No. 35990

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

JEYAKANNAN KANTHASAMY

Appellant
(Appellant in the Federal Court of Appeal)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent
(Respondent in the Federal Court of Appeal)

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MEMORANDUM OF ARGUMENT OF THE APPLICANT
(Pursuant to s.40(1) of the *Supreme Court Act* and Rule 25 of the Rules of the Supreme Court of Canada)

Part I – OVERVIEW AND SUMMARY OF FACTS

1. Jeyakannan Kanthasamy is a young male Tamil from the north of Sri Lanka. He came to Canada in 2010 seeking protection. In February 2011, the Refugee Division (RPD) found that conditions had improved in Sri Lanka so that he was not at risk there. In January 2012, a pre-removal risk assessment (PRRA) officer found that, while he faced harassment and discrimination as a young northern Tamil male, this did not rise to the level of persecution. He applied to remain on humanitarian and compassionate (H&C) grounds: he had suffered in the past as a young northern male Tamil in Sri Lanka; he had settled here as a teenager in his uncle's family, doing well in high school; he suffered from post-traumatic stress (PTSD) and could not cope with return; and he faced ongoing serious discrimination and harassment in Sri Lanka. His application was refused. The Federal Court refused to quash the decision but certified a question for appeal. The Court of Appeal dismissed his appeal. He is before this Court seeking to address the scope of the humanitarian and compassionate discretion which the Respondent Minister refused to exercise in his favour.

2. Mr. Kanthasamy, a 21 year old Tamil,[1] was detained by the Sri Lankan Army (SLA) in March 2010, as they suspected him of supporting the Liberation Tigers of Tamil Eelam (LTTE)

[1] Jeyakannan Kanthasamy was 16 years old when he arrived in April, 2010. Appeal Book, H&C Application, Vol. I, p. 194.

due to his profile as a young northern Tamil male. He was released the same day, but warned that soldiers would come for him again if they thought he was helping the LTTE. At the same time, another Tamil militant group aligned with the SLA was pressuring him to join. Young Tamils in the North were disappearing, many arrested by the army. Fearing for his son's safety, his father arranged for him to go to Colombo and then to Canada to live with his uncle. In Colombo, he was detained by the police, again on suspicion of LTTE ties. He was mistreated, released on paying a bribe, and warned not to stay in Colombo. He left for Canada in April 2010.[2]

3. The Appellant's protection claim was refused on February 18, 2011. The RPD did not disbelieve him, but decided conditions in Sri Lanka had improved and he did not have a profile that would put him at risk.[3] In August 2011, he filed a PRRA application, claiming risk based on his past experiences, his profile, and worsening conditions for Tamils, a minority ethnic community in Sri Lanka.[4] The PRRA officer found him credible and accepted that young northern Tamil males face harassment and discrimination in Sri Lanka, but found that this did not rise to the level of persecution.[5]

4. Mr. Kanthasamy sought H&C consideration relying on several factors:[6] he had established here since arriving as a teenager, attending high school and working part time for his uncle;[7] he was integrating into his uncle's family and making close friends;[8] he wanted to pursue art and computer graphics after high school; he suffered from moderate to severe PTSD and adjustment disorder with mixed anxiety and depressed mood, confirmed by a psychological assessment done by a psychologist, with expertise in working with Sri Lankan war victims, who noted the studies showing high levels of distress and depression among young refugees; his condition would deteriorate if he were deported to Sri Lanka;[9] and he very much feared returning

[2] Appeal Book, Vol. I, Personal Information Form Refugee Narrative, pp. 101-03.
[3] Appeal Book, Vol. I, RPD Decision and Reasons, pp. 106-14. He sought leave to review this decision but it was denied: Federal Court File: IMM-1487-11, May 19, 2011.
[4] Appeal Book, Vol. I, PRRA Application, pp. 115-48.
[5] Appeal Book, Vol. I, PRRA Officer Decision and Reasons, pp. 149-58. He sought leave to review this decision but it was denied: Federal Court File: IMM-2126-12, April 24, 2012.
[6] Appeal Book, Vol. I, H&C Submissions, pp. 159-66.
[7] Appeal Book, Vol. I, Appellant's Affidavit, pp. 178-179; Uncle's Affidavit, p. 180; School Records, pp. 183-92; Uncle's Employment and Support Letter, pp. 197-98.
[8] Appeal Book, Vol. I, Appellant's Affidavit, pp. 178-79; Uncle's Affidavit, p. 180; Temple Letter, p. 193; Friend's Support Letter, p. 196; Uncle's Employment and Support Letter, pp. 197-98.
[9] Appeal Book, Vol. I, Psychological Assessment, Dr. P. Kanagaratnam, pp. 199-205.

to Sri Lanka as conditions had deteriorated and young northern Tamils like him faced ongoing harassment and discrimination.[10] His application was finally refused by an immigration officer in April 2012 with supplementary reasons in July 2012.[11]

5. The officer, who refused the H&C application, noted that the discretion was not to relieve against hardship, but only unusual and undeserved or disproportionate hardship. Mr. Kanthasamy had not established this.[12] The officer noted:

a. The onus was on him to establish that he would be personally affected. While some Tamils were singled out, this happened where there was a suspicion that the person supported the LITE. Moreover, it was a security measure to preserve the best interests and security of Sri Lanka. The officer concluded: "after assessing the evidence I have been provided with in conjunction with the objective documentary evidence, I find that I have been presented with insufficient evidence that the Applicant will face unusual and undeserved or disproportionate hardship upon his return to Sri Lanka".[13]

b. While relying heavily on articles about conditions in Sri Lanka from 2007 and 2008, the officer cited a more current article, which indicated that young male Tamils continue to be subject to harassment by state security officials and that the current situation differs little from that which has existed for Tamils for more than two decades. But she found Mr.

[10] See for e.g. Appeal Book, Vol. II, Country Documentation: IRIN, Sri Lanka; Lots of Talking and not Much Improvement in North, July 3, 2012, pp. 211-12; Human Rights Watch (HRW), Sri Lanka: The Meaning of Victory, June 19, 2012, pp. 213-15; Amnesty International Annual Report 2012 – Sri Lanka, May 24, 2012, pp. 221-23; IRIN, Sri Lanka: Thousands Missing Three Years After the War Ends, May 18, 2012, pp. 224-25; Sri Lanka Guardian, Human Rights Situation in Sri Lanka, Mar. 12, 2012, pp. 226-31; Groundviews, New Wave of Abductions and Dead Bodies in Sri Lanka, Feb. 26, 2012, pp. 232-34; Freedom from Torture Medical Foundation (UK), UK Must Stop Removals of Tamils to Sri Lanka after Damning New Evidence of Torture on Return, Feb. 25, 2012, p. 235; HRW, UK: Halt Deportations of Tamils to Sri Lanka, Feb. 24, 2012, pp. 236-37; IRB RIR, Sri Lanka: Treatment of Tamils in Colombo by Members of the Sri Lankan Security Forces and Police, Feb.9, 2012, pp. 238-44; Sri Lanka Guardian, Government is Silent on Disarming the Paramilitaries, Jan. 24, 2012, pp. 245-46;.HRW, World Report 2012 – Sri Lanka, Jan. 22, 2012, pp. 247-50; Canada DFAIT: Minster Baird Comments on Final Report of Sri Lanka's Lessons Learnt and Reconciliation Committee, Jan. 11, 2012, p. 251; Sri Lanka Guardian, Tamils Heavily Victimized at Colombo Airport, Jan. 5, 2012, p. 252-53; The Guardian, Deported Tamils Face Torture on Return to Sri Lanka, Dec. 15, 2011, pp. 254-55; UNCAT Concluding Observations on Sri Lanka, Dec. 8, 2011, pp. 256-69; International Crisis Group (ICG), Sri Lanka: Post-war Progress Report September 12, 2011, pp. 299-302; The Economist, Sri Lanka: Emergent Uncertainty, Sept. 3, 2011, pp. 303-04; The Guardian, Tamils Still Suffer 2 Years after Sri Lankan War, Aug. 10, 2011, pp. 305-07.

[11] Appeal Book, Vol. I, Officer's Decision and Reasons, July 11, 2012, pp. 4-7; April 26, 2012, pp. 8-15.

[12] Appeal Book, Vol. I, Officer's Reasons, pp. 8, 14.

[13] Appeal Book, Vol. I, Officer's Reasons, pp. 5, 11, 14.

Kanthasamy had not established he personally faced discrimination because of ethnicity. He had not faced past discrimination.[14]

c. Mr. Kanthasamy had some establishment, which was expected as he had been permitted to remain. It was not to a degree that would cause hardship for him to leave. As well, he had not shown he could not study or work in Sri Lanka.[15]

d. It was in Mr. Kanthasamy's best interests to be with his family in Sri Lanka where he had lived for most of his life and could reintegrate with family support.[16]

e. The psychologist's PTSD diagnosis, while accepted, could be for any number of reasons, not those identified by the psychologist. Mr. Kanthasamy had not shown he was seeking treatment, could not obtain it in Sri Lanka, or that it would be a hardship to do so.[17]

6. Mr. Kanthasamy applied to review the decision. His application was refused by Justice Kane of the Federal Court. Her judgment was upheld by the Court of Appeal. It noted:

a. Although never before confirmed by the Court of Appeal and the Supreme Court, the "unusual and undeserved, or disproportionate hardship" test, which has been adopted by the Federal Court, is the appropriate standard to be applied under ss. 25(1) of *IRPA*. It expresses in a concise way, the sort of exceptional considerations that would warrant the granting of the relief within the scheme of the Act.[18]

b. The broader test in *Yhap* and *Chirwa*, which considers other reasons of public policy and states that compassionate considerations are "those facts established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief'"[19] does not correctly express the test under s. 25(1) of the Act.

c. Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under ss. 96 and 97 of the Act – may not be considered under s. 25(1) by virtue of s. 25(1.3) but the facts underlying those factors may

[14] Appeal Book, Vol. I, Officer's Reasons, pp. 5, 11-14.
[15] Appeal Book, Vol. I, Officer's Reasons, pp. 5-6, 14.
[16] Appeal Book, Vol. I, Officer's Reasons, p. 14.
[17] Appeal Book, Vol. I, Officer's Reasons, p. 6.
[18] Appeal Book, Vol. I, *Kanthasamy v. MCI*, [2014] FCJ No. 472, 2014 FCA 113 [*Kanthasamy* (FCA)], at para. 47, p. 61.
[19] Appeal Book, Vol. I, *Kanthasamy* (FCA), *ibid*., at para. 58, p. 65; see cases cited *Yhap v. MEI*, [1990] 1 FC 722 (TD), BOA Vol. IV, Tab 89; *Chirwa v. MMI* [1970] I.A.B.D. No. 1; (1970), 4 IAC 338, BOA Vol. I, Tab 25.

nevertheless be relevant insofar as they relate to whether the appellant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.[20]

d. The decision was reasonable, in finding that there was insufficient evidence showing the Appellant would be targeted personally by security forces and that his degree of establishment is to be expected of someone who spent some time in Canada. She noted s. 25(1.3) of IRPA but used a hardship analysis. [21]

Part II – STATEMENT OF QUESTIONS IN ISSUE

7. The questions in issue are as follows:

a. What is the standard of review applicable to the issues which arise in this appeal?

b. What is the scope of the H&C discretion in s. 25 of the IRPA: is it limited to cases of "unusual and undeserved, or disproportionate hardship", reserved for exceptional cases, and restricted by requiring that the hardship be 'personalized' or that the person's establishment be greater than what would ordinarily be expected?

c. Was the decision made in this case reasonable in light of the reasons given?

