SCC File No.35990

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

JEYAKANNAN KANTHASAMY

Appellant
(Appellant in the Federal Court of Appeal)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Respondent in the Federal Court of Appeal)

RESPONDENT'S FACTUM ON APPEAL

(Pursuant to r.42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Applicant

Barbara Jackman
Jackman, Nazami and Associates
Barristers and Solicitors
3-596 St. Clair Avenue West
Toronto, Ontario M6C 1A6

Tel. No.: (416) 653-9964 x225
Fax No.: (416) 653-1036
Email: barb@bjackman.com

Agent for the Applicant

Michael Bossin
Barrister and Solicitor
Ottawa Community Legal Services
422-1 Nicholas Street
Ottawa, Ontario K1N 7B7

Tel. No.: (613) 241-7008
Fax No.: (613) 241-8680
Email: bossinm@lao.ca

Counsel for the Respondent

Marianne Zoric / Kathryn Hucal
Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Tel. No.: (416)954-8046 /952-0625
Fax No.: (416) 954-8982
Email: marianne.zoric@justice.gc.ca
Email: kathryn.hucal@justice.gc.ca

Agent for the Respondent

William F. Pentney, Q.C.
Department of Justice
Litigation Branch
50 O'Connor Street, Suite 500
Ottawa, Ontario K1A 0H8

Per: **Christopher Rupar**

Tel. No.: (613) 670-6290
Fax No.: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Counsel for Intervener
Canadian Council for Refugees

David Matas / Richard Goldman / Jamie Liew and Jennifer Stone
Neighbourhood Legal Services
333 Queen St. East
Toronto, ON M5A 1S9

Tel. No.: (416) 861-0677 ext 708
Fax No.: (416) 861-1777
Email: dmatas@mts.net
Email: carmtl@gmail.com
Email: Jamie.liew@uottawa.ca
Email: stonej@lao.on.ca

Agent for Intervener
Canadian Council for Refugees

Perley-Robertson, Hill & McDougall LLP/s.r.l.
1500-340 Albert Street
Ottawa, ON K1R 0A5

Per: Jacqueline Bonisteel

Tel. No.: (613) 566-2845
Fax No.: (613) 238-8775
Email: jbonisteel@perlaw.ca

Counsel for Intervener
Justice for Children and Youth

Emily Chan and Samira Ahmed
Justice for Children and Youth
1203-415 Yonge Street
Toronto, ON M5B 2E7

Tel. No.: (416) 920-1633 ext. 223
Fax No.: (416) 920-5855
Email: chane@lao.on.ca

Agent for Intervener
Justice for Children and Youth

Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Per: Marie-France Major

Tel. No.: (613) 695-8855 ext. 102
Fax No.: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for Intervener
Barbra Schlifer Commemorative Clinic and The Canadian Centre for Victims of Torture

Alyssa Manning and Aviva Basman
Refugee Law Office
20 Dundas Street West, Suite 202
Toronto, ON M5G 2H1

Tel. No.: (416) 977-8111
Fax No.: (416) 977-5567
Email: manninga@lao.on.ca
Email: basmana@lao.on.ca

Rathika Vasavithasan
Barbra Schlifer Commemorative Clinic
489 College St., Suite 503
Toronto, ON M6G 1A5

Tel. No.: (416) 323-9149
Fax No.: (416) 323-9107
Email: r.vasavithasan@schliferclinic.com

Agent for Intervener
Barbra Schlifer Commemorative Clinic and The Canadian Centre for Victims of Torture

Laila Demirdache
Barrister & Solicitor
Ottawa Community Legal Services 422-1 Nicholas Street
Ottawa ON, K1N 7B7

Tel: 613-241-7008
Fax: 613-241-8680
Email: demirdl@lao.on.ca

Counsel for Intervener
Parkdale Community Legal Services

Toni Schweitzer
Parkdale Community Legal Services
1266 Queen Street West
Toronto, ON M6K 1L3

Tel. No.: (416) 531-2411
Fax No.: (416) 531-0885
Email: schweit@lao.on.ca

Ronald Poulton
Poulton Law Office Professional Corporation
596 St. Clair Avenue West, Suite 6
Toronto, ON M6C 1A6

Tel. No.: (416) 653-9900
Fax No.: (416) 653-1036
Email: ronald.poulton@sympatico.ca

Agent for Intervener
Parkdale Community Legal Services

Jean Lash
South Ottawa Community Legal Services
1355 Bank Street, Suite 406
Ottawa, ON K1H 8K7

Tel. No.: (613) 733-0140
Fax No.: (613) 733-0401
Email: lashj@lao.on.ca

Counsel for Intervener
Canadian Association of Refugee Lawyers

Audrey Macklin
Professor and Chair in Human Rights Law
Faculty of Law, University of Toronto
84 Queen's Park
Toronto, ON M5S 2C4

Email: Audrey.macklin@utoronto.ca

Laura Brittain
Joo Eun Kim
Refugee Law Office
20 Dundas Street West, Suite 202
Toronto, ON M5G 2H1

Tel. No.: (416) 977-811
Fax No.: (416) 977-5567
Email: brittail@lao.on.ca
Email: kimi@lao.on.ca

Agent for Intervener
Canadian Association of Refugee Lawyers

Karima Karmali
Staff Lawyer – Immigration and Refugee Law
Integrated Legal Services Office
Legal Aid Ontario
73 Albert Street, Ground Floor
Ottawa, ON K1P 1E3

Tel. No.: (613) 238-7931 ext. 59
Fax No.: (613) 238-3410

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The basic presumption of the *Immigration and Refugee Protection Act* (*IRPA)*[1] is that all persons who seek permanent resident status in Canada will comply with the requirements of the *Act* and its *Regulations*[2] both in respect of eligibility for permanent residence, as well as admissibility. However, in cases where the inability of the applicant to do so would result in unusual and undeserved, or disproportionate hardship, an application to the Minister of Citizenship and Immigration (the Minister) on humanitarian and compassionate grounds ("H&C") under s. 25 of the *IRPA* may be approved.

