# Ottawa Immigration Law Conference

## ALARMING TRENDS IN FEDERAL COURT JURISPRUDENCES - H&C'S POST *KANTHASAMY*

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# H&C Application Processing Trends 2013 - 2017

| **H&C Approval Rate** | 2013 | 2014 | 2015 | **2016*** | 2017 |
|---|---|---|---|---|---|
| **Removed/Departed** | 0.6% | 0.0% | 0.5% | 2.5% | 1.7% |
| **Not Removed** | 40.2% | 48.9% | 59.8% | 67.1% | 57.8% |
| Residing in Canada | 26.6% | 48.7% | 59.6% | 63.1% | 59.3% |
| Residing Outside Canada | 51.0% | 49.5% | 60.6% | 78.1% | 54.7% |
| **Total** | **39.28%** | **47.40%** | **56.84%** | **63.4%** | **54.9% (or 59%)** |

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# H&C Application Processing Trends 2018 - 2021

| H&C Approval Rate | 2018 | 2019 | 2020 | 2021 (Jan to Mar) |
|---|---|---|---|---|
| **Total** | **64.34** | **64.77** | **42.76** | **30.26** |

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# Kanthasamy v. Canada (MCI), 2015 SCC 61

- Historical purpose: to offer **equitable relief** in circumstances that **"would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another"**

- What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers **must substantively consider and weigh *all* the relevant facts and factors** before them


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

- The words "**unusual and undeserved or disproportionate hardship**" should be treated as **descriptive**, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1)

- Officers should **not** look at s. 25(1) through the lens of the three adjectives as **discrete and high thresholds**, and use in a way that **limits their ability** to consider and give weight to *all* relevant H&C considerations in a particular case.

- Allow s. 25(1) to respond more **flexibly** to the equitable goals of the provision.


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# *Kanthasamy Dissent*

**"Exceptional" – 16 times in dissent**
**- 1 in majority**

**Majority**: [19]… H&C discretion in s. 25(1) was seen as being a flexible and responsive **exception to the ordinary operation** of the *Act*, or, in the words of Janet Scott, **a discretion "to mitigate the rigidity of the law in an appropriate case".**


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# *Kanthasamy Dissent*

**Dissent:**

[63] S. 25(1) is a **safety valve** that **supplements the two normal streams**. … Properly construed, it provides a flexible means of relief for applicants whose **cases are exceptional** and compelling… Decision makers must determine whether, having regard to all of the circumstances, including the **exceptional** nature of H&C relief, decent, **fair-minded Canadians would find it simply unacceptable to deny the relief sought.**

[91]… **It was never intended to be an alternate immigration stream** or an appeal mechanism for failed asylum claimants. It should be reserved for **exceptional cases.**


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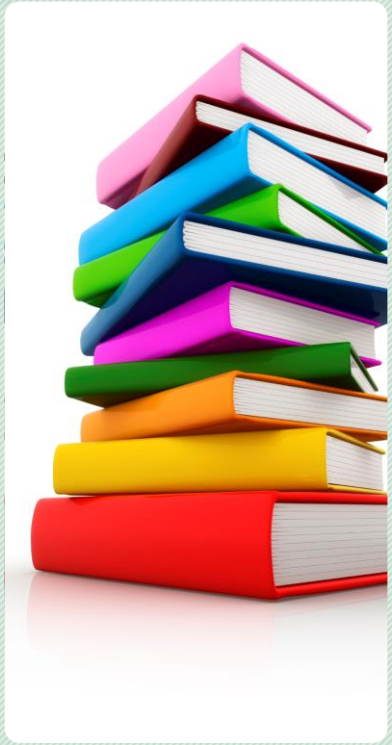
# Trend – Kanthasamy Dissent

***Huang v Canada (MCI)*, 2019 FC 265 at para 19, C. J. Crampton:**

[19] Section 25 was **enacted to address** situations in which the consequences of deportation "**might fall *with much more force on some persons … than on others*, because of their particular circumstances …": ***Kanthasamy***, above, at para 15 (emphasis added)… . Accordingly, an applicant for the **exceptional** H&C relief provided by the IRPA **must demonstrate the existence or likely existence of misfortunes or other H&C considerations *that are greater than those typically faced by others who apply for permanent residence in Canada***.