Part III – STATEMENT OF ARGUMENT

A. STANDARD OF REVIEW

8. There are two principal issues in this appeal: the nature and scope of the statutory discretion and its application. The Appellant maintains that the correctness standard, applied by the Court of Appeal, is the appropriate standard to determine the nature and scope of the discretion. He further maintains that even if the Court were to apply a reasonableness standard to the question of law, the decision is unreasonable. On the second issue in respect of the application of the discretion, the Appellant maintains that the standard is reasonableness and that this decision is unreasonable.

9. The Court of Appeal concluded that the standard of review, in respect of matters of statutory interpretation that have been certified for appeal as questions of general importance, is correctness.[22] As it noted, this is consistent with prior rulings of this Court in respect of questions

[20] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para. 75, p. 69.
[21] Appeal Book, Vol. I *Kanthasamy* (FCA), *supra* note 18, at paras. 89-100, pp. 73-76.
[22] Appeal Book, Vol. I *Kanthasamy* (FCA), *supra* note 18, at paras. 32-36, pp. 55-56.

of law arising in the immigration context,[23] in particular, the scope of equitable discretion, similar to the one at issue on this appeal.[24] This would normally be taken to meet the first step in the *Dunsmuir* assessment, that "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."[25]

10. Applying the correctness standard is also consistent with this Court's later analysis of the factors to consider in determining which standard ought to be used in respect of a particular question. In *Smith,* a majority of this Court summarized the state of the law on standard of review drawing from the reasoning in *Dunsmuir*. It noted that standard of correctness governs:

> (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61).

It went on to summarize that the standard of review is reasonableness where the question:

> (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54)[26]

11. There are factors which favour the use of the correctness standard. The scope of the H&C discretion is a question of general law. While its application to the facts justifies the reasonableness standard, the initial and principle issue is simply what the statutory terms – 'humanitarian and compassionate' – mean. This is consistent with this Court's conclusion in

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[23] *Baker v. MCI*, [1999] 2 S.C.R. 817; [1999] S.C.J. No. 39, at paras. 53-56, BOA Vol. I, Tab 13; *Chieu v. MCI*, 2002 SCC 3 [*Chieu*], at paras. 20-26, BOA Vol. I, Tab 13. *Mugesera v. MCI*, [2005] S.C.J. No. 39; 2005 SCC 40; [2005] 2 S.C.R. 100, at paras. 36-37, 59, BOA. Vol. II, Tab 49; *Hilewitz v. MCI*, [2005] S.C.J. No. 58; 2005 SCC 57; [2005] 2 S.C.R. 706, at para. 71, BOA Vol. II, Tab 33; *MCI v. Khosa*, 2009 SCC 12 [*Khosa*] at paras. 44, 58, BOA Vol. II, Tab 46.

[24] *Chieu*, *supra* note 23, at paras. 20-26, BOA Vol. I, Tab 24.

[25] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; 2008 SCC 9 [*Dunsmuir*], at para. 62, BOA Vol. II, Tab 30. The judgement of this Court in *Khosa*, *supra* note 23, is distinguishable. While it concerned the equitable discretion of the Immigration Appeal Division, the legal scope of the statutory discretion was not at issue (see para. 58) and the decision maker is a judicial tribunal, unlike here where the decision maker is a civil servant. Similarly, the reasoning in *Agraira v. MPSEP*, 2013 SCC 36; [2013] 2 S.C.R. 559, at paras. 48-50 is distinguishable in that the matter related to a national security exemption which is particularly within the expertise of the executive branch of government. See also *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23; 2008 SCC 23; [2008] 1 S.C.R. 761, at para. 41, BOA Vol. II, Tab 39, where the Court recognized deference was due to the Minister of Justice in respect of the decision on surrender in the extradition context, but that the Minister had to apply the correct legal test.

[26] *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, BOA Vol. III, Tab 76.

Chieu: "the scope of this discretionary jurisdiction itself is a legal issue ultimately to be supervised by the courts." [27]

12. The H&C discretion is rooted in Canadian values of significant import[28] including family integrity, the best interests of children, and protection of the vulnerable. These values are not solely domestic ones,[29] but ones which Canada recognizes as being of universal application.[30] Underlying the discretion is a recognition that the rules and regulations which govern the admission of persons into this country may not account for very real human instances where compassion is warranted. In this sense, the use of the discretion focuses on how we treat strangers in our midst. It is an issue of central importance to the legal system as a whole. Further, given its impact on individuals and their families, the determination is not polycentric; it requires "the resolution of an issue in which an individual's rights are at stake," which are, in many instances, significant human rights.[31]

13. A second factor of relevance in this appeal is the lack of expertise on the part of officers about questions of law. Officers no doubt may develop some factual expertise from reading the H&C applications filed. However, there is no oral hearing and little opportunity to acquire a real understanding of the individuals whose futures in Canada they decide. They are civil servants, not lawyers. They are not judicial or quasi-judicial tribunals. There is no reason to create a judicial construct of legal expertise on the part of immigration officers and border guards in understanding the complexities of the statutory discretion they are called upon to exercise. They do not even make decisions without direction, but rather are guided by instructions from senior

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[27] *Chieu*, *supra* note 23, at paras. 22-26, BOA Vol. I, Tab 24; *Moreno v. MEI*, [1993] F.C.J. No. 912, at paras. 26-27, BOA Vol. II, Tab 48.
[28] *Baker*, *supra* note 23, at paras. 65-68, BOA Vol. I, Tab 13.
[29] It is noted that in every case, the decision transcends our borders as the subject of the H&C application is a citizen or habitual resident of another state jurisdiction.
[30] *Baker*, *supra* note 23, at para. 69-71; BOA Vol. I, Tab 13. See also *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], s. 3(3)(d), (f). The Act is to be construed and applied in a manner that ensures that decisions taken are consistent with the Charter and complies with international human rights instruments to which Canada is signatory. See also *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, s. 24(2) [*Charter*]; *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*Universal Declaration*], art. 8; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171(entered into force 23 March 1976, accession by Canada 19 May 1976) [*International Covenant*], art. 2.3; *American Convention on Human Rights*, 22 November 1969, OAST No 36 (entered into force 18 July 1978) [*American Convention*], art. 25.
[31] *Baker*, *supra* note 23, at paras. 53, 67, 70-71, BOA Vol. I, Tab 13.

officials.[32] Such officers, whose predominant role is to enforce immigration rules, ought not to be entrusted with the authority to define Canadian concepts of kindness and compassion.

14. Further, as noted below, there are a number of different decision-makers applying 'humanitarian and compassionate' discretion in different contexts. The discretion may be exercised by a variety of different officers and guards: visa officers, even locally engaged staff, at Canadian visa posts abroad; Canadian Border guards at ports of entry and enforcement centres; and immigration officers at several centralized processing centres in Canada, as in the case at bar.[33] It may also be exercised by the Immigration Appeal Division in those instances where appeals come before it. Visa officers, immigration officers, and border guards may be called upon to apply the H&C hardship criteria used under s. 25 of the Act,[34] as well as the different H&C factors of *Chirwa* test used under s. 28(2)(c) of the Act.[35] So not only are different interpretations being given to the same term, the same decision makers are being called upon to apply both tests.[36] This inconsistency favours a correctness standard.[37]

15. With different tribunals – not even from the same agency – rendering H&C decisions, the risk of inconsistent decision making is high. Indeed, this is already a reality with the different interpretations being given to the H&C discretions over a significant time period. Inconsistent decision making does not foster respect for government, for the Canadian judicial system, or for the judiciary. It is not fair if one person is permitted to remain in Canada, while her neighbor in no discernibly different situation is not, just because one officer applied a more stringent

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[32] CIC Manual: IP 5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, Part 5 [IP 5, Part 5], available online at: http://www.cic.gc.ca/english/resources/tools/perm/hc/processing/hardship.asp , BOA Vol. IV, Tab 100.

[33] CIC Instrument of Designation and Delegation, Immigration and Refugee Protection Act and Regulations, Jan.6.2015, Humanitarian & Compassionate Grounds, available online at: http://www.cic.gc.ca/english/resources/manuals/il/il3-eng.pdf, Items 43-55, pp. 21-26.

[34] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para. 47, p. 61.

[35] *IRPA*, *supra* note 30, s. 28(2)(c) gives an officer the discretion to permit a permanent resident to retain status on H&C grounds although not meeting the residency obligation set out in the regulations. The jurisprudence on the scope of H&C discretion is rooted in *Chirwa*, *supra* note 19, BOA Vol. I, Tab 25 and *Ribic v. Minister of Citizenship and Immigration*, [1985] I.A.B.D. No. 4, at para. 14, BOA Vol. III, Tab 67. See also *Bufete Arce v. Minister of Citizenship and Immigration*, [2003] I.A.D.D. No. 370 [*Bufete Arce*], at para. 10, BOA Vol. I, Tab 17; *Bello v. Minister of Citizenship and Immigration*, [2014] F.C.J. No. 801; 2014 FC 745 [*Bello*], at para. 41, BOA Vol. I, Tab 15.

[36] *Canadian National Railway Co. v. Canada (AG)*, [2014] S.C.J. No. 40; 2014 SCC 40 [*CNR Co.*], at para. 55, BOA Vol. I, Tab 22.

[37] *Rogers Communications Inc v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283, at para. 15; *Lethbridge Industries Ltd. v. Alberta (Human Rights Commission)*, [2014] A.J. No. 900; 2014 ABQB 496, at para. 64; *MCI v. Dhillon*, [2014] 1 F.C.R. 325; [2012] F.C.J. No. 710; 2012 FC 726, at para. 20.

interpretation of the law.