2. Section 25 is not intended to relieve against the ordinary hardship associated with compliance with the law, nor is it intended to provide relief from compliance simply because an applicant would not otherwise qualify. To interpret s. 25 in such a manner would mean that virtually no one would be obliged to comply with the law.

3. Contrary to the Appellant's assertions, the consideration of "unusual and underserved or disproportionate hardship" under s. 25 does not improperly narrow the test for H&C. The test for H&C, whether before the Immigration Appeal Division (IAD) or before the Minister or Minister's delegate (an H&C officer), requires an applicant to demonstrate compelling circumstances in his or her case that would warrant the grant of such an exemption from the normal and expected application of the *IRPA* or *Regulations*.

4. As outlined below, the IAD and H&C Officers consider similar factors when assessing whether to grant an appeal or provide an exemption, on H&C grounds. Application of the "test" in *Chirwa* would not have changed the outcome for the Appellant. He simply did not demonstrate humanitarian and compassionate circumstances in his case that would warrant an exemption from having to comply with the usual requirements. The test the H&C Officer adopted was reasonable as was her decision to refuse the application.

---

[1] *Immigration and Refugee Protection Act*, SC 2001, c 27. Respondent's Book of Authorities [RBOA vol I, tab 6]
[2] *Immigration and Refugee Protection Regulations*, SOR/2002-227. [RBOA, vol I, tab 7]

B. SUMMARY OF THE FACTS

(a) Appellant's Immigration History

5. The Appellant is a citizen of Sri Lanka. He left Sri Lanka using his own passport and arrived in Canada in April 2010, using a fraudulent passport.[3] Since then he has sought permission to remain in Canada through a variety of immigration applications, all of which have been refused. These include a refugee claim, a pre-removal risk assessment (PRRA), and the application for humanitarian and compassionate consideration (H&C application) that is the subject matter of the present appeal. The Appellant was also granted a stay of removal by the Federal Court pending the litigation of his H&C application.[4] His various applications are briefly described below.

(i) Refugee claim

6. A month after arriving in Canada in 2010, the Appellant filed a claim for refugee protection. It was denied by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (the Board) in February 2011.[5]

7. The Board determined that as a young Tamil male from the north of Sri Lanka with no connections to the Liberation Tigers of Tamil Eelam (LTTE), the Appellant did not have a well-founded fear of persecution and was not a Convention refugee under s. 96 of the *IRPA*, nor was he in need of protection pursuant to s. 97(1) of the *IRPA*. His profile is not one that would particularly attract any undue attention or reprisal from militant organizations or security forces if he were to return to his family in Sri Lanka.[6]

8. The Board considered and assessed the documentary evidence related to changed country conditions in Sri Lanka since the defeat of the LTTE. This evidence included a report from the United Nations High Commissioner for Refugees which, as the Board noted, stated that in light of the cessation of hostilities, Sri Lankans from the north are no longer in need of international

[3] H&C Decision, Appellant's Record [AR] Vol I, p 10
[4] *Kanthasamy v Canada (MCI)*, IMM-7326-12, August 2, 2012
[5] H&C Decision, AR Vol I, p 10
[6] Refugee Claim Decision, AR Vol I, p 111

protection under broader refugee criteria or protection solely on the basis of indiscriminate harm. There is no longer a presumption of eligibility for Tamils from the north.[7] In the Appellant's case, although he had previously been questioned by the army and police about the LTTE, he was released without conditions. That would not have happened if he had been suspected of being an LTTE cadre or a supporter of its regrouping.[8]

9. The Board noted that while checkpoints are still systematic and people occasionally stopped, they are rarely taken into custody.[9] Although Sri Lanka is not without continued problems, the preponderance of the evidence lead the Board to conclude that the Appellant's fear of persecution is not well-founded.[10] Further, although the Board accepted that crime and extortion occur in Sri Lanka, the Appellant did not show that he faced a specific risk in this regard that is not faced generally by others.[11] Thus, he is also not a person in need of protection. The Appellant's application for leave for judicial review of this decision was dismissed on May 19, 2011.[12]

(ii) Application for Pre-Removal Risk Assessment (PRRA)

10. In August 2011, the Appellant submitted a PRRA application which was refused in January 2012.[13] The Officer considering the PRRA application concluded that the Appellant's evidence was a restatement of the fears and risks previously considered and rejected by the Board. The new evidence the Appellant submitted consisted of his affidavit and some additional country condition documentation. It was found to be vague, lacking in detail on material points, and a continuation of evidence already considered by the Board. In particular, in relation to evidence that a specific group was looking for him, the information about these visits, their purpose and timing was vague and was unsupported by a statement from the Appellant's mother, who had originally provided him with the information.[14]

---

[7] Refugee Claim Decision, AR Vol I, p 112
[8] Refugee Claim Decision, AR Vol I, pp 110-111
[9] Refugee Claim Decision, AR Vol I, p 113
[10] Refugee Claim Decision, AR Vol I, p 113
[11] Refugee Claim Decision, AR Vol I, pp 105-114; *IRPA*, s 97(1)(b)(ii) [RBOA vol I, tab 6]
[12] Appellant's Affidavit, AR Vol I, p 95, para 4
[13] PRRA Decision, AR Vol I, pp 149-158
[14] PRRA Decision, AR Vol I, pp 152, 154-155