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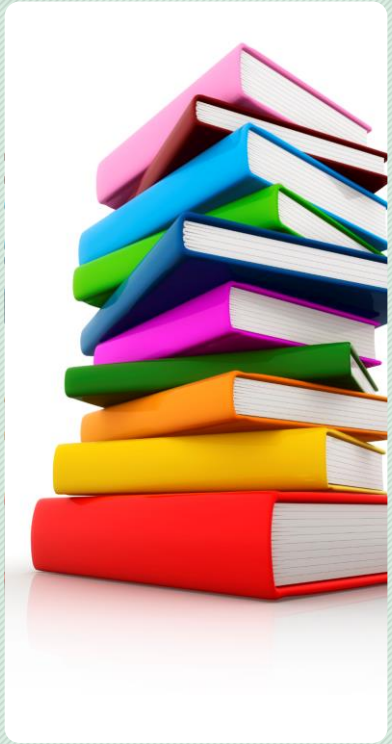
# Trend – Kanthasamy Dissent

***What Kanthasamy actually said:***

[15] In proceedings before the Special Joint Committee of the Senate and the House of Commons on Immigration Policy in 1975, Janet Scott **elaborated on the importance of being able to guard against the unfairness of deportation in certain cases** ". . . it **was recognized that** deportation might fall with much more force on some persons . . . than on others, because of their particular circumstances, and *the Board was therefore* ***empowered to mitigate the rigidity of the law in an appropriate case***. *Section 15 is a humanitarian and equitable section*, which **gives the Board power to do what the legislator cannot do**, that is, take account of particular cases..."



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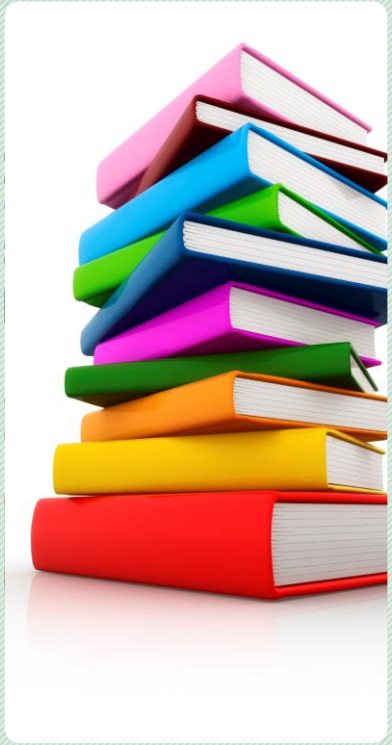
# Trend –Kanthasamy Dissent

***Huang v Canada (MCI)*, 2019 FC 265 at para 19, C. J. Crampton:**

[20] Put differently, applicants for H&C relief must "establish **exceptional** reasons as to why they should be allowed to remain in Canada" or allowed to obtain H&C relief from abroad: *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 90. This is simply another way of saying that applicants for such relief must demonstrate the existence of **misfortunes or other circumstances that are exceptional, *relative to other applicants who apply for permanent residence from within Canada or abroad***: *Jesuthasan, v Canada (Citizenship and Immigration)*, 2018 FC 142, at paras 49 and 57; *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327, at para 67.



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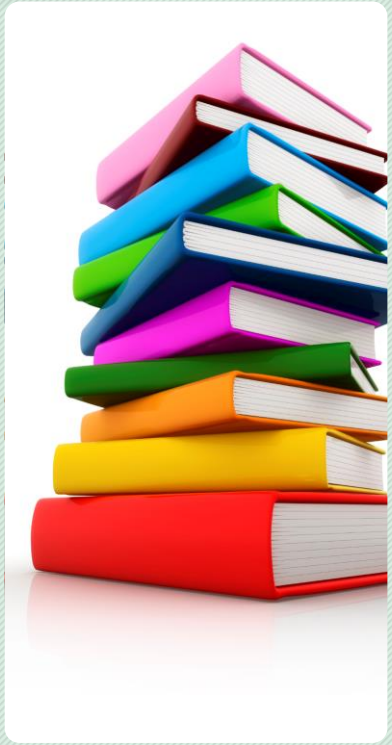
# Trend – citing pre-Kanthasamy

***Huang v Canada (MCI)*, 2019 FC 265 at para 19, C. J. Crampton:**

[21] I recognize that in *Apura v Canada (MCI)*, 2018 FC 762, at para 23, this Court suggested that **it would be an error to deny an H&C application based on the absence of "exceptional" or "extraordinary" circumstances**. To the extent that this statement is inconsistent or in tension with the principles quoted in paragraphs 19 and 20 above, and with other jurisprudence that can be fairly read as having adopted a similar approach, I consider that it **does not accurately reflect the existing state of the law**: see, e.g., *Li v Canada (Citizenship and Immigration)*, 2018 FC 187 at paras 25-26; *L. E. v Canada (Citizenship and Immigration)*, 2018 FC 930, at paras 37-38; *Yu v Canada (Citizenship and Immigration)*, 2018 FC 1281, at para 31; *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137, at paras 14-15; *Sibanda v Canada (Citizenship and Immigration*, 2018 FC 806, at paras 19-20; *Jani v Canada* (*Citizenship and Immigration*), 2018 FC 1229, at para 25; *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29.