16. Where the decision makers are from different entities and agencies, with very different roles to play in the management of the movement of people in and out of Canada, and are located throughout the world, there is no opportunity to develop collegiality in approach to the decision making. Ultimately, the failure of the Courts to provide the parameters of the legal terms that decision makers are required to apply institutionalizes uncertainty. In the absence of other means to promote consistency, this can work to exacerbate and make more obvious the personal differences which are a human norm of decision making. Uncertainty ultimately undermines respect for the law and the judiciary.[38]

17. The H&C discretion is a significant means – if not at times the only means - of ensuring that the human rights of non-citizens are considered.[39] It is through the rule of law, however, that human rights are protected.[40] This cannot be achieved without a consistent interpretation of the laws which impact on human rights. A reasonableness standard, with its range of possible 'acceptable' outcomes, cannot provide the predictability required to ensure human rights protection. It is not just a matter of protecting the person, but also of ensuring that state actors know both the scope of human rights protections afforded under Canadian law and the limits on them. In a global community, it is essential that other state and international decision-makers be able to look to Canada, a democracy committed to human rights protections, for consistency in such protection.[41]

B. DID THE LOWER COURTS INCORRECTLY NARROW THE SCOPE OF THE H&C DISCRETION?

Statutory Provisions Relating to H&C Discretion:

[38] This is not the kind of situation contemplated in *Khosa*, *supra* note 23, at para. 26 and *Dunsmuir*, *supra* note 25, at para. 41 where "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute". That certainly would apply to the application of the H&C discretion, as in *Khosa*. But people who make applications to come into or remain in Canada on H&C grounds ought to know beforehand what kinds of circumstances may warrant a positive exercise of discretion.

[39] *Baker*, *supra* note 23, BOA Vol. I, Tab 13; *De Guzman v. MCI*, 2005 FCA 436 [*De Guzman*], at paras. 82-89, BOA Vol. II, Tab 27.

[40] In *Reference re Secession of Quebec*, [1998] 2 SCR 217 [Secession Reference] at para 70, BOA Vol. III, Tab 66, this Court emphasized the "sense of orderliness" conveyed by the rule of law, noting that "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society." *Dyson v. Attorney General*, [1911] 1 KB 410; *R v. Mills*, [1986] 1 SCR 863 at 882.

[41] *Universal Declaration*, *supra* note 30; *International Covenant*, *supra* note 30; *American Convention*, *supra* note 30.

18. The *IRPA* provides a framework governing the admission and removal of non-citizens. There are explicit categories for the admission of immigrants – from skilled workers to refugees seeking resettlement. Individuals must meet the admission criteria to gain permission to come. As well, there are grounds for which admission will be denied or removal secured, such as security, criminality, misrepresentation. There are discretions in the Act which permit individuals to enter or remain in Canada even if they do not qualify for admission or may otherwise be inadmissible.[42]

19. There are two principal provisions which confer a discretion to grant relief from inadmissibility in humanitarian and compassionate circumstances,[43] both of which have been engaged in appeals before this Court:[44]

a. S. 25(1) permits the Minister to grant a foreign national permanent resident status or an exemption from any applicable statutory criteria or obligations if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. [45]

b. S. 67(1) of the Act permits the Immigration Appeal Division to allow an appeal brought by a sponsor of a member of the family class, a permanent resident or refugee under removal order or a visa holder, where satisfied that the decision appealed is legally or factually wrong; there has been a breach of fairness; or, taking into account the best interests of a child

[42] See for e.g. *IRPA*, *supra* note 30, s. 24 (temporary resident permit); s. 28(2)(c) (retention of permanent residence on H&C grounds); s. 36(3)(c) (rehabilitation on criminality); s. 42.1 (national interest exemption from admissibility bars).
[43] There is a third provision which grants an H&C discretion in a more limited circumstance: *IRPA, ibid.*, s. 28(2)(c) gives an officer the discretion to permit a permanent resident to retain status on H&C grounds although not meeting the residency obligation set out in the regulations. The jurisprudence on the scope of H&C discretion in s. 28(2)(c) of the Act is rooted in *Chirwa*, *supra* note 19, BOA Vol. I, Tab 25 and *Ribic*, *supra* note 35, at para. 14, BOA Vol. III, Tab 67. See also *Bufete Arce*, *supra* note 35, at para. 10, BOA Vol. I, Tab 17; *Bello*, *supra* note 35, at para. 41, BOA Vol. I Tab 15.
[44] *Baker*, *supra* note 23, concerned the precursor to s. 25 of the *IRPA*. *Chieu*, *supra* note 23, concerned the precursor to s. 67, while *Khosa*, *supra* note 23, concerned s. 67 of the *IRPA*.
[45] *IRPA*, *supra* note 30, s. 25. This provision was amended to exclude from consideration persons described in s. 34 (security), s. 35 (human or international rights violations), and s. 37 (organized criminality) of the Act. The amendments in the "*The Faster Removal of Foreign Criminals Act*" came into effect on June 26, 2013. The precursor to s. 25 was s. 115(2) of the *Immigration Act,* S.C. 1976, C. 52 (assented to in 1977) [*Immigration Act*, 1976/77] BOA Vol. IV, Tab 99: it permitted the Governor in Council to exempt a person from the regulations or otherwise facilitate the admission of a person, where satisfied that this should be done for reasons of public policy or due to the existence of compassionate or humanitarian considerations.

directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.[46]

20. Two interpretations of the meaning of 'H&C' have developed. In respect of IAD appeals under s. 67 of the Act,[47] H&C has been interpreted with reference to the reasoning in *Chirwa v. MEI*[48] decided in 1970. The IAB concluded:

> 27 … Webster's New Collegiate Dictionary defines "compassion" (fr. com - pati, to bear, suffer) as "sorrow or pity excited by the distress or misfortunes of another, sympa-thy". The word "pity" is given as a synonym: "A feeling for the suffering of others". While this definition implies an element of subjectivity, since emotion is involved, it is clear that no judicial decision or finding, no matter how discretionary, can be based on emotion. The meaning of the words "compassionate considerations" in the context of s. 15(1) (b) (ii) must therefore be taken to be those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another - so long as these misfortunes "warrant the granting of special relief" from the effect of the provisions of the *Immigration Act*. The *Immigration Act* and the *Immigration Appeal Board Act* are in *pari materia*. It is clear that in enacting s. 15(1) (b) (ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend s. 15(1) (b) (ii) of the *Immigration Appeal Board Act* to be applied so widely as to destroy the essentially exclusionary nature of the *Immigration Act* and Regulations.
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> 28 The same arguments apply to the phrase "humanitarian considerations". Webster defines "humanitarianism" as "Regard for the interests of mankind, benevolence". "Humane" is defined as "Having feelings and inclinations creditable to man; kind, benevolent" - again a subjective word which is used objectively in the section.[49]

21. In the case at bar, the Court of Appeal rejected an interpretation of H&C in s. 25 consistent with the interpretation of H&C in s. 67 of the Act. It concluded that the 'isolated words' used in

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[46] *IRPA*, *supra* note 30, s. 67(1). The original precursor to this provision appeared in s. 15 of the *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3 (first assented to in 1967) which permitted the IAB to quash or stay deportation orders against permanent residents having regard to all the circumstances of the case, or orders made against any other non-citizen, having regard to the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief. The risk issues were replaced by the refugee determination process introduced in the *Immigration Act* 1978, when the Governor in General was given the H&C discretion generally and the IAD was given it in respect of permanent residents, refugees, sponsors, and visa holders.

[47] As noted the H&C discretion in s. 28(2)(c) of the *IRPA* also follows the *Chirwa* line of reasoning. See note 28.

[48] *Chirwa*, *supra* note 19, at paras. 27-28, BOA Vol. I, Tab 25.

[49] See also *Yhap*, *supra* note 19, BOA Vol. IV, Tab 89 where Justice Jerome at para. 35 characterized the discretion afforded an immigration officer by s. 114(2) of the Act as wide and compassionate or humanitarian considerations as 'rather broad'; *Espino v. MCI*, [2006] F.C.J. No. 1578, at para. 1, BOA Vol. I, Tab 32 where Justice Harrington stated: "Compassion has been defined as including suffering together with another, participation in suffering; fellow-feeling, sympathy, the feeling or emotion when a person is moved by the suffering or distress of another and by the desire to relieve it."; *Aryan v. MCI*, [2004] F.C.J. No. 334; 2004 FC 254, at para. 55, BOA Vol. I, Tab 8.

Chirwa and *Yhap* did not correctly express the test in s. 25.[50] Rather it found that while it and this Court had never decided that it was to be interpreted more narrowly as a hardship test, this is the test that has been applied;[51] it has been explicitly adopted by the Federal Court;[52] "it expresses in a concise way the sort of exceptional considerations that would warrant the granting of such relief within the scheme of the Act";[53] and

> "[t]he isolated words in *Yhap* and *Chirwa* take subsection 25(1) beyond permitting relief in situations of very significant hardship (as described above) to situations where one's subjective view of the equities is aroused. That goes beyond the role of subsection 25(1) within the scheme of the Act. It would take even broader words, such as "equitable and just," to import such an expansive standard into subsection 25(1) of the Act.[54]

22. The 'definition' the Court of Appeal adopted is that set out in the instruction manual for Canadian immigration and border officers: "unusual and underserved or disproportionate hardship". The current Manual indicates:

> The assessment of hardship in an H&C application is a means by which CIC decision-makers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s) or a permanent resident status. The test is whether it would be a hardship for the applicant if the requested exemption or permanent resident status is not granted.
>
> The criterion of "unusual and undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on Subsection 25(1), which means that these terms are more than just guidelines.
> See *Singh v. Canada (MCI);* 2009 Carswell Nat 452; 2009 CF 11, 2009 FC 11.
>
> In many cases in Canada, the hardship test will revolve around the requirement in A11 to apply for a permanent residence visa before entering Canada. In other words, would it be a hardship for the applicant to leave Canada in order to apply abroad?
>
> The assessment of a request for H&C consideration overseas is essentially a determination of whether the applicant would suffer unusual and undeserved or disproportionate hardship if they are not granted an exemption or an immigrant visa for Canada.
>
> Hardship is assessed by weighing together all of the H&C considerations submitted by the applicant. Individual H&C factors should not be considered in isolation in a determination of the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant.[55]

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[50] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para. 58, p. 65; citing *Yhap*, *supra* note 19, and *Chirwa*, *supra* note 19. It is to be noted that the "isolated words" in *Chirwa* have been applied since 1970 in more than a thousand cases. See Case Headnotes citing *Chirwa v. MEI*, between April 2013 and September 2010, BOA Vol. IV, Tab 91.
[51] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at paras. 45-47, p.61.
[52] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para. 59, p. 65.
[53] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para. 49, p. 62.
[54] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para. 60, p.65.
[55] IP 5, Part 5, *supra* note 32.