11. The Officer concluded that the Board's findings regarding the Appellant's personal situation in Sri Lanka were not changed by the new evidence. Although harassment of young Tamil males from the north continued, it did not amount to persecution. Furthermore, the new evidence did not demonstrate that the country conditions had deteriorated since the Board's decision, or that the Appellant's personal circumstances had changed such that a finding of risk was warranted.[15] The application for leave to judicially review this decision was dismissed on April 23, 2012.[16]

(iii) Request for exercise of discretion on H&C grounds

12. On July 29, 2011 (one day before his 18th birthday), the Appellant applied for an exemption on humanitarian and compassionate grounds pursuant to s. 25(1) of the *IRPA*, to permit him to apply for permanent resident status from within Canada.[17] He based his application on the same risks he had presented before the Board and in his PRRA application, as well as on his establishment in Canada and his best interests as a child.[18]

13. The Appellant submitted the following evidence in support of his H&C application:

- His own affidavit evidence that he:
  - (i) is a student and not working,
  - (ii) is supported by his uncle, although he had been receiving Ontario Works payments which were cancelled as of June 7, 2011,[19] and
  - (iii) would face "undue hardship" in Sri Lanka as a young Tamil male.[20]
- An affidavit from his uncle stating that the Appellant lives with him and his family, and is very close to the family.[21]
- A letter from the Appellant's mother indicating he is residing with his uncle.[22]
- Copies of school documents such as his grade 11 report cards and a certificate of completion of an orientation program.[23]

---

[15] PRRA Decision, AR Vol I, pp 155-157
[16] Appellant's Affidavit, AR Vol I, p 95, para 5
[17] Application and submissions in support of H&C Application, pp 162-177
[18] H&C Decision, AR Vol I, p 10;
[19] H&C Decision, AR Vol I, p 209
[20] Appellant's Affidavit, AR Vol I, pp 178-179
[21] Uncle's Affidavit, AR Vol I, p 180
[22] Mother's Letter, AR Vol I, p 181
[23] Appellant's Documents, AR Vol I, pp 181-192

- A letter from a temple indicating that since November 2010 he had been volunteering there three days a week.[24]
- His negative refugee decision and excerpts of some country condition documents.[25]

14. The same Immigration Officer who considered the Appellant's PRRA application also considered his H&C application. The H&C application was also refused in January 2012.[26] The Appellant sought leave to judicially review the refusal of the H&C application, but withdrew his application as it was agreed by the Minister that a reconsideration of his application was required – the Officer had misapplied s. 25(1.3) of the *IRPA* and failed to consider the allegations of risk due to adverse country conditions through the lens of hardship.[27]

15. The Appellant was given an opportunity to provide further submissions in support of his H&C application.[28] He provided the following evidence:

- A letter of support from a friend setting out how important the Appellant's friendship is to him.[29]
- A letter dated March 28, 2011 from the Appellant's uncle, indicating that the Appellant had begun working at his uncle's hair salon in December 2010.[30]
- A T4 statement for 2011, indicating the Appellant had earned $451 working at his uncle's salon.[31]
- A psychological assessment dated March 10, 2012, based on an interview with the Appellant as well as forms the Appellant had completed.[32]
- Photographs and some country conditions documents.[33]

16. This H&C application was considered by a new officer. It was refused on April 25, 2012.[34] When the Appellant sought leave to judicially review the refusal, it became evident that the Senior Immigration Officer who decided his H&C application (the H&C Officer) had not

[24] Letter, AR Vol I, p 193
[25] H&C Submissions, AR Vol I, pp 164-165
[26] H&C Decision, AR Vol I, pp 207-210
[27] Appellant's Affidavit, AR Vol I, p 95, para 6; H&C Decision, AR Vol I, p 209
[28] H&C Submissions, AR Vol I, pp 194-195
[29] Letter, AR Vol I, p 196
[30] Letter, AR Vol I, p 197
[31] T4 Statement, AR Vol I, p 198
[32] Psychological Assessment, AR Vol I, pp 199-205
[33] H&C Submissions, Letter referencing attached materials, AR Vol I, p 195; Country condition documents, AR Vol II, pp 232-234; 236-269; 272-416
[34] H&C Decision, AR Vol I, pp 8-15

seen his further submission, as it was received in her office after the refusal.[35] Therefore, the application was reopened to allow the H&C Officer to consider the new submissions. The H&C Officer's updated decision was rendered on July 11, 2012 as an Addendum to her original refusal.[36] The decision, which includes both the April 2012 refusal and subsequent Addendum, are the subject of this appeal.