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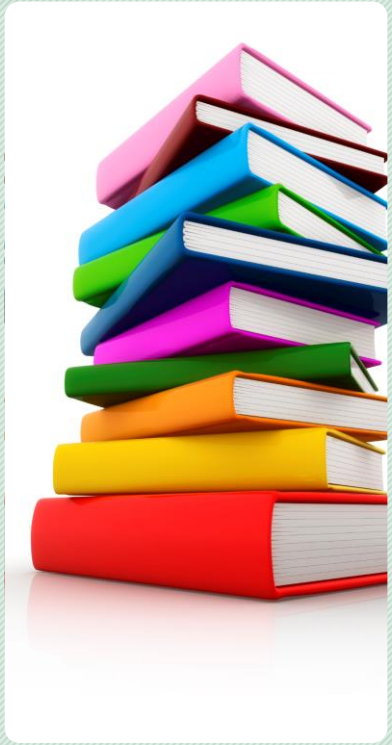
# Trend – Kanthasamy Dissent

***Bakal v. Canada (Citizenship and Immigration)*, 2019 FC 417, Lafrenière J.:**

[14] The one decision cited by the Applicant, *Apura v Canada (MCI)*, 2018 FC 762, which suggests that the **absence** of exceptional or extraordinary circumstances **cannot form the basis of a decision** to deny H&C relief, **appears to be an outlier**. Not only does it **fly in the face of well-established jurisprudence**, it has been squarely rejected by this Court in *Nguyen v Canada (MCI)*, 2017 FC 27 at para 29, and more recently in a decision of the Chief Justice of this Court in *Huang* at paras 20 and 21 …



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# Trend – citing Dissent

- *Lee v. Canada (MCI)*, 2020 FC 504 , J. Russell:

[74] **H&C relief is exceptional relief** (see *Kanthasamy* **at para** 63) and there is nothing in the evidence to suggest that the Applicants have established themselves in Canada **in any way that is exceptional** or that would give rise to any kind of **significant hardship** if they were to re-locate to South Korea. In my view, that is all the Officer is saying.

[87] … Chief Justice has recently made clear in *Huang v Canada*, 2019 FC 265 at para 19, H&C relief is exceptional relief and is not intended to alleviate every hardship that the Applicants face: "…"

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# Kanthasamy Dissent

❖ ***Damian v. Canada (MCI)*, 2019 FC 1158, J. McHaffie**

[16] **Referring to <u>passages in the dissent</u> in *Kanthasamy***, the **respondent** Minister submitted that relief under s. 25 is intended to be **"exceptional and extraordinary",** and that it therefore requires that **"exceptional or extraordinary circumstances**" be demonstrated.

Ms. Damian took issue with the Minister's description … suggesting …it is inconsistent with the approach described by the majority in *Kanthasamy*.

[18] … The officer did not use or rely on those terms; rather, the Minister introduced them in defending the officer's decision before this Court…

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# Kanthasamy Dissent

❖ *Damian v. Canada (MCI),* 2019 FC 1158, J. McHaffie

[19] First, relief under subsection 25(1) can be described **semantically as "exceptional",** in that **it provides an exception** to the requirements of the *IRPA*, and as "extraordinary", in that granting such relief is not in the ordinary course…

- **Dissent** s. 25(1) "was meant to operate as an exception, not the rule" at para 94.
- **Majority** in *Kanthasamy* agreed: the section is not "to be applied so widely as to destroy the essentially exclusionary nature" of the *IRPA*: *Kanthasamy* at para 14, citing *Chirwa*.

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# Kanthasamy Dissent

❖ *Damian v. Canada (MCI),* 2019 FC 1158, J. McHaffie

[20] **The question is therefore whether the use of "exceptional and extraordinary" language goes beyond being merely descriptive to create a heightened standard or test for assessing an H&C application.** On this issue, the dissent in *Kanthasamy* argued that the "exceptional" nature of the relief justified a more stringent standard: "As the Minister is empowered to grant an exceptional remedy, the test should also convey the level of intensity that those factors must reach … **The majority did not adopt this approach**, as the dissent recognized: *Kanthasamy* at paras 106-107.