23. In addition to concluding that the H&C discretion was limited to hardship, the Court of Appeal limited it further in characterizing it as an "exceptional" discretion and in finding the officer's interpretive restrictions to be reasonable:[56] the officer required that it be personalized;[57] discounted establishment because it occurred during the time the protection request was considered and it was what was expected of claimants; [58] and considered the application on the constructed myth that she was deciding whether to process the landing application from within Canada or require that Mr. Kanthasamy return to Sri Lanka to pursue it. A new application made from outside of Canada under s. 25 of the Act has no hope of success given that the application was just refused under s.25.[59]

24. It is the Appellant's submission that there is nothing in the wording of the statutory grant of discretion which requires or permits interpretive restrictions, not explicitly articulated in the legislation.[60] The Court of Appeal's reasons in respect of the H&C discretion do not accord with principles of statutory interpretation; rather it appears to have adopted a narrower interpretation because the Federal Court had been applying the narrower test and because, in the Court's view, it reflected the 'exceptional' nature of the discretion, limited to very significant hardship.[61]

Principles of Statutory Interpretation

25. In determining the scope of a statutory discretion, this Court has considered various factors: the ordinary meaning of the term, its legislative history and historical application, and

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[56] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para 85, p. 72.

[57] Appeal Book, Vol. I, Officer's Reasons, pp. 4-5, 11-14: The officer found the Appellant had not established he would be personally discriminated against, personally affected, or singled out if returned to Sri Lanka. This was upheld by the Federal Courts. Appeal Book, Vol. I, FC Reasons, pp. 24-31, at para. 21-40: The Court decided the law was well settled that the risks alleged in an H&C application must be risks that are personal – having a direct and negative impact on the particular applicant. Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at paras 48-49, 54-55, pp. 62, 64.

[58] Appeal Book, Vol. I, Officer's Reasons, p. 5, 14: She found the Appellant's establishment, while commendable, came as a result of being permitted to remain, even though subject to a removal order, and it was not to a degree that would cause him hardship to leave. This was upheld as reasonable by the lower Courts: Appeal Book, Vol. I *Kanthasamy* (FC), paras. 40-46, pp. 33-36; Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, pp.74-76.

[59] The only kind of request to return Mr. Kanthasamy could make would be on H&C grounds, as he is not a member of the Family Class, (*Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPRegs.*], s. 4) nor would he qualify in any of the independent immigrant classes, (as described in *IRPRegs*., ss. 72.8 – 115). A student authorization would not be likely as it requires a temporary purpose under *IRPA*, *supra* note 30, ss. 20(1)(b), 22, 29(2); *IRPRegs.*, ss. 179(b), 183(1)(a), and especially s. 216(1)(b), which he doesn't have, having sought to remain permanently in Canada as a protected person and on H&C grounds.

[60] *CNR Co.*, *supra* note 36, at para. 36, BOA Vol. I, Tab 22.

[61] Appeal Book, Vol. I, *Kanthasamy* (FCA), *supra* note 18, at para. 49, p. 62.

the objectives and scheme of the Act, adopting the framework for statutory interpretation articulated in Dreidger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[62]

Ordinary Meaning of "Humanitarian" and "Compassionate"

26. As noted above, initial jurisprudence on interpreting the meaning of 'humanitarian' and 'compassionate' took a broad and humane approach, as exemplified in *Chirwa*,[63] the early formative decision on H&C discretion. The Board looked to the ordinary meaning of the terms.[64] Equating the H&C discretion to 'hardship', as the Court of Appeal has done, is much more limiting. The ordinary meaning of the term "hardship" signifies "pain and suffering, something that causes pain, suffering, or loss"[65] This is an aspect of H&C but is more restrictive than what one would expect by the wording of the provision. The ordinary meaning of a term may not be determinative, but it is a relevant consideration.[66]

Legislative and Historical Considerations

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[62] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2, at para. 21, BOA Vol. III, Tab 68, citing Sullivan R, Statutory Interpretation (1997); Sullivan R, Driedger on the Construction of Statutes (3rd ed. 1994); Côté PA, The Interpretation of Legislation in Canada (2nd ed. 1991), Driedger in Construction of Statutes (2nd ed. 1983), at p. 87. Like in *Rizzo* where the Court cited s. 10, *Interpretation Act*, R.S.O. 1980, c. 219, in this case, s. 12, *Interpretation Act*, R.S.C., 1985, c. I-21 states: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". See also: *Chieu*, *supra* note 23, at para. 27, BOA Vol. I, Tab 24; *CNR Co.*, *supra* note 36, at para. 36, BOA Vol. I, Tab 22; *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, at para. 18, BOA Vol. II, Tab 35; *R. v. Summers*, [2014] S.C.J. No. 26, at para. 35, BOA Vol. III, Tab 60.

[63] *Chirwa*, *supra* note 19, BOA Vol. I, Tab 25.

[64] It is to be noted that the *Chirwa* test was in place from 1970. When s. 115(2) of the *Immigration Act*, 1976/77, *supra* note 45, came into effect in August 1977, the meaning of H&C at that time was only the *Chirwa* test. The narrower description of H&C came into play much later, as the first mention of the narrower manual guidelines by the Federal Court is in 1990 in *Yhap*, *supra* note 19, BOA Vol. IV, Tab 89.

[65] *Miriam-Webster Internet Dictionary*, *s.v.* "hardship", available online at http://www.merriam-webster.com/dictionary/hardship; Other definitions are similar: e.g. "a condition of life that causes difficulty or suffering" (*Cambridge Internet Dictionaries Online*, s.v. "hardship", available online at: http://dictionary.cambridge.org/us/dictionary/american-english/hardship?q=Hardship.). *The Free Dictionary Online*, citing *Burton's Legal Thesaurus* provides equivalent terms: adversity, affliction, misfortune, suffering, travail, See also: adversity, burden, calamity, casualty, catastrophe, damage, detriment, grievance, misfortune, nuisance, plight, pressure, privation, tragedy, trouble (*The Free Dictionary Online*, s.v. "hardship", available online at: http://legal-dictionary.thefreedictionary.com/hardship). BOA Vol. IV, Tab 93.

[66] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, 2002 SCC 42, at paras. 27-30, BOA Vol. I, Tab 14; *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No. 56; 2005 SCC 54; [2005] 2 S.C.R. 601, at para. 10, BOA Vol. I, Tab 20.

27. As long as Canada has had formal laws governing the admission to and exclusion or removal of persons from the country, discretion to overcome the rules has existed. While there is an expectation that the rules will be followed, immigration legislation is fundamentally concerned with the movement of people and the reality is that there will always be instances where it would be callous, cold-hearted or inhumane to turn some away even though she cannot comply with admissibility requirements.

28. In the initial legislation, the Minister was given a completely undefined statutory power to stay removal and to issue permits.[67] With increasing legislative sophistication, the discretion became more focused to be applied in particular circumstances.[68] The jurisprudence over the years reflects a view that such discretionary powers are broad.[69] With reference to the Minister's general power to issue permits to inadmissible persons, this Court noted in *Hardayal*: "the issuance of the Minister's permits introduced an element of flexibility and humanitarianism into the administration of immigration law".[70]

29. It is submitted that the H&C discretion remains broad in the current legislation. The 'humanitarian' and 'compassionate' terms have not changed since introduced in the 1977

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[67] *Immigration Act*, 9-10 Edward VII (1910), Ch. 27, s. 4 (Minister's Permit (MP)); s. 14 (Board of Inquiry (BI)); s. 19 (Ministerial Appeal (MA)), BOA Vol. IV, Tab 95; *Immigration Act*, R.S.C. 1927, Ch. 93, s. 4 (MP); s. 14 (BI); s. 19 (MA), BOA Vol. IV, Tab 96; *Immigration Act*, R.S.C. 1952, c. 145, s. 5 (MP); s. 15 (BI); s. 20 (MA), BOA Vol. IV, Tab 97; *Immigration Act*, S.C. 1952, Ch. 325, s. 9 (MP); s. 31 (MA), BOA Vol. IV, Tab 98; *Immigration Act*, 1976/77, *supra* note 45, s. 37 (MP); s. 114(2) (GIC exemption), BOA Vol. IV, Tab 99.

[68] *Immigration Act*, 1976/77, *supra* note 45, s. 19(1)(e) (security exemption); s. 55 (*non-refoulement);* s. 72 (permanent resident & refugee appeals); s. 79 (sponsorship appeal), BOA Vol. IV, Tab 99.

[69] Broad discretion also exists where the discretion involved a balancing of public safety/national security against risk to the person. See for e.g. *Ahani v. MCI*, 2002 SCC 2, at para. 16; *Suresh v. MCI*, 2002 SCC 1, at paras. 32, 36, BOA Vol. III, Tab 78; *MEI v. Chiarelli*, [1992] S.C.J. No. 27, at para. 41; *Prata v. MMI*, [1975] S.C.J. No. 38; [1976] 1 S.C.R. 376, at p. 5.

[70] *MMI v. Hardayal*, [1978] 1 S.C.R. 470, at p. 5 (QL); see also *Sharp v. Wakefield* [1891] A.C. 173; *Espaillat Rodriguez v. The Queen*, [1963] S.C.J. No. 63; [1964] S.C.R. 3, (Ministerial Appeal), at p. 6 (QL) "The Minister of Citizenship and Immigration is given wide discretionary powers under the Act and it may well be that he has power to waive the visa requirements." See also *Violi v. MCI*, [1965] S.C.R. 232, at p. 11 (Ministerial appeal), BOA Vol. IV, Tab 87; *Gana v. MMI*, [1970] S.C.J. No. 33 (IAB appeal); *Boulis v. MMI*, [1972] S.C.J. No. 131, at pp. 7-8 (IAB equitable discretion; *Grillas v. MMI*, [1972] S.C.R. 577, at p. 11 (IAB equitable discretion). In *Podaleszcka v. MMI*, [1972] S.C.J. No. 57 (IAB Appeal), at p. 8-9, BOA Vol. III, Tab 56, s. 15 of the *Immigration Appeal Board Act*, *supra* note 46, was characterized as providing a "generous scope for appeal from deportation orders."; *Ramawad v. MMI*, [1978] 2 S.C.R. 375 (requiring that inquiry be adjourned for Minister to exercise discretion on granting a work permit); *Singh v. MEI*, [1985] S.C.J. No. 11, at para. 17, BOA Vol. III, Tab 71; *Prassad v. MEI*, [1989] S.C.J. No. 25; *Baker*, *supra* note 23, BOA Vol. I, Tab 13; *Chieu*, *supra* note 23, at para. 29, 38-39, BOA Vol.I Tab 24; *Khosa*, *supra* note 23, at paras. 10, 15, BOA Vol. II, Tab 46.

Immigration Act.[71] The broad approach is not only consistent with the ordinary meaning of humanitarian and compassionate, as analyzed in *Chirwa*, it is consistent with this Court's treatment of the discretion in the past.