(iv) H&C Decision

17. In arriving at her decision on the H&C application, and pursuant to s. 25(1.3), the H&C Officer did not consider risks to the Appellant under ss. 96 and 97 of the *IRPA*. That is, she did not engage in another assessment of whether he was at risk of persecution pursuant to s. 96 or risk as defined in s. 97 of the *IRPA*. Rather, she considered these circumstances from the perspective of whether they amounted to hardship. The Officer found that the Appellant did not establish that he would be personally discriminated against because of his ethnicity.[37] The Officer also noted that there was insufficient evidence that the Appellant would be targeted by security forces or was a person of interest to authorities or any other group. His family lives in Sri Lanka and there is no evidence that they are being targeted for mistreatment.[38]

18. The H&C Officer also analyzed the circumstances of the Appellant as a young man who is living with his extended family in Canada. She acknowledged that he had made friends in Canada and is close to his uncle's family, but found that it would be in his best interests to have the care and support of his parents and siblings.[39] The Officer also found that:

- The Appellant's immediate family, including his father, mother and sisters, continue to reside in Sri Lanka;
- No evidence was adduced to demonstrate that the Appellant's immediate family in Sri Lanka was being targeted for mistreatment;
- No evidence was adduced that his immediate family would be unable or unwilling to support or assist him in Sri Lanka;

[35] H&C Decision, AR Vol I, p 4
[36] H&C Decision, AR Vol I, pp 3-7
[37] H&C Decision, AR Vol I, pp 4-5, 10-11, 14
[38] H&C Decision, AR Vol I, pp 5, 11
[39] H&C Decision, AR Vol I, pp 6, 14

- The Appellant had resided in Sri Lanka for most of his life, and had attended school there;
- The Appellant attends high school in Canada, volunteers at a temple, and works at his uncle's salon;
- The Appellant lives with his uncle's family and is close to them;
- The Appellant has been in Canada for two years.

19. The Officer assessed the Appellant's establishment and found that attending school, working part time and having friends in Canada, while being under a removal order, was a level of establishment to be expected. It did not warrant a positive determination of the application.[40]

20. The H&C Officer considered the Appellant's psychological assessment which was addressed to "the associated emotional *sequelae*" of his deportation order.[41] This report contained detail about the Appellant's experiences in Sri Lanka, as told by the Appellant to the psychologist but this was not otherwise supported by evidence in his application. The H&C Officer accepted the diagnosis in the report associated with the effects of the Appellant's impending removal but found that he had failed to provide evidence that he had been or was in treatment regarding his issues, or that he would be unable to obtain treatment in Sri Lanka if required and he had not established unusual and undeserved, or disproportionate hardship.[42]

21. Further, the H&C Officer noted that the psychological report was not evidence of country conditions in Sri Lanka. The details provided by the Appellant to the psychologist in the report were nowhere else mentioned in the H&C submissions. Also, Dr. Kanagaratnam, the psychologist, had no direct evidence of the underlying facts the Appellant had reported to her during her interview with him. While her diagnosis that the Appellant is anxious or distressed may be sound, Dr. Kanagaratnam was not in a position to confirm the details provided by the Appellant. The opinion does not provide expert evidence on country conditions.[43]

[40] H&C Decision, AR Vol I, pp 5-6, 14
[41] Psychological Assessment, AR Vol I, p 200
[42] H&C Decision, AR Vol I, pp 4-6
[43] H&C Decision, AR Vol I, pp 4-6

22. Notwithstanding the Appellant's updated submissions, the H&C Officer found she was unable to exercise discretion in his favour as he had failed to provide sufficient evidence that if returned to Sri Lanka he would personally suffer discrimination based on his ethnicity or face unusual and undeserved, or disproportionate hardship.

C. DECISION OF THE FEDERAL COURT

23. Justice Kane of the Federal Court dismissed the application for judicial review finding that the H&C Officer had considered all of the evidence. Applying the standard of review of reasonableness,[44] she determined that the H&C Officer did not fetter her discretion[45] and came to reasonable conclusions on the issues.[46] Justice Kane further found that the H&C Officer properly considered the same facts that are considered in a PRRA risk assessment, but in the context of hardship, as required by s. 25(1.3) of the *IRPA*.[47]

24. Justice Kane concluded that "the H & C process permits an exemption from applying for permanent residence from outside of Canada. It is an exceptional provision to be exercised when there is unusual or undeserved or disproportionate hardship. The Officer assessed all the factors and made the appropriate distinction between an assessment of risk, which was conducted for the PRRA and an assessment of hardship which is required for H & C determinations."[48]

25. Justice Kane certified the following question of general importance:

> What is the nature of risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of *IRPA*, as amended by the *Balanced Refugee Reform Act*?[49]

[44] Federal Court Decision, 2013 FC 802, paras 8-11 (FC Decision)
[45] FC Decision, 2013 FC 802, paras 42-44
[46] FC Decision, 2013 FC 802, paras 35-36, 40-44, 47-59
[47] FC Decision, 2013 FC 802, paras 24, 37
[48] FC Decision, 2013 FC 802, para 61
[49] FC Decision, 2013 FC 802, para 74

D. DECISION OF THE FEDERAL COURT OF APPEAL

(a) Standard of Review

26. Writing for the Federal Court of Appeal (FCA), Justice Stratas considered this Court's decision in *Agraira* noting that this Court no longer appeared to be assessing whether the FCA correctly answered a certified question on statutory interpretation. However, absent clarification from this Court on the apparent change in approach, the FCA would continue to follow its practice of providing a definitive answer to a certified question on a point of statutory interpretation, which is the functional equivalent of engaging in a correctness review.[50] The FCA concluded that reasonableness was the appropriate standard of review for the decision itself.[51]

(b) Test for H&C application: unusual and undeserved, or disproportionate hardship

27. The FCA concluded that, consistent with Federal Court jurisprudence, the standard for determining whether to exercise discretion on H&C grounds under ss. 25(1) is whether the Appellant would experience "unusual and undeserved, or disproportionate hardship" if he had to apply for permanent residence from Sri Lanka.[52] Further, the hardship must affect the Appellant directly and personally.[53]

