidering H&C decisions.

PART III – SUBMISSIONS

A. STANDARD OF REVIEW

16. The Intervener agrees that the issue of whether H&C officers can reconsider their decision is one of jurisdiction and is therefore reviewable on a correctness standard.

> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59.
> *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235 at para. 8.

B. CONTEXT OF H&C APPLICATIONS

17. H&C applications are made for an almost infinite number of reasons by persons in a similarly infinite number of circumstances. The purpose of H&C discretion is to allow flexibility to apply Canada's humanitarian tradition in cases not anticipated in the legislation.

18. As noted in the relevant Immigration Manual, this discretionary tool is

intended to uphold Canada's humanitarian tradition and to satisfy the objectives of the *Act*.

> Immigration Manual IP 5: Immigrant Applications in Canada Made on Humanitarian and Compassionate Grounds at para. 2

19. The centrality of flexibility to the H&C process has been referred to in numerous decisions of the Courts, including this Honourable Court's decision in *Legault*.

> *Legault v. Canada (MCI)*, 2002 FCA 125, citing Manual IP 5, above, at para. 21.

20. As is further noted in the Manual, s.25(1) provides the flexibility to grant exemptions to numerous requirements under the Act on humanitarian grounds and applicants may base their requests for H&C consideration on any number of factors including, but not limited to:

> - establishment in Canada;
> - ties to Canada;
> - the best interests of any children affected by their application;
> - factors in their country of origin (this includes but is not limited to: economic opportunities or climate in cases of medical conditions);
> - health considerations;
> - family violence considerations;
> - consequences of the separation of relatives;
> - inability to leave Canada has led to establishment; and
> - <u>any other factor they wish to have considered.</u>
>
> Immigration Manual IP 5: Immigrant Applications in Canada Made on Humanitarian and Compassionate Grounds at para. 5.5 (emphasis added).

21. It can therefore be said that the central pillars underlying s.25 are flexibility, humanitarianism and compassion. It is also to be noted that unlike other provisions in the IRPA, s.25 is essentially a rights granting, rather than limiting provision. The provision enables Canada to exempt individuals from inadmissibilities set out elsewhere in the Act and empowers the Minister to grant permanent resident status to persons who are otherwise inadmissible to Canada. In other words, its sole purpose is to grant rights in meritorious cases that are not otherwise provided in the *Act*.

22. The rights at stake in humanitarian and compassionate applications are also of central relevance in understanding the context in which they are submitted. As the Supreme Court noted in *Baker*,

> In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.
>
> *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817 at para. 15

C. APPLICATIONS JUDGE PROPERLY CANVASSED THE RELEVANT JURISPRUDENCE

23. In concluding that immigration officers have the authority to reconsider their decisions, the applications judge properly canvassed the jurisprudence on the issue of *functus officio*. As such, the Intervener respectfully submits that the certified question should be answered in the negative; that is, the ability of an immigration officer determining an H&C decision should *not* be limited by the doctrine of *functus officio*.

24. The most authoritative pronouncement on the issue is the Supreme Court of Canada's decision in *Chandler.* In that decision, the Supreme Court noted that the rule of *functus officio* applied originally to Court decisions, "after the formal judgment had been drawn up, issued and entered." The rule was subject to two exceptions: where there was a slip in drawing up the judgment, and where there was an error in expressing the manifest intention of the Court.

> *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at paras 19.

25. The Supreme Court, however, made it clear that a more flexible approach is required in the administrative decision-making context. While finding that the doctrine of *functus officio* applies to administrative tribunals, on the policy ground favouring finality in proceedings,

> its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are

> subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> *Chandler, supra* at paras 20 – 21.

26. The applications judge properly summarized the decision in *Chandler*, thoroughly analyzed the jurisprudence on the application of *functus officio* to non-adjudicative immigration decisions and concluded that immigration officers are authorized to reconsider their decisions in regard to H&C applications.

27. The applications judge found that the doctrine of *functus officio* does not apply to <u>bar</u> immigration officers from reconsidering their decisions on request. That conclusion was correct, given the jurisprudence and given fundamental principles of administrative law upon which it was based.

28. In reviewing the Supreme Court of Canada's decision in *Chandler*, the applications judge correctly summarized that case as follows:

> [24] The doctrine of *functus officio* provides that once a decision-maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors. The policy rationale underlying this doctrine is the need for finality in proceedings: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at paras. 20-21.
>
> [25] The Supreme Court also noted in *Chandler* that the doctrine of *functus officio* is not limited to judicial decision, but can apply as well to decisions of administrative tribunals.

> However, it may be necessary to apply the doctrine in a more flexible and less formalistic fashion in the administrative tribunal context, where, for example, a right of appeal may exist only on a point of law. Indeed, the Court held that "Justice may require the re-opening of administrative proceedings in order to provide relief which would otherwise be available on appeal": *Chandler*, at para. 21.
>
> *Kurukkal v. Canada (MCI)*, 2009 FC 695 at paras. 24-25.