30. In *Baker,* this Court noted that an H&C request had to be "evaluated in a manner that is respectful of humanitarian and compassionate considerations", which include consideration of relevant "central humanitarian and compassionate values", such as the best interests of children.[72] It went on to note:

> 53 ….discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian *Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).[73]

31. Similarly in *Chieu,* this Court adopted a broad inclusive interpretation of the IAD's equitable discretion to allow an appeal "in all the circumstances of a case," noting that it permitted the IAD to take into account all relevant factors, including "every extenuating circumstance."[74] In the context of discretionary powers given under immigration legislation which are intended to provide equitable relief, this Court has been consistent in concluding that they are unrestricted and to be broadly applied.[75]

Statutory Objectives

32. Canada's immigration objectives reflect humanitarian values, including the protection of human rights, such as protection from harm and of family integrity. These values permeate Canada's judicial system.[76] In *Baker* this Court noted:

> 15. ….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

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[71] *Immigration Act*, 1976/77, *supra* note 45, s. 114(2). It is only the decision maker who has changed, BOA Vol. IV, Tab 99.
[72] *Baker*, *supra* note 23, at paras. 66, 68-73, BOA Vol. I, Tab 13**.** This Court did consider the Minister's guidelines which articulated the 'hardship' approach but the scope of the discretion in this respect was not put at issue.
[73] *Baker*, *supra* note 23, at paras. 8-10; and at paras. 51-53, BOA Vol. I, Tab 13.
[74] *Chieu*, *supra* note 23, at paras. 15-17, 79, BOA Vol. I, Tab 24; *Canepa MCI*, [1992] F.C.J. No. 12 (CA) [*Canepa*], at para. 30.
[75] *Chieu*, *supra* note 23, at paras. 29-49, BOA Vol. I, Tab 24. The reasoning of this Court in *Khosa*, *supra* note 23, does not detract from this submission. That case concerned the application of the statutory discretion, not its scope.
[76] *Baker*, *supra* note 23, BOA Vol. I, Tab 13; *Chieu*, *supra* note 23, BOA Vol. I, Tab 24; *De Guzman*, *supra* note 39, at paras. 82-89, BOA Vol. II Tab 27; *Slaight Communications v. Davidson*, [1989] S.C.J. No. 45 [*Slaight*], at paras. 9-14, 26-28, 82-88, BOA Vol. III, Tab 75; *Secession Reference*, *supra* note 40, at paras. 46, 52, 72, 74, BOA Vol. III Tab 66; *IRPA*, *supra* note 30, ss. 3(1)(d), 3(2)(a), (e), 3(3)(d), (f).

> 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.

33. The narrow approach is not consistent with statutory objectives, which require that decisions taken under the Act be consistent with the *Charter*, including its principles of equality and freedom from discrimination, and that they comply with international human rights instruments to which Canada is signatory.[77] The interpretation given to s. 25 of the Act by the decision maker and the lower courts effects discrimination in treatment based on the status of the person in Canada.[78] Foreign nationals without status in Canada applying under s. 25 of the Act must meet a hardship test to be accorded humanitarian and compassionate consideration, while others – permanent residents, refugees and those who have sponsoring family members in Canada – who have access to the appeal process at the IAD are accorded humanitarian and compassionate consideration based on the reasoning in *Chirwa*. This Court noted in *Chieu*[79] that status differences could impact on statutory rights, citing the restrictions on removal to a country of persecution for a refugee, but lack of restriction when deporting a permanent resident. However, this is not the same as approving different interpretations of the same term based on status.[80] Negating the exercise of discretion for some classes of applicants renders the remedy illusory for them.[81] Parliament left the discretion to be considered in all cases of foreign nationals who file an H&C application while in Canada, including those without status and those who have made refugee claims. It is not the role of the Court to interpret legislation in a discriminatory fashion; it is contrary to the objectives of equality and fair treatment, particularly when status is not an indicator of other relevant factors such as the strength of the person's establishment, ties to Canada or need for safe haven.[82]

Ministerial Guidelines

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[77] *IRPA*, *supra* note 30, s. 3(3)(d) & (f).
[78] *Legault v. MCI*, [2002] F.C.J. No. 457; 2002 FCA 125 [*Legault*], at para. 16-19, BOA Vol. II, Tab 44; *Lalane v. MCI*, [2009] F.C.J. No. 658 [*Lalane*], at paras. 1, 38, BOA Vol. II Tab 40; *Ramaischrand v. MCI*, 2011 FC 441, at para. 20 BOA Vol. III, Tab 63; *Irimie v. MCI*, [2000] F.C.J. No. 1906, at paras. 17, 26, BOA Vol. II, Tab 34.
[79] *Chieu*, *supra* note 23, at para. 59, BOA Vol. I, Tab 24.
[80] See *Legault*, *supra* note 78, at paras. 16-19, BOA Vol. II, Tab 44.
[81] *Lau v. MEI*, [1984] 1 F.C. 434 (CA) (QL), at pp. 3-4 BOA Vol. II, Tab 41; *Pushpanathan v. MCI*, [1999] F.C.J. No. 380, at para. 15, BOA Vol. III, Tab 58; *Duong v. MCI*, [2001] F.C.J. No. 362, at para. 17, BOA Vol. II, Tab 31.
[82] *Slaight*, *supra* at note 76, at para. 87, BOA Vol. III, Tab 75.

34. The narrower scope of the H&C discretion has been defined by the Minister and the lower Courts[83] – not Parliament.[84] It is an inherently flawed approach: it does not accord with the ordinary meaning of the terms used, nor with historical practice or precedent, nor with the statutory objectives as set out above. The test was developed in Ministerial guidelines for immigration officers called upon to exercise the H&C discretion.[85] While the Immigration Manual has been referenced by this Court in the past, it has been referenced as guidelines for officers to consider.[86]

35. At issue here is not the consideration of the guidelines, but of elevating them to become definitional when this is not consistent with the enabling legislation. The Immigration Manual refers to the hardship test as having been 'defined' by the Courts:

> The assessment of hardship in an H&C application is a means by which CIC decision makers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s).The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on subsection 25(1), which means that these terms are more than mere guidelines. See Singh v. MCI 2009 FC 11.[87]

36. In Singh, Shore J. does elevate the guidelines, making them binding:

> Moreover, the criterion of "unusual, undeserved or disproportionate hardship" or "difficultés inhabituelles et injustifiées ou excessive" has now been adopted by this Court in its decisions on subsection 25(1), which means that these terms are more than mere guidelines.[88]

37. It is submitted that the guidelines cannot become 'law' to replace statutory provisions through judicial interpretation. To the extent that the Court of Appeal effectively did this, it is in error in fettering the discretion of officers who are required to consider H&C factors, not solely unusual, undeserved or disproportionate hardship. [89]

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[83] IP 5, Part 5, *supra* note 32, section 5.10, BOA Vol. IV, Tab 100; *Singh v. MCI*, 2009 FC 11, BOA Vol. III Tab 73.
[84] It is trite to note that the Manual provides guidelines to officers who apply the Act but that it is not 'law' – either statutory or regulatory: *Yhap*, *supra* note 19, BOA Vol. IV, Tab 89; *Vidal v. MEI*, [1991] F.C.J. No. 63 (QL) [*Vidal*], at pp. 5-6, 13, BOA Vol. IV, Tab 86; *MCI v. Thamotharem*, [2007] F.C.J. No. 734; 2007 FCA 198 [*Thamotharem*], at paras. 55-64, BOA Vol. III, Tab 80.While not binding, fairness normally requires that beneficial provisions be applied evenly among applicants. *De Gala v. MEI*, [1987] F.C.J. No. 7 (QL), at pp. 5-6, 10-12 BOA Vol. II, Tab 26.
[85] See *Baker*, *supra* note 23.
[86] See *Baker*, *supra* note 23.
[87] IP 5, Part 5, *supra* note 32, section 5.10, BOA Vol. IV, Tab 100.
[88] *Singh*, *supra* note 83, citing *Liniewska v. MCI*, 2006 FC 591, 152 A.C.W.S. (3d) 500, at para. 16, BOA Vol. II, Tab 45; *Ruiz v. MCI*, 2006 FC 465, at para. 35, BOA Vol. III, Tab 69; *Kawtharani v. MCI*, 2006 FC 162, at para. 16, BOA Vol. II, Tab 38; *Pashulya v. MCI*, 2004 FC 1275 at para. 43, BOA Vol. III Tab 54; *Legault*, *supra* note 78, at paras. 16-19, 23, 28, BOA Vol. II, Tab 44; *Baker*, *supra* note 23, at para. 17, BOA Vol. I, Tab 13.
[89] *Yhap*, *supra* note 19, BOA Vol. IV, Tab 89; *Vidal*, *supra* note 84, at pp. 5-6, 13, BOA Vol. IV Tab 86; *Thamotharem*, *supra* note 84, at paras. 55-64, BOA Vol. III, Tab 80.

38. There are other effective restrictions imposed judicially on the H&C discretion under s. 25 of the IRPA. The Appellant maintains that these, as well, act as effective fetters on an officer's discretion and are unwarranted given the broad equitable wording of the provision.

39. **Exceptional:** The Court of Appeal characterized the discretion as 'exceptional'. It is this characterization which led that Court to justify the narrower hardship test, concluding that it best reflects the 'exceptional' nature of the remedy. It is submitted that this is not justified by the wording of the discretion itself. [90]

40. While the H&C discretion is an exception, it does not require that it be exercised on an exceptional basis or that the applicant, herself, be exceptional. Humanitarian grounds exist in many instances where the individuals are merely ordinary people. In the case at bar, hardship is clearly an issue but there are other factors: the Applicant was able to leave Sri Lanka while still a child, moving beyond the war that scarred him, completing high school in Canada, and forming close friendships. He is artistic and interested in pursuing this, an option clearly available to him in Canada. He suffers PTSD yet managed to do well here. These kinds of factors are not 'exceptional', but they do evoke compassion and ought not to be disregarded. As such, discounting the Applicant's establishment because he acquired it as a result of seeking protection and it is what was expected of him has the effect of elevating the test for a positive exercise of discretion to only exceptional people.[91]

41. **Personalized Hardship:** The requirement that hardship be personalized, i.e. that a direct link be established between the discrimination faced generally by young Tamil males and the

[90] In the UK, the Immigration Rules specifically characterize the equitable discretion in respect of leave to remain as being 'exceptional'. Cases which fall outside the Rules are considered in light of the family rights set out in Art. 8 of the European Convention, based on a proportionality assessment. See *Esther Ebun Oludoyi & Ors v. Secretary of State for the Home Department*, [2014] UKUT 00539 (IAC) at paras. 1-8.