28. The Court noted that to assist in deciding H&C applications, Officers are guided by a processing manual which sheds light on the meaning of "unusual and undeserved, or disproportionate hardship" and includes a list of factors for consideration which are a "reasonable enumeration of the types of matters that an Officer must consider."[54] However, the processing manual is an administrative guideline only, desirable to promote consistency in decision-making, but which does not constitute a closed list of factors for consideration. It would be impermissible fettering of discretion to treat it that way.[55]

---

[50] *Agraira v Canada (MPSEP)*, 2013 SCC 36 [*Agraira*] [RBOA, vol I, tab 9]; Federal Court of Appeal Decision, 2014 FCA113, paras 32-36 [FCA decision]
[51] FCA Decision, 2014 FCA 113, para 37
[52] FCA Decision, 2014 FCA 113, paras 40-43
[53] FCA Decision, 2014 FCA 113, paras 41, 48-49
[54] FCA Decision, 2014 FCA 113, para 50
[55] FCA Decision, 2014 FCA 113, paras 50-53

29. The FCA rejected the Appellant's argument that given the decisions in *Chirwa* and *Yhap*, the test for relief should require only that one's subjective view of the equities be aroused. The purpose of s. 25 and the scheme of the *Act* did not support this interpretation.[56]

30. With respect to the question of risk on return to the home country, the FCA concluded that the role of the H&C Officer "is to consider the facts presented through a lens of hardship and not undertake another section 96 or 97 risk assessment." The H&C Officer is to look at facts relating to hardship, not factors relating to risk.[57]

31. The Court answered the certified question on this issue as follows:

> What is the nature of risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the Balanced Refugee Reform Act?
>
> Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3). However, the facts underlying those factors may nevertheless be relevant insofar as they related to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.[58]

(c) Review of H&C decision

32. The FCA concluded that the H&C Officer's decision was reasonable, as it was defensible and acceptable on the facts before her[59] and dismissed the appeal.

---

[56] *Chirwa v Canada (MMI)*, (1970), 4 IAC 338 (IAB) [*Chirwa*], at para. 27-29 [RBOA, vol I, tab 22]; *Yhap v Canada (MEI)*, [1990] 1 FC 722, at para 36 [*Yhap*] [RBOA, vol II, tab 58]; FCA Decision, 2014 FCA 113, paras 56-60
[57] FCA Decision, 2014 FCA 113, paras 69-74
[58] FCA Decision, 2014 FCA 113, para 101
[59] FCA Decision, 2014 FCA 113, paras 79-85

PART II – POINTS IN ISSUE

33. The standard of review applicable to the H&C Officer's interpretation of s. 25 of the *IRPA* is reasonableness.

34. The H&C Officer's interpretation of the test for an application on H&C grounds was reasonable.

35. The H&C officer's decision denying the Appellant's H&C application was reasonable.

PART III – STATEMENT OF ARGUMENT

A. STANDARD OF REVIEW

36. The discretionary decision of the Minister's delegate, the H&C Officer, in determining whether to approve an application on humanitarian and compassionate grounds is subject to a reasonableness standard of review.

37. In *Dunsmuir*, this Court held that it was not necessary to undertake a fresh assessment of the standard of review in each case if it has already been determined satisfactorily in the jurisprudence.[60] In *Baker*, this Court stated that "considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language."[61] Factors favouring deference included the expertise of the Minister in immigration matters, as well as the considerable "choice" available to the Minister when determining when H&C considerations warranted an exemption.[62] Thus, the Court determined H&C decisions to be subject to the reasonableness *simpliciter* standard of review.

38. This Court's subsequent jurisprudence on standard of review reinforces this standard. Reasonableness is the presumptive standard of review where a tribunal interprets its own statute or statutes closely connected to its function and with which it has particular familiarity and where the finding is not of central importance to the legal system as a whole.[63] Reasonableness will also usually apply automatically to discretionary decisions.[64]

---

[60] *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 62 [*Dunsmuir*] [RBOA vol I, tab 24]
[61] *Baker v Canada (MCI)*, [1999] 2 SCR 817, at para 62 [*Baker*] [RBOA vol I, tab 13]
[62] *Ibid*, paras 59 and 60 [RBOA vol I, tab 13]
[63] *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, at para 13 Appellant's Book of Authorities [ABOA vol I, tab 21]; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160, at paras 26, 34, 37 [ABOA vol III, tab 76]; *Alberta (Information and Privacy Commissioner) v Alberta Teacher's Association*, 2011 SCC 61, [2011] 3 SCR 654, at paras 32, 39 [RBOA vol I, tab 10]; *Dunsmuir, supra*, at para 54 [RBOA vol I, tab 24]
[64] *Agraira, supra*, at para 50 [RBOA, vol I, tab 9], citing *Dunsmuir, supra*, at para 53 [RBOA vol I, tab 24]

39. The Federal Court applied the reasonableness standard of review noting that it is not for the Court to substitute the decision it would have made, but rather to determine if the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[65] The Court of Appeal found the decision to be reasonable on the merits, and correct with respect to the statutory interpretation issues. *A fortiori*, it may be upheld on the more deferential reasonableness standard.

40. While the *IRPA* does require a certified question for access to the Federal Court of Appeal,[66] this does not mean that the FCA must necessarily abandon the reasonableness standard of review when answering it. In *Chieu*, this Court stated that the precedential value of a case, or the requirement for a certified question in the immigration legislation were not determinative of the standard of review noting that in *Baker* a question had also been certified, but reasonableness was chosen as the standard of review.[67]

41. This Court's jurisprudence emphasizes the deference owed to administrative tribunals which are intended by Parliament to be the main interpreters of the administrative schemes that they administer.[68] This deference applies to questions of statutory interpretation as well.[69]

42. As for the approach to be followed by an appellate Court in an appeal from a decision disposing of an application for judicial review, this Court in *Agraira* stated that it is to step "into the shoes of the lower Court"[70] and apply the appropriate standard of review when assessing the decision before it. That standard is reasonableness.