29. After correctly summarizing the Supreme Court of Canada's decision in *Chandler,* the applications judge went on to properly canvass the divergent jurisprudence regarding whether the doctrine of *functus officio* applies to non-adjudicative immigration decisions.

> *Kurukkal*, *supra* at paras. 28 – 50.

30. In reviewing this Court's jurisprudence, the applications judge properly noted that, in *Herzig*, the doctrine of *functus officio* was applied specifically to administrative tribunals acting in an adjudicative capacity. Given the specific context in which *Herzig* was decided, the appellant's reliance on that decision is misplaced, since the issue in the case at bar is whether the doctrine applies strictly in the case of non-adjudicative immigration decisions.

> *Kurukkal, supra* at para. 61.
> *Herzig v Canada (Industry)*, 2002 FCA 36 at para. 16.

31. The applications judge also reviewed this Court's decision in *Selliah*, where this Court suggested that applications for reconsideration based

on new evidence can be made after H&C decisions are received, leaving open the conclusion that the doctrine of *functus officio* does not strictly apply. The appellant's assertion that there is no connection between an applicant's ability to request reconsideration and an H&C officer's power to reconsider is illogical. Without the possibility of reconsideration, there is no basis upon which a request for reconsideration could be made.

Kurukkal, *supra* at paras. 44-46.
Selliah v. Canada (MCI), 2005 FCA 160 at para. 4.

32. Given the jurisprudence, the limited exceptions imposed in *Chandler* and *Herzig*, stipulating that final decisions can be revisited only when the decision-maker is authorized by statute or where there has been a slip or error in the decision, are clearly meant to apply to judicial decisions and administrative tribunals acting in an adjudicative capacity.

33. The spectrum of administrative action in Canada is extremely broad, ranging from adversarial, curial and quasi-judicial proceedings to general policy initiatives, all of which are subject to administrative law principles of judicial review. The doctrine of *functus officio* quite clearly has no application to the kinds of administrative action at the policy end of the spectrum. No one would argue, for example, that the Chairperson of an administrative tribunal would be barred from

reconsidering the decision to issue a policy directive, notwithstanding the fact that such a policy initiative is a form of administrative decision subject to judicial review.

34. This being the case, the only logical interpretation of the jurisprudence is that the flexibility with which the doctrine of functus is to be applied includes the option of finding that it does not apply in certain, specific contexts. The Intervener respectfully submits that the H&C process, with its emphasis on flexibility, with its responsiveness to the unforeseeable and with its humanitarian purpose is one such context.

35. The applications judge therefore correctly canvassed and applied the relevant jurisprudence.

D. BALANCING FAIRNESS AND FINALITY: NEED FOR A FLEXIBLE APPROACH

36. While the doctrine of *functus officio* generally applies to all administrative decisions; in accordance with the Supreme Court in *Chandler*, the doctrine should be applied "more flexibly and less formalistically in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law."

37. In light of the Supreme Court's conclusion, the applications judge was correct in concluding that the doctrine of *functus officio* does not apply to bar immigration officers from reconsidering their decisions in the H&C context.

38. For the reasons given by the applications judge, the intervener submits that H&C officers have the authority to reconsider their decisions upon request. As noted by the applications judge, who cited Brown and Evans' authoritative text, *Judicial Review of Administrative Action in Canada*, the Court was tasked with determining whether the "benefits of finality and certainty in decision-making outweigh those of responsiveness to changing circumstances, new information and second thought."

Kurukkal, *supra* at 53.

39. After a thorough weighing of factors, the applications judge concluded that immigration officers deciding H&C applications could reconsider their decision. The following is a summary of the applications judge's reasons:

- "unless the legislation precludes a further decision or the decision is subject to some form of estoppel, non-adjudicative decisions may be reconsidered and varied from time to time" (Brown and Evans, *Judicial Review of Administrative Action in Canada*, at para. 12:6100)

- An express power of reconsideration is not necessary in non-adjudicative decisions, arrived at through more

informal processes, by officials on whom no time limits are imposed.

- Silence may mean that Parliament intended officers to have the discretion to reconsider

- *Herzig* applied the doctrine of *functus officio* to adjudicative decisions

- A broad discretion is conferred on immigration officers under subsection 25(1) of *IRPA*.

- The H&C process is quite informal, suggesting there be greater procedural flexibility

- There is no right of appeal from H&C decisions. The only recourse is an application for judicial review, with leave of the Court, based on the evidence before the decision-maker.

- While a person can file a subsequent H&C application, the substantial filing fees and significant processing time limit its effectiveness as an option.

- There is no *lis inter partes*, or live controversy, in an H&C application. The direct effect of the decision is likely only felt by the applicant.

- Potential abuses could be dealt with by an immigration officer promptly considering the materiality, reliability and newness of the evidence, and whether the request is *bona fide*.

Kurukkal, *supra* at paras. 55-73.