[91] There is jurisprudence which takes issue with the requirement of 'exceptionality'. In *Aboubacar v. MCI*, 2014 FC 714 at para 19, BOA Vol. I, Tab 2; the officer concluded the applicant's establishment was not exceptional but rather expected because he had received a work permit while waiting for his sponsorship application to be processed. Rennie J. rejected this reasoning, noting that in applying the officer's rationale it would logically follow that only if the applicant had worked illegally and established himself would it be worthy of consideration on H&C grounds.

hardship the Applicant would face in Sri Lanka, is not explicit in the legislation, nor is it an obvious and necessary interpretation of H&C.[92]

42. Section 25(1) of the Act states the Minister must "examine the circumstances *concerning the foreign national*" and may grant status if it is "justified by humanitarian and compassionate considerations *relating to the foreign national*."[93] The additional subsection enacted by the *Balanced Refugee Reform Act* ("BRRA") explains the Minister "must consider elements related to the hardships that *affect* the foreign national."[94] Circumstances of hardship can certainly relate to, concern and affect a person sufficiently without the individual being personally targeted.[95] The interpretation of these provisions to require that the hardship be "personalized" is an exaggeration and incorrect.

43. There are instances where the Federal Court has taken issue with the personalization of the test for hardship.[96] In *Shah*, Justice Mandamin concluded:

> [72] The Officer set aside all of the country conditions and dismissed relevant facts indicative of hardship by incorrectly applying a standard which required the Applicant to show that she would be personally targeted or threatened….
>
> [73] I find the Officer applied a higher standard than appropriate for H&C decisions by incorrectly requiring the Applicant to establish a personal risk beyond that faced by other individuals in Trinidad. *The test of risk causing unusual, undeserved or disproportionate hardship is not limited to personal risks to an Applicant's life or safet***y**, and the Officer failed to properly consider whether the overall problem of

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[92] *Chirwa*, *supra* note 19; *Baker*, *supra* note 23; *Chieu*, *supra* note 23; *Canepa*, *supra* note 74*; Caliskan v. MCI***,** 2012 FC 1190; [2012] FCJ No 1291 [*Caliskan*] at paras. 18-26, BOA Vol. I, Tab 18. Personalized hardship is required: The Court cited a concern with floodgates that was mentioned in the jurisprudence: *Lalane*, *supra* note 78, at paras. 1, 38, BOA Vol. II, Tab 40; *Ramaischrand*, *supra* note 78, at para. 9, BOA Vol. III, Tab 63. Personalized hardship is not required: *Shah v. MCI*, 2011 FC 1269 [*Shah*], paras. 69-73; *Diabate v. MCI* 2013 FC 129 [*Diabate*] at paras. 32-37, BOA Vol. II, Tab 28.

[93] *IRPA*, *supra* note 30, s. 25(1) NEEDS BOA CITE?.

[94] *IRPA*, *supra* note 30, as amended by Bill C-11, *Balanced Refugee Reform Act*, SC 2010, c. 8 assented to 2010-06-29.

[95] "Concern" is defined as "to relate to" or "to bear on", where the meaning of "relate" is "to have a relationship or connection." *Miriam-Webster Internet Dictionary*, *s.v.* "concern", available online at: http://www.merriam-webster.com/dictionary/concern?show=0&t=1422464922; same source, *s.v.* "relate", available online at: http://www.merriam-webster.com/dictionary/relate. And similarly, the definition of "affect" is "to produce an effect upon." *Merriam-Webster Internet Dictionary*, *s.v.* "affect", available online at: http://www.merriam-webster.com/dictionary/affect, BOA Vol. IV, Tab 93.

[96] See *Aboudaia v.* MCI 2009 FC 1169 at para 17, BOA Vol. I, Tab 3; *Rebaï v. MCI*, 2008 FC 24, at paras. 7-10, BOA Vol. III, Tab 65; *Shah*, *supra* note 92, at paras. 69-73, BOA Vol. III, Tab 71; *Diabate*, *supra* note 92, at paras. 32-37, BOA Vol. II, Tab 28; *Aboubacar*, *supra* note 91, at para. 19, BOA Vol. I, Tab 2.

> criminality constituted unusual and undeserved, or disproportionate hardship in the circumstances.[97]

44. Similarly, Justice Gleason reasoned in *Diabate* determined it to be incorrect and unreasonable to demand "an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin" when conducting an H&C analysis.[98] In other words, the test for hardship does not require personalization.

45. The reasoning above was relied upon recently by Justice Rennie in *Aboubacar*. He explained there exist circumstances where country conditions are "such that they support a reasoned inference as to the challenges a particular applicant would face on return."[99] This is sufficient for an applicant to establish hardship without having to establish that it is individualized or personalized.

46. Moreover, the requirement of the showing of personalized hardship fails to recognize that profiling is not individual; discrimination is not individual. Hardship may arise, as it does in the present case, when a group of individuals with particular profile factors face discrimination for this reason. It has nothing to do with the individual personally and everything to do with the group to which she belongs. Indeed, discrimination is defined popularly as the "the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age or sex."[100] To require that hardship be personalized is to ignore the essence of discrimination itself.

47. Mr. Kanthasamy is a young male Tamil from the north of Sri Lanka. The evidence indicates that Tamils face harassment and discrimination, in a militarized and occupied north, with registration again required for northern Tamils in the south, and in the face of a past history of violent persecution and discrimination against Tamils, particularly young male Tamils from the north.[101] The PRRA officer, in fact, recognized that the evidence showed that young male

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[97] *Shah*, *supra* note 92, at para. 73 [emphasis added] BOA Vol. III, Tab 71.
[98] *Diabate*, *supra* note 92, at para. 36 BOA Vol. II, Tab 28.
[99] *Aboubacar*, *supra* note 91, at paras. 11-12 BOA Vol. I, Tab 2.
[100] *Oxford Dictionary*, *s.v.* "discrimination", available online at: http://www.oxforddictionaries.com/definition/english/discrimination BOA, Vol. IV, Tab 93.
[101] Appeal Record, Vol. II, Country Documentation, Appellant's Affidavit, Aug. 2011, pp. 267-69; Appellant's Submissions, 2011, summarizes extensive documentary evidence in relation to Tamils, pp. 236-66; Appellant's Submissions, 2011, pp. 283-86; IRIN, Sri Lanka; Lots of Talking and not Much Improvement in the North, July 3, 2012, pp. 330-32; HRW, Sri Lanka: The Meaning of Victory, June 19, 2012, p. 333; AI Annual Report – 2012, pp.

Tamils from the north faced harassment and discrimination, but had concluded it did not rise to the level of persecution.[102] Contrary to the general evidence before her which she noted in her own reasons,[103] the H&C officer was looking for evidence that the Applicant had actually done something to bring him to the attention of the Sri Lankan government, through actual support for the LTTE.[104] The point was missed entirely – the suspicion of an LTTE link is rooted in the profile: young male northern Tamils are suspected as a class of supporting the LTTE. Discrimination arises based on adherence to the group profile.

48. By analogy, the reasoning of the Federal Court of Appeal in the refugee context is helpful in clarifying why it is not necessary to establish that a risk of hardship need not be personalized. The Court of Appeal recognized that "there is no need to show either that the persecution was personal or that there had been persecution in the past." The Court noted:

> It can be said in light of earlier decisions by this Court on claims to Convention refugee status that
>
> (1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;
>
> (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
>
> (3) a situation of civil war in a given country is not an obstacle to a claim "provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or if necessary by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; …[105]

And it went on to cite from Prof. Hathaway's the *Refugee in International Law*:

> In view of the probative value of the experiences of persons similarly situated to a refugee claimant, it is ironic that Canadian courts historically have shown a marked reluctance to recognize the claims of persons whose apprehension of risk is borne out in the suffering of large numbers of

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340-43; The Sri Lanka Guardian, Human Rights Situation in Sri Lanka, Mar. 12, 2011, pp. 346-54; HRW, UK: Halt Deportations of Tamils to Sri Lanka, Feb. 24, 2012, p. 361; HRW, World Report, 2012, p. 375; UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, July 5, 2010, pp. 500; US DOS, 2010, Country Reports on Human Rights Practices, Sri Lanka, pp. 490-91, 496; IRB RIR, Sri Lanka: Treatment of Tamils in Colombo by Members of the Sri Lankan Security Forces and Police, Feb.9, 2012, pp. 364-70; IRB RIR, Sri Lanka: Whether there has been Increased Surveillance, Arrests and Detentions of Tamil Citizens since February, 2011, pp. 504-10.

[102] Appeal Record, Vol. I, PRRA Reasons, pp. 276-77.

[103] Appeal Record, Vol. I, H&C Reasons, pp. 328-31.

[104] Appeal Record, Vol. I, H&C Reasons, pp. 325, 328.

[105] *Salibian v. MEI*, [1990] 3 F.C. 250, at para. 17, BOA Vol. III, Tab 70; *Orelien v.MEI*, [1991] F.C.J. No. 1158, BOA Vol. III, Tab 52; *Surajnarain v. MCI*, 2008 FC 1165 [*Surajnarain*] at paras. 11-12, BOA Vol. III, Tab 77; *Nabizadeh v. MCI*, [2012] F.C.J. No. 406; 2012 FC 365 [*Nabizadeh*], at para. 50, BOA Vol. III, Tab 51.

> their fellow citizens. Rather than looking to the fate of other members of the claimant's racial, social, or other group as the best indicator of possible harm, decision makers have routinely disfranchised refugees whose concerns are based on generalized group-defined oppression. …..
>
> In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country or origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.[106]

49. While in the case at bar the issue is discrimination and not persecution, the treatment is group based.[107] The Immigration Manual at IP 5.11 states that an officer must assess hardship by considering a number of factors, including discrimination and harassment.[108] And, in answering the certified question, the Court of Appeal acknowledged that the underlying factors for the claim to persecution can be relevant.[109] Profiling is just as relevant to a claim to hardship as it is to a claim to a fear of persecution.

50. In 1977, Parliament granted a broad humanitarian and compassionate discretion to the Governor in Council, later transferring it to the Minister of Immigration. There is no justification for giving it a different meaning and thereby narrowing its scope. It is not appropriate to limit it to cases of personalized hardship and exceptionality. Nor is it appropriate to interpret it as permitting an officer to discount or minimize establishment, especially that of a child, because it is what was expected and happened while the person was in the protection assessment process. Such interpretations restrict the scope of the discretion and ignore the lengthy history of judicial precedent in Canada, which has consistently acknowledged that the discretion is broad in recognition of the profound and very human impact that immigration laws have on individuals, resulting in family separation, exposure of some to harm, and *de facto* exile where the person's roots here are deep.