B. STATUTORY INTERPRETATION – MODERN APPROACH

43. The proper approach to statutory interpretation requires that the words of the provision be read in their entire context and according to their grammatical and ordinary sense, harmoniously

---

[65] FC Decision, 2013 FC 802, paras 11, 60, 61
[66] *IRPA*, s 74(d) [RBOA vol I, tab 6]
[67] *Chieu v Canada (MCI)*, [2002] 1 SCR 84, at para 23 [*Chieu*] [RBOA vol I, tab 21]
[68] *McLean v BC Securities Commission*, [2013] 3 SCR 895, 2013 SCC 67, at paras 30, 31, 33 [*McLean*] [RBOA vol II, tab 34]
[69] *McLean, supra*, at paras 31-32 [RBOA vol II, tab 34]; *Agraira, supra*, at paras 55-58 [RBOA vol I, tab 9]
[70] *Agraira, supra,* at paras 45-46 [RBOA vol I, tab 9]

with the scheme and object of the *Act* and the intention of Parliament.[71] The factors need not be applied in a formulaic fashion, as they are closely related and interdependent, and need not be canvassed separately in every case.[72]

C. SECTION 25 HUMANITARIAN AND COMPASSIONATE APPLICATIONS

44. As a foreign national in Canada, the Appellant made an H&C application pursuant to s. 25. He failed to demonstrate that in his personal circumstances, the requirement to comply with the obligations of the *Act* to apply for permanent resident status from outside Canada and qualify in the normal manner would result in "unusual and undeserved, or disproportionate hardship."[73]

45. The grant of an H&C exemption is a discretionary and exceptional measure that permits an exemption to the usual requirements of the *IRPA*, including the requirement to apply from outside the country when seeking to immigrate to Canada, where the applicant demonstrates the existence of humanitarian and compassionate circumstances that warrant this exemption.[74]

(a) Statutory scheme

46. As the Appellant acknowledges, the *IRPA* and its *Regulations* outline a complete scheme of requirements that an applicant for permanent residence must satisfy, both with respect to entitlement to an immigrant visa as well as in respect of inadmissibility. Section 11(1) of the *IRPA* provides that all foreign nationals seeking admission to Canada must first apply to an

---

[71] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 21 [*Rizzo*] [ABOA vol III, tab 68]; *Agraira, supra*, at para 64 [RBOA vol I, tab 9]; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306, at para 27 [RBOA vol I, tab 17]; *Chieu, supra*, at para 28 [RBOA vol I, tab 21]

[72] *Chieu, supra*, at para 28 [RBOA vol I, tab 21]

[73] Citizenship and Immigration Canada, Inland Process Manual 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, available online, 2011-04-01, at 5.10-5.11 [IP5 Manual] [RBOA vol II, tab 59]. *Owusu v Canada (MCI)*, 2003 FCT 94, at para 11 [*Owusu*] [RBOA vol II, tab 40]; *Owusu v Canada (MCI)*, [2004] 2 FCR 635, 2004 FCA 38, at para 8 [*Owusu (FCA)*] [RBOA vol II, tab 41]; *Monteiro v Canada (MCI)*, 2006 FC 1322, at para 20 [*Monteiro*] [RBOA vol II, tab 39]; *Samsonov v Canada (MCI)*, 2006 FC 1158, at paras 27, 29-33 [*Samsonov*] [RBOA vol II, tab 52]; *Hamzai v Canada (MCI)*, 2006 FC 1108, at para 21 [*Hamzai*] [RBOA vol I, tab 26]; *Liniewska v Canada (MCI)*, 2006 FC 591, at para 9 [*Liniewska*] [RBOA vol I, tab 33]; *Ruiz v Canada (MCI)*, 2006 FC 465, at para 35 [*Ruiz*] [ABOA vol III, tab 69]; *Legault v Canada (MCI)*, 2002 FCA 125, at paras 23, 28 [*Legault*] [RBOA vol I, tab 31].

[74] *Pannu v Canada (MCI)* 2006 FC 1356, at paras 26, 29 [RBOA vol II, tab 43]; *Paz v Canada (MCI)*, 2009 FC 4 at para 15 [*Paz*] [RBOA vol II, tab 44]; *Legault, supra*, at para 15 [RBOA vol I, tab 31]. Leave to SCC dismissed (2002) SCCA No 220; *Baker, supra* at para 15 [RBOA vol I, tab 13]

officer for a visa or for any other document that may be required by the *Regulations*. The *Regulations* require that every person who seeks to establish permanent residence in Canada obtain a permanent resident visa prior to arrival in Canada.[75] The obligation to qualify for and obtain a permanent resident visa before arrival in Canada as an immigrant has been described as a cornerstone of the *IRPA*.[76]

47. Pursuant to s. 25(1) of the *IRPA*, the Minister of Citizenship and Immigration [the Minister] may grant a foreign national permanent resident status or an exemption from any applicable criteria or obligation of the *IRPA* if the Minister is of the opinion that it is justified by H&C considerations relating to the foreign national.