40. The applications judge's reasons take into account and address the issues raised in the appellant's factum.

41. The appellant's examples of potential abuses are, with respect, exaggerated. It has always been open for H&C officers to reconsider

their decisions, upon request, and they have exercised that power in the past without sacrificing the integrity of the system. Should an immigration officer believe an applicant not to have been diligent in the filing of materials that could have been made available earlier, it will, as the applications judge found, be open to the officer to refuse to reconsider the decision on that basis.

42. Furthermore, there is no reason to fear the impact of reconsideration requests on removals. H&C applications do not automatically stay removals from Canada, and nor would requests for reconsideration of same. If the new evidence is found to be irrelevant or that it ought to have been produced earlier, no deferral or stay of removal will be warranted.

43. The Appellant also overstates the Minister`s interest in finality. Where new information comes to light following a positive H&C decision, it remains open to the Minister to initiate inadmissibility proceedings. In other words, the Department effectively retains the right to revisit its earlier decisions where new information suggests it is appropriate to do so. This is as it should be. The Intervener submits that it is only appropriate, given the nature of H&C applications, to afford applicants a similar right to request reconsideration where the interest of justice so warrants.

44. Furthermore, the Intervener submits that recognizing a power to reconsider will, in many circumstances, be far more efficient and cost saving than requiring an applicant to submit an entirely new application. Where relevant and probative new evidence comes to light in respect of an H&C application that may have been pending for several years, a quick reconsideration by an officer already acquainted with the file is undeniably more efficient than initiating the same, multi-year process afresh.

45. The applications judge's reasoning is sound, follows basic principles of administrative law and the Supreme Court of Canada jurisprudence, and therefore ought not be disturbed.

46. While the intervener agrees with the appellant that the principle of *functus officio* generally applies in the administrative law context, it submits that the applications judge was correct in concluding that immigration officers have the authority to reconsider their H&C decisions.

47. Again, *Chandler* instructs that the application of the functus principle in the administrative context is highly contingent on the nature of the proceedings. Some proceedings, those at the adjudicative end of the administrative spectrum, will be subject to the full functus doctrine.

Those at the other end of the spectrum will not. Thus the nature of the decision dictates in large measure the degree to which functus principles will apply. This was also acknowledged in *Nouranidoust* wherein Justice Reed noted:

> As I read the jurisprudence, I think the need to find express or implied authority to reopen a decision in the relevant statute is directly related to the nature of the decision and the decision-making authority in question.
>
> *Nouranidoust v. Canada (MCI),* [1999] F.C.J. No. 1100, at para. 24

48. As a result, the nature of the H&C decision and its place on the administrative spectrum must be considered. Again, the H&C process is, while dealing with the fundamental rights of applicants, non-adversarial in nature and lies at the more informal end of the administrative spectrum. The Intervener respectfully submits that it is these characteristics of the H&C process that illustrate both why and when immigration officers will have the discretion, and in some cases the obligation, to reopen H&C applications.

49. At the same time, the rationale underlying the discretion to reopen also defines its limits. In the H&C context, where the interests of justice, humanitarianism and compassion should be assessed in determining whether to reopen a decision, the absence of any such factors justifies a refusal to exercise the discretion to reopen.

50. Furthermore, the Intervener notes as well that there is a specific, statutory obligation to consider the best interests of the child. This statutory duty further underscores the need for flexibility in H&C decision-making, in order to ensure that Canada is complying with its procedural obligations under the *United Nations Convention on the Rights of the Child*.

> *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, online: http://www2.ohchr.org/english/law/pdf/crc.pdf

51. The intervener agrees, in large part, with the examples set out in paragraph 26 of the appellant's memorandum of fact and law as providing useful guidance for when an immigration officer might choose to reconsider his or her decision. However, given the emphasis the *Chandler* decision places on "flexibility" and "justice," the intervener proposes that 26(h) be worded as follows: "where the interests of justice warrant reconsideration."

52. While the Appellant provides a useful set of examples that may warrant reconsideration, the Intervener submits that it would not be appropriate to constrain an immigration officer's discretion by way of a prescribed list of criteria when the very *raison d'être* of H&C discretion is to respond to unforeseen circumstances.

PART IV – ORDER SOUGHT

53. The Intervener requests that the Court dismiss this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, Ontario, this 9th day of April, 2010

Angus Grant and Aviva Basman
Counsels for the Intervener

A-308-09

FEDERAL COURT OF APPEAL

B E T W E E N :

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

-and-

KAMADCHY SUNDARASWARAIYE GURUMOORTHI KURUKKAL

Respondent

-and-

CANADIAN COUNCIL FOR REFUGEES

Intervener

INTERVENER'S MEMORANDUM OF FACT AND LAW

Angus Grant
489 College Street, Suite 301
Toronto, Ontario
M5G 1A5
Phone: (416) 483-4381
Fax: (416) 483-9856

Aviva Basman
Refugee Law Office
20 Dundas St. West, Suite 202
Toronto, Ontario
M5G 2H1
Phone: (416) 977-8111
Fax: (416) 977-5567

Solicitors for the Intervener