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[106] *Salibian*, *supra* note 105, at paras. 17-20, BOA Vol. III, Tab 70. The floodgates argument was also rejected in *Toth v. MEI*, [1988] F.C.J. No. 587 (CA), BOA Vol. IV, Tab 82.
[107] *Law Society of B.C. v. Andrews*, [1989] S.C.J. No. 6, at paras. 1, 10, 35-39, 61-63, BOA, VOL II, Tab 42. At para. 10 the Court noted that s. 15 is designed to protect groups who suffer social, political and legal disadvantage in our society.
[108] IP 5, Part 5, *supra* note 32, BOA Vol. IV, Tab 100.
[109] *Kanthasamy* (FCA), *supra* note 18, at para 101,Appeal Record, Vol. I, p. 76.

C. DECISION IS NOT REASONABLE

51. If the Court is not satisfied that a correctness standard of review applies, the Appellant submits that the factors that he has identified are relevant to the application of a reasonableness standard of review. The definitional parameters established by the Court of Appeal are not reasonable ones, in light of the principles of statutory interpretation outlined above, such that the decision is not reasonable.[110]

52. This Court has held that while the reasonableness standard is a deferential one, it does not call for blind submission to the decision maker's assessment. [111] Rather tribunals are recognized as having "a margin of appreciation within the range of acceptable and rational solutions". As this Court indicated in *Dunsmuir:*

> 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.[112]

53. In addition to the submissions above, this appeal raises two other issues in respect of the reasonableness of the decision: whether perverse findings are unreasonable and whether numerous indications of insensitivity and errors in reasoning cumulatively displace the deference that might be accorded to each individually by a reviewing court.[113] These include:

54. **Profile**: The Appellant was not disbelieved by the RPD or the PRRA officer. The RPD found him not at risk of persecution or torture because conditions were improving in Sri Lanka.[114] This proved wrong. The PRRA officer recognized that young northern Sri Lankan Tamils face

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[110] *Qin v. MCI*, 2013 FC 147 at para. 44.
[111] *Lake*, *supra* note 25, at para. 41, BOA Vol. II, Tab 39.
[112] *Dunsmuir*, *supra* note 25, BOA Vol. II, Tab 30; *Khosa*, *supra* note 23, at para. 59, BOA Vol. II, Tab 46.
[113] The Applicant does not challenge the validity of the legislation, but maintains that it must be interpreted in a manner which is cognizant of and protective of his human rights as entrenched in the *Charter*, see: *Baker*, *supra* note 23, BOA Vol. I, Tab 13; *Chieu*, *supra* note 23, BOA Vol. I, Tab 24; *De Guzman*, *supra* note 39, at paras. 82-89, BOA Vol. II, Tab 27; *Slaight*, *supra* at note 76, at paras. 9-14, 26-28, 82-88, BOA Vol. III, Tab 75; He has a right to liberty and security of the person and he has a right to be free from discrimination. A fair process must include a full and proper consideration of these interests.
[114] Appeal Book, Vol. I, Appellant's Affidavit, pp. 94-97, para. 4; RPD Decision and Reasons, Vol. I, pp. 105-14; He sought leave to review the decision, but it was denied. *Kanthasamy v. MCI*, May 19, 2011, FC File: IMM-1487-11.

harassment and discrimination, but found this did not rise to the level of persecution.[115] The H&C officer recognized the discrimination, that young male Tamils continue to be subject to harassment by state security officials and that the current situation differs little from the past, but then found that Mr. Kanthasamy – a young Northern male Tamil – had not established he would face this treatment.[116] He had provided evidence which indicated that Tamils from the north, younger Tamils, and Tamils being returned after losing their asylum claims were being targeted on the basis of ethnicity. Tamils face discrimination because elements of their profile give rise to a suspicion of LTTE association, even though unfounded. The officer, however, concluded that only Tamils who were actually supporting the LTTE were at risk.[117] This error led the officer to conclude that the Applicant would not personally face discrimination if returned to Sri Lanka, when it is clear from his profile that he comes within a class that faces such mistreatment.[118] The conclusion is perverse in light of the evidence before the officer.

55. **Security Measures**: The officer acknowledged some Tamils were singled out by the Sri Lankan government because of a link to the LTTE, but that in any event this was a security measure to preserve the best interests and security of the Sri Lankan nation.[119] It has been established by the Federal Court on multiple occasions that security measures that include discriminatory, arbitrary arrests are unjustifiable, especially when detention may involve torture.[120] It is patently perverse for a Canadian official to justify egregious human rights violations of another state under the guise of protection national security. The decision is tainted by the perversity of the officer's reasoning.[121]

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[115] See Appeal Record, Vol. I, PRRA Officer's Reasons, Vol. II, pp. 149-58.
[116] Appeal Book, Vol. I, Officer's Reasons, Vol. I, pp. 5-14.
[117] Appeal Book, Vol. I, Officer's Reasons, Vol. I, pp. 5-14.
[118] *Uribe v. MCI*, 2011 FC 1164 at paras. 6-11, BOA Vol. IV, Tab 84; *Aguilar Zacarias v. MCI*, 2011 FC 62, [2011] FCJ No 144, BOA Vol. I, Tab 4; *Caliskan*, *supra* note 92, para. 26, BOA Vol. I, Tab 18; *Salibian*, *supra* note 105, at para. 17, BOA Vol. III, Tab 70; *Orelien*, *supra* note 105, at para. 38, BOA Vol. III, Tab 52; *Surajnarain*, *supra* note 105, paras. 11-12, BOA Vol. III, Tab 77; *Nabizadeh*, *supra* note 105, at para. 50, BOA Vol. III, Tab 51.
[119] Appeal Book, Vol. I, Officer's Reasons, pp. 5-14; On review the Court did not specifically address this issue.
[120] *Sinnasamy v. MCI*, 2008 FC 67 at para. 26, BOA Vol. III, Tab 74. See also *Murugamoorthy v. MCI* 2003 FC 1114 at paras. 3-7, BOA Vol. II, Tab 50; *Ranjha v. MCI*, 2003 FCT 637; [2003] F.C.J. No. 901 at para. 24, BOA Vol. III, Tab 64; *Thirunavukkarasu v. MCI*, [1994] 1 F.C. 589 at para. 22, BOA Vol. IV, Tab 81; *Kaillyapillai v. MCI*, [1997] F.C.J. No. 232, at para. 7, BOA Vol. II, Tab 37; *Rajaratnam v. MCI*, [1994] F.C.J. No. 1019, at paras. 21-31, BOA Vol. III, Tab 61; *Rajathurai v. MCI*, [1995] F.C.J. No. 1023, at para. 11, BOA Vol. III, Tab 62; *Alfred v. MCI*, [1994] F.C.J. No. 463, at paras. 4-8, BOA Vol. I, Tab 6.
[121] *Jonas v. MCI*, [2006] F.C.J. No. 501; 2006 FC 398, at para. 8, BOA Vol. II, Tab 36; *Budhu v. MCI*, [1998] F.C.J. No. 375, at para. 27, BOA Vol. I, Tab 16; *Yusuf v. MEI*, [1991] F.C.J. No. 1049; [1992] 1 F.C. 629, paras. 21-23, BOA Vol. IV, Tab 90.

56. **Psychologist's Report:** The officer found Mr. Kanthasamy provided insufficient evidence that he was seeking treatment, could not obtain treatment in Sri Lanka, or that having to do so would be a hardship.[122] The officer misunderstood the report: the psychologist concluded that removal from Canada would cause the Appellant's condition, which he has coped with to present, to deteriorate. The officer was required to consider this, not whether he could seek treatment once it had deteriorated. The purpose of the H&C consideration is to avoid harm, not cause it and then consider whether it can be treated. As the Federal Court has established, "the medical report must be considered for what it did say" rather than for what it doesn't.[123] Further, in the absence of an adverse credibility finding,[124] it was not open to the officer to surmise that the Applicant's PTSD resulted from something other than the war and his mistreatment experienced as a child in Sri Lanka. [125] The Guidelines for the Immigration and Refugee Board state that weight should be accorded to expert evidence based on the expertise and qualifications of the witness providing a report. While the decision-maker is not obligated to accept or give full weight to the expert, he or she must "take particular care in explaining why it rejects the evidence of that expert, especially if the evidence supports a party's position."[126] The psychological assessment was conducted by a qualified psychologist with experience dealing with PTSD and Sri Lankan patients specifically, who worked for a reputable organization.[127] The officer gave insufficient justification for discounting this evidence which corroborated the hardship the Appellant would suffer if returned. The officer's conclusions are perverse.

57. **Reasons:** The officer's reasons lack clarity. While she stated that she had assessed "the evidence provided in conjunction with the objective documentary evidence" to conclude that

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[122] Appeal Book, Vol. I, Officer's Reasons, pp. 5-14.
[123] *Bagri v. MCI*, [1999] F.C.J. No. 784 at para. 11, BOA Vol. I, Tab 12; *P.U.A. v. MCI,* 2011 FC 1146, at para. 32, BOA Vol. III, Tab 53.
[124] *Alimard v. MCI*, [2000] FCJ No. 1223, at paras. 15-17; *Cornea v. MCI*, [2003] FCJ No. 1225.
[125] *Arslan v. MCI*, [2013] F.C.J. No. 246, at paras. 6, 87-88, BOA Vol. I, Tab 7; *AB v. MC),* [2014] F.C.J. No. 1043; 2014 FC 899, at paras. 36-39, BOA Vol. I, Tab 1; *Hilo v. MCI*, [1991] F.C.J. No. 228, at paras. 5-6.
[126] Immigration and Refugee Board, Legal References, Weighing Evidence – Section 6 (31 Dec. 2003), online: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/EvidPreu06.aspx#67
[127] The psychologist, as with an examining doctor in respect of medical reports, cannot verify the person's past history of mistreatment as the medical professional was not present. In accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment "The Istanbul Protocol", ISSN 1020-1688, UN High Commissioner for Human Rights, Aug.9,1999 ANNEX I, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at p. 57, BOA Vol. IV, Tab 94 the medical expert should be providing an interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment.

insufficient evidence had been presented, [128] she does not explain what is the "objective" evidence she considered and why the Appellant's evidence was not "objective."[129] He had also provided documentary evidence.[130] While this would not stand on its own, it is a relevant consideration in determining if the decision is justified, transparent and intelligible.[131]

58. **Best Interest of the Child**: The officer baldly asserted that it is in the Appellant's best interest to return to Sri Lanka to be with his family.[132] In reaching this conclusion she considered that he grew up there, could continue his studies there, and his family is there to help him reintegrate. It cannot be said that the officer was "alert, alive and sensitive" to the best interests of the child (BIOC) when she ignored the Appellant's character as a member of a vulnerable minority experiencing decades of persecution and discrimination in his country of citizenship. A BIOC analysis requires that an officer consider relevant factors. Family is without a doubt significant, but so is a child's safety and ability to live in peace without facing harassment and discrimination based on ethnicity. The officer simply failed to consider the problems which the Appellant, as a young artistic male Tamil from the north of Sri Lanka, faces in that country.[133] Further, the officer's failure to be sensitive to the fact that he came as a teenager to Canada and was still a child through the years his application was in process is apparent in her conclusion about his establishment, finding that it is what is to be expected. This is an inappropriate analysis for a child.[134]