48. While the provision has since been further amended,[77] the text of s. 25(1) that applied at the time of the Appellant's application is as follows:

Humanitarian and compassionate considerations — request of foreign national 25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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.	Séjour pour motif d'ordre humanitaire à la demande de l'étranger 25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, 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 considérations d'ordre humanitaire relatives à l'étranger le justifient**, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[75] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 11(1), 20(1) [RBOA vol I, tab 6]; *See also: Immigration and Refugee Protection Regulations*, SOR/2002-227, s 6 [RBOA vol I, tab 7]
[76] *Serda v Canada (MCI)*, 2006 FC 356, at para 20 [RBOA vol II, tab 54]. See also: *Paz, supra*, at para 12 [RBOA vol II, tab 44]
[77] *IRPA*, ss 25(1) [RBOA vol I, tab 6], as amended by *Budget Implementation Act, 2008*, SC 2008, c 28, s 117 [RBOA vol I, tab 2], *Balanced Refugee Reform Act*, SC 2010, c8, ss 4 and 5 [RBOA vol I, tab 1], *Protecting Canada's Immigration System Act*, SC 2012, c 17, ss 13 and 14 [RBOA vol I, tab 8], and *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, ss 9, 10, and 36 [RBOA vol I, tab 3].

49. The original and continuing intention of the H&C provision was to provide the Minister with flexibility to approve compelling and exceptional cases not anticipated in the *IRPA*. It was never intended to be an alternative immigration stream or an appeal mechanism for failed asylum claimants.[78]

50. To warrant this special exemption, the onus is on an applicant to satisfy the Minister that in his or her personal circumstances, the requirement to comply with the obligations of the act to apply for permanent residence status from outside Canada in the normal manner would result in unusual and undeserved, or disproportionate hardship.[79] This description of the test is a longstanding one.[80] As the FCA in the case at bar stated, 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."[81]

(b) The BRRA Amendment: Section 25(1.3)

51. In 2010, the *Balanced Refugee Reform Act*[82] introduced the amendment to s. 25 of the *IRPA* which limited the factors an H&C Officer can consider when examining a request for H&C consideration from a foreign national in Canada. An Officer is not to consider the factors that are taken into consideration under ss. 96 and 97 of the *IRPA*, but must still consider elements related to hardship.[83]

---

[78] Canada, Minister of Manpower and Immigration, *A report of the Canadian immigration and population study: The Immigration Program*, Ottawa, 1974, pp 50, 75-76 [*Green Paper* - Vol 2, Ch 2 "Selection of Immigrants"] [RBOA vol II, tab 60]; Canada, Citizenship and Immigration, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* [1998 *White Paper*], at pp 22-23 and 42-43 [RBOA vol II, tab 61]; House of Commons, Standing Committee on Citizenship and Immigration, proceedings, Bill C-11 (13 March 2001), at p 9 (Joan Atkinson) [RBOA vol II, tab 62]; House of Commons, Standing Committee on Citizenship and Immigration, proceedings, Bill C-11 (27 May 2010) at p 2 (Peter MacDougall) [RBOA vol II, tab 63].

[79] IP5 Manual - Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, at 5.10 [RBOA vol II, tab 59]. *Owusu*, *supra*, at para 11 [RBOA vol II, tab 40]; *Owusu (FCA)*, *supra*, at para 8 [RBOA vol II, tab 41]; *Monteiro*, *supra*, at para 20 [RBOA vol II, tab 39]; *Samsonov*, *supra*, at paras 27, 29-33 [RBOA vol II, tab 52]; *Hamzai*, *supra*, at para 21 [RBOA vol I, tab 26]; *Liniewska*, *supra*,, at para 9 [RBOA vol I, tab 33]; *Ruiz*, *supra*, at para 35 [ABOA vol III, tab 69]; *Legault*, *supra*, at paras 23, 28 [RBOA vol I, tab 31].

[80] See eg: Employment and Immigration Canada, Immigration Manual IE 9: Persons Seeking Permanent Resident Status in Canada, 1987-1989, at 3-2 [RBOA vol II, tab 65]

[81] FCA Decision, 2014 FCA 113, para 47

[82] *Balanced Refugee Reform Act*, SC 2010, c 8 [RBOA vol I, tab 1]

[83] *IRPA*, *supra*, s 25(1.3) [RBOA vol I, tab 6]. A subsequent amendment to the *IRPA* now provides that an application for H&C cannot be considered while a refugee claim before the RPD or appeal of a refugee claim to the

Non-application of certain factors 25. (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.**	**Non-application de certains facteurs** 25. (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**.

52. The purpose of s. 25(1.3) of the *IRPA* is to avoid duplication in the immigration system by specifically providing that H&C Officers may not consider the factors that are taken into account in applications based on risk, such as refugee claims or PRRA applications. H&C Officers should not be asked to assess risk allegations which either have already been assessed in the refugee determination process in Canada or ought to have been presented in that process.[84]

53. The PRRA is intended for the consideration of new evidence or evidence that could not have been presented previously regarding risk to an applicant if removed to their country of nationality.[85] In most cases, an applicant, like the Appellant, whose PRRA has been refused is eligible to make a new PRRA application one year after the prior application was refused.

54. The rationale for separating risk considerations from the in-Canada H&C process is to make clear that the in-Canada refugee determination process and the process for requesting H&C consideration in Canada are two different streams. The former is a refugee system dedicated to the legal analysis of risk of persecution, torture, or cruel and unusual treatment or punishment upon removal in accordance with international Conventions, while the latter is a humanitarian

Refugee Appeal Division (RAD) is pending or, subject to certain exceptions, if fewer than 12 months have passed since such a claim was rejected by those tribunals. *IRPA, supra*, s 25(1.2)(b), s 25(1.21) [RBOA vol I, tab 6]

[84] House of Commons, Standing Committee on Citizenship and Immigration, proceedings, Bill C-11 (4 May 2010) at 11-12 (Les Linklater) [RBOA vol II, tab 64]; House of Commons, Standing Committee on Citizenship and Immigration, proceedings, Bill C-11 (27 May 2010) at p 2 (Peter MacDougall) [RBOA vol II, tab 63].