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# Kanthasamy Dissent

*Damian v. Canada (MCI),* 2019 FC 1158, J. McHaffie

[21] Thus, to the extent that words such as "exceptional" or "extraordinary" are used **simply descriptively,** their use appears to be in keeping with the majority in *Kanthasamy*, although such use may not add much to the analysis. **However, to the extent that they are intended to import a legal standard into the H&C analysis** … this would appear to be contrary to the reasons of the majority. **Given the potential for words such as "exceptional" and "extraordinary" to be taken beyond the merely descriptive to invoke a more stringent legal standard, it may be more helpful to simply focus on the *Kanthasamy* approach, rather than adding further descriptors.**

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# Kanthasamy Dissent

*Lopez Bidart v. Canada (MCI)*, 2020 FC 307, **Justice Strickland**

[31] … If there is **one key lesson** from *Kanthasamy* and the subsequent jurisprudence, it is that officers will fall into error if they treat any particular form of words as a "magic formula" to be applied to H&C cases. Indeed, that is **exactly what the Supreme Court counselled against in *Kanthasamy*** (at paras 31-33). The real question is whether the officer engaged in a consideration of all of the relevant factors that weigh in favour of – or against – the grant of relief under subsection 25(1) (see *Damian* at paras 16-22).

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# Trend – citing pre-Kanthasamy

- *Kisana v. Canada (MCI)*, 2009 FCA 189: an Officer can be presumed to have known about how the best interests of a child might be favoured in Canada in all the manners not available in other countries

- *Kanthasamy*: requires the best interests of a child to be "well identified and defined" and "examined with a great deal of attention" in light of all the evidence, as a "singularly significant focus and perspective"; **must substantively consider and weigh *all* the relevant facts and factors** before them.

- *Vavilov* "where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally not meet the requisite standard of justification, transparency and intelligibility."

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# Trend – citing pre-Kanthasamy


❖ Reply:

- With respect, if the Respondent is suggesting this Court ought to be revisiting a binding precedent, rather than offer a misleading picture of the state of the jurisprudence, it ought to argue this expressly in accordance with proper applicable test: A binding precedent "may be revisited if new legal issues are raised as a consequence of significant developments in the law or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": *Canada (AG) v Bedford*, 2013 SCC 72 at para 42. It does not appear that the Respondent is arguing the decision in *Kanthasamy* ought to be revisited, and indeed no reasons are given to justify doing so.

# Practice Points for H&C JR


- Look for insensitive language and highlight
  - E.g. mother could seek social assistance; Foster care is a safety net
- Focus on BIOC errors first, if possible – must be well-defined and examined with a great deal of attention
  - What compelling factors/evidence can you highlight that the officer did not?
  - What did the officer minimize?
- Ground in errors:
  - E.g. ADR provides solutions - no reason for exemption from normal requirement to apply for PR from abroad
  - Ignores ADR hardship - "Statelessness" like circumstances
  - Not eligible to apply under any other category / cannot leave Canada
  - Ignored evidence, contrary to conclusion (return to Saudi Arabia since lost status, not eligible to extend PGWP)

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# Practice Points for H&C JR


- Find gaps in logic: your gut reaction to something that is not quite right
- Then conclude by summarizing and listing all compelling factors weighing in their favour – such that error makes overall assessment unreasonable
- Do not just argue about weighing evidence – which is what the DOJ will say you're doing

- Overview should give all key points about why decision is wrong
- Point first writing – in sections and paragraphs
  - Looks like moving up conclusion
  - Make point, then explain why
- Be *specific* when talking about the facts
- Use bullet points when listing examples

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# Practice Points for H&C JR


- Yemen "may have different economical and financial aspects and thus not comparable to Canada"; conditions "may not be favourable"; but he has not shown "he will be unable to find employment in the Yemen" because he is a "resourceful and enterprising individual"
- ADR is imposed because "immediate action is needed to temporarily defer removals in situations of humanitarian crisis" and/or where "circumstances in that country pose a generalized risk to the entire civilian population".
- It is not simply that the applicant will face a lower standard of living and have difficulties getting a job in Yemen – he will be returning to a country in the midst of an armed civil war and famine crisis of untold scale, where he has *never* lived and has *no* connections or support to assist to navigate survival. The UN describes the living conditions in Yemen as "catastrophic"
- the Officer also failed to consider the actual present resulting situation, which is that the Applicant will effectively remain in Canada without status, facing all the associated insecurity and uncertainty that this entails


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