Part IV – COSTS

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[128] Appeal Book, Vol. I, Officer's Reasons, pp. 5-14.
[129] *Cepeda-Gutierrez v. MCI*, [1998] F.C.J. No. 1425, at paras. 16-17, BOA Vol. I, Tab 23; *Babai v. MCI*, [2004] F.C.J. No. 1614, at paras. 35-37, BOA Vol. I, Tab 11.
[130] Appeal Book, Vol. II, Country Documentation, Appellant's Affidavit, Aug. 2011, pp. 146-48; Appellant's Submissions, 2011, summarizes extensive documentary evidence in relation to Tamils, pp. 115-45; IRIN, Sri Lanka; Lots of Talking and not Much Improvement in the North, July 3, 2012, pp. 211-12; HRW, Sri Lanka: The Meaning of Victory, June 19, 2012, pp. 213-15; AI Annual Report – 2012, pp. 221-23; The Sri Lanka Guardian, Human Rights Situation in Sri Lanka, Mar. 12, 2011, p. 226-231; HRW, UK: Halt Deportations of Tamils to Sri Lanka, Feb. 24, 2012, p. 236-37; HRW, World Report, 2012, pp. 247-50; UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, July 5, 2010, pp. 395-410; US DOS, 2010, Country Reports on Human Rights Practices, Sri Lanka, pp. 355-94; IRB RIR, Sri Lanka: Whether there has been Increased Surveillance, Arrests and Detentions of Tamil Citizens since February, 2011, p. 411.
[131] *Dunsmuir*, *supra* note 25, BOA Vol. II, Tab 30; *Khosa*, *supra* note 23, at para. 59, BOA Vol. II, Tab 46.
[132] Appeal Book, Vol. I, Officer's Reasons, pp. 5-14.
[133] *Baker*, *supra* note 23.
[134] In *USA v. Burns* (2001) SCJ No. 8 at para. 68, the Supreme Court specifically saw youth as a relevant factor in the assessment of what conduct would "shock the conscience" in relation to the imposition of the death penalty. BOA Vol. IV, Tab 85.

59. The Applicant seeks his costs in respect of this Appeal and in respect of the proceedings before the lower courts.

Part V – ORDER SOUGHT

60. The Applicant requests that the appeal be allowed and his application for humanitarian and compassionate relief be remitted for reconsideration in accordance with law.

ALL OF WHICH is submitted this 16th day of February, 2015.

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Barbara Jackman

Jackman, Nazami & Associates
Solicitors for the Appellant

Part VI - TABLE OF AUTHORITIES

Domestic Jurisprudence	Cited at (para.)	Cited at (FN)
AB v. MCI, 2014 FC 899; [2014] F.C.J. No. 1043 at paras. 36-39	Factum para. 56	125
Aboubacar v. MCI, 2014 FC 714 at paras 11-12, 19	Factum para. 40, 43, 45	91, 96, 99
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Part VII – STATUTORY PROVISIONS

Humanitarian and compassionate considerations — request of foreign national
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Restriction — designated foreign national
(1.01) A designated foreign national may not make a request under subsection (1)
(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;
(b) if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
(c) in any other case, until five years after the day on which they become a designated foreign national.

Suspension of request
(1.02) The processing of a request under subsection (1) of a foreign national who, after the request is made, becomes a designated foreign national is suspended
(a) if the foreign national has made a claim for refugee protection but has not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;
(b) if the foreign national has made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
(c) in any other case, until five years after the day on which they become a designated foreign national.

Refusal to consider request
(1.03) The Minister may refuse to consider a request under subsection (1) if
(a) the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and
(b) less than 12 months have passed since the end of the applicable period referred to in subsection (1.01) or (1.02).

Payment of fees
(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.

Exceptions
(1.2) The Minister may not examine the request if
(a) the foreign national has already made such a request and the request is pending;
(a.1) the request is for an exemption from any of the criteria or obligations of Division 0.1;
(b) the foreign national has made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division; or
(c) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.

Exception to paragraph (1.2)(c)
(1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national
(a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or
(b) whose removal would have an adverse effect on the best interests of a child directly affected.

Non-application of certain factors
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

Provincial criteria
(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.
2001, c. 27, s. 25; 2008, c. 28, s. 117; 2010, c. 8, s. 4; 2012, c. 17, s. 13; 2013, c. 16, ss. 9, 36, c. 40, s. 291.

Humanitarian and compassionate considerations — Minister's own initiative
25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Exemption
(2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).

Provincial criteria
(3) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.
2010, c. 8, s. 5; 2013, c. 16, s. 10.

Public policy considerations
25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.

Exemption
(2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).

Provincial criteria

(3) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

Conditions
(4) The conditions referred to in subsection (1) may include a requirement for the foreign national to obtain an undertaking or to obtain a determination of their eligibility from a third party that meets any criteria specified by the Minister.
2010, c. 8, s. 5; 2012, c. 17, s. 14.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de resident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de Territoire au titre des articles 34, 35 ou 37 — qui demande un visa de resident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considerations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Réserve —étranger désigné
(1.01) L'étranger désigné ne peut demander l'étude de son cas en vertu du paragraphe (1) que si cinq années se sont écoulées depuis l'un ou l'autre des jours suivants :
a) s'il a fait une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en dernier ressort sur la demande d'asile;
b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;
c) dans les autres cas, le jour où il deviant un étranger désigné.

Suspension de la demande
(1.02) La procédure d'examen de la demande visée au paragraphe (1) présentée par l'étranger qui devient, à la suite de cette demande, un étranger désigné est suspendue jusqu'à ce que cinq années se soient écoulées depuis l'un ou l'autre des jours suivants :
a) si l'étranger désigné a fait une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en dernier resort sur la demande d'asile;
b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;
c) dans les autres cas, le jour où il deviant un étranger désigné.

Refus d'examiner la demande
(1.03) Le ministre peut refuser d'examiner la demande visée au paragraphe (1) présentée par l'étranger désigné si :
a) d'une part, celui-ci a omis de se conformer, sans excuse valable, à toute condition qui lui a été imposée en vertu du paragraphe 58(4) ou de l'article 58.1 ou à toute obligation qui lui a été imposée en vertu de l'article 98.1;
b) d'autre part, moins d'une année s'est écoulée depuis la fin de la période applicable visée aux paragraphes (1.01) ou (1.02).

Paiement des frais
(1.1) Le ministre n'est saisi de la demande faite au titre du paragraphe (1) que si les frais afférents ont été payés au préalable.

Exceptions

(1.2) Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants :
a) l'étranger a déjà présenté une telle demande et celle-ci est toujours pendante;
a.1) celle-ci vise à faire lever tout ou partie des critères et obligations visés par la section 0.1;
b) il a présenté une demande d'asile qui est pendante devant la Section de la protection des réfugiés ou de la Section d'appel des réfugiés;
c) sous réserve du paragraphe (1.21), moins de douze mois se sont écoulés depuis le dernier rejet de la demande d'asile, le dernier prononcé de son retrait après que des éléments de preuve testimoniale de fond aient été entendus ou le dernier prononcé de son désistement par la Section de la protection des réfugiés ou la Section d'appel des Réfugiés.

Exception à l'alinéa (1.2)c)
(1.21) L'alinéa (1.2)*c*) ne s'applique pas à l'étranger si l'une ou l'autre des conditions suivantes est remplie :
a) pour chaque pays dont l'étranger a la nationalité — ou, s'il n'a pas de nationalité, pour le pays dans lequel il avait sa residence habituelle —, il y serait, en cas de renvoi, ex-posé à des menaces à sa vie résultant de l'incapacité
du pays en cause de fournir des soins médicaux ou de santé adéquats;
b) le renvoi de l'étranger porterait atteinte à l'intérêt supérieur d'un enfant directement touché.

Non-application de certains facteurs
(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

Critères provinciaux
(2) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.
2001, ch. 27, art. 25; 2008, ch. 28, art. 117; 2010, ch. 8, art. 4; 2012, ch. 17, art. 13; 2013, ch. 16, art. 9 et 36, ch. 40, art. 291.

Séjour pour motif d'ordre humanitaire à l'initiative du ministre
25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considerations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de
l'enfant directement touché.

Dispense
(2) Il peut dispenser l'étranger du paiement des frais afférents à l'étude de son cas au titre du paragraphe (1).

Critères provinciaux
(3) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.
2010, ch. 8, art. 5; 2013, ch. 16, art. 10.

Séjour dans l'intérêt public
25.2 (1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et

obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

Dispense
(2) Il peut dispenser l'étranger du paiement des frais afférents à l'étude de son cas au titre du paragraphe (1).

Critères provinciaux
3) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

(4) Les conditions mentionnées au paragraphe (1) peuvent notamment inclure l'obligation pour l'étranger en cause d'obtenir d'une tierce partie une détermination de recevabilité qui répond aux critères précisés par le minister ou d'obtenir un engagement.
2010, ch. 8, art. 5; 2012, ch. 17, art. 14.

Residency obligation
28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

Application
(2) The following provisions govern the residency obligation under subsection (1):
(*a*) a permanent resident complies with the residency obligation with respect to a five year period if, on each of a total of at least 730 days in that five-year period, they are
(i) physically present in Canada,
(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a
child, their parent,
(iii) outside Canada employed on a fulltime basis by a Canadian business or in the federal public administration or the public service of a province,
(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or
(v) referred to in regulations providing for other means of compliance;
(*b*) it is sufficient for a permanent resident to demonstrate at examination
(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in re- spect of the five-year period immediately after they became a permanent resident;
(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and
(*c*) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention
of permanent resident status overcomes any breach of the residency obligation prior to the determination.
2001, c. 27, s. 28; 2003, c. 22, s. 172(E).

Obligation de résidence
28. (1) L'obligation de résidence est applicable à chaque période quinquennale.

Application
(2) Les dispositions suivantes régissent l'obligation de résidence :

a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) il est effectivement présent au Canada,
(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publiquefédérale ou provinciale,
(v) il se conforme au mode d'exécution prévu par règlement;
b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est resident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;
c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au resident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.
2001, ch. 27, art. 28; 2003, ch. 22, art. 172(A).

Appeal allowed
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
(*a*) the decision appealed is wrong in law or fact or mixed law and fact;
(*b*) a principle of natural justice has not been observed; or
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Effect
(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

Fondement de l'appel
67. (1) Il est fait droit à l'appel sur prevue qu'au moment où il en est disposé :
a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
b) il y a eu manquement à un principe de justice naturelle;
c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Effet
(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.