[85] *IRPA*, s 112(2)(c) [RBOA vol I, tab 6]; *IRPA*, s 112(3) sets out those who are eligible for assessment under s 97 only

exemption where factual elements, including those that do not meet the thresholds of ss. 96 and 97 risks, can be considered from the more flexible perspective of hardship.[86]

55. Unlike the refugee determination process, the H&C process in Canada focuses on a broader range of factors such as degree of establishment; the best interests of affected children; relationships in Canada; the country of nationality's ability to provide medical treatment; discrimination and general country conditions which have a direct impact on the applicant and are examined through the lens of hardship.[87]

(c) Guidelines

56. In order to assist H&C Officers when assessing H&C applications and to encourage consistency in decision-making, CIC publishes guidelines (Guidelines) for the processing of H&C applications in a chapter of its processing manual (IP 5 Manual).[88] The Guidelines outline the same test for H&C – whether there is unusual and undeserved, or disproportionate hardship – as has been repeatedly adopted in the Federal Court,[89] approved and upheld by the Federal Court of Appeal,[90] and accepted without comment by this Court in *Baker*.[91]

57. The Immigration Manual Guidelines 2 and 5.10 provide guidance in the determination of H&C applications: [92]

[86] Senate, Standing Committee on Social Affairs, Science and Technology, Bill C-11 (23 June 2010) at 11:19-11:20 (Hon Jason Kenny), at 11:86-11:88 (Luke Morton, Jennifer Irish) [RBOA vol II, tab 66]; IP 5 Manual – Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds [RBOA vol II, tab 59].
[87] House of Commons, Standing Committee on Citizenship and Immigration, proceedings, Bill C-11 (27 May 2010) at p 2 (Peter MacDougall) [RBOA vol II, tab 63]; Senate, Standing Committee on Social Affairs, Science and Technology, Bill C-11 (23 June 2010) at 11:86-11:88 (Jennifer Irish) [RBOA vol II, tab 66]. See also *Chieu, supra*, paras 84-85 [RBOA vol I, tab 21]
[88] IP 5 Manual - Immigration Applications in Canada made on Humanitarian and Compassionate grounds [RBOA vol II, tab 59]. These Guidelines are now published as Program Delivery Instructions: http://www.cic.gc.ca/english/resources/tools/perm/hc/index.aspprocessing.
[89] *Reis v Canada (MCI)*, 2012 FC 179, at para 73 [RBOA vol II, tab 48]; *Paz, supra*, at paras 15, 18-19 [RBOA vol II, tab 44]
[90] *Legault, supra,* at para 23 [RBOA vol I, tab 31]
[91] *Baker, supra*, at paras 72-73 [RBOA vol I, tab 13]
[92] IP 5 Manual – Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds, at 2, 5.10 [RBOA vol II, tab 59]

2. Program objectives

2. The purpose of H&C discretion is to allow flexibility to approve deserving cases not covered by the legislation. This discretionary tool is intended to uphold Canada's humanitarian tradition. Use of this discretion should not be seen as conflicting with other parts of the Act or Regulations but rather as a complementary provision enhancing the attainment of the objectives of the Act.

The H&C decision-making process is a highly discretionary one that considers whether a special grant of an exemption from a requirement of the Act is warranted. It is widely understood that invoking Subsection 25(1) is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada.

A humanitarian and compassionate assessment considers circumstances and/or factors that may be sufficiently compelling to allow for the requested exemption.

5.10. The assessment of hardship

Unusual and undeserved hardship	**Disproportionate hardship**
• The hardship faced by the applicant (if they were not granted the requested exemption) must be, in most cases, unusual. In other words, a hardship not anticipated or addressed by the Act or Regulations; **and** • The hardship faced by the applicant (if they were not granted the requested exemption) must be undeserved so in most cases, the result of circumstances beyond the person's control.	• Sufficient humanitarian and compassionate grounds may also exist in cases that do not meet the "unusual and undeserved" criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances.

58. In addition to outlining the statutory obligation to consider the best interests of a child directly affected in an H&C application, the Guidelines list several factors under various headings, *inter alia,* establishment, location of family ties, and conditions in the country of origin, which may be considered when assessing hardship. For example, lack of critical medical care, discrimination, and other adverse country conditions which have a direct negative impact on

an applicant can, in some cases and circumstances, amount to hardship.[93] As the FCA here noted, the Guidelines are meant to be rules of thumb, or interpretative aids; they are not exhaustive and should not be considered as such by an Officer.[94] The Guidelines may also be of assistance to a Court in understanding the implementation of provisions within the *IRPA.*[95]

D. H&C APPLICATION

(a) Test adopted by Officer is Reasonable

59. The H&C Officer's adoption of the unusual and undeserved, or disproportionate hardship test in determining the Appellant's application for H&C under s. 25 of the *IRPA* is reasonable. As this Court found in *Baker*, an H&C decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act.[96]

60. The Appellant's primary assertion is that an H&C Officer considering an application under s. 25 of the *IRPA* errs in applying the unusual and undeserved, or disproportionate hardship test as this impermissibly narrows the test for H&C. The Appellant contends that the test as described in the IAB (now IAD) decision in *Chirwa* should be applied. The Federal Court has considered and rejected this contention a number of times. It has repeatedly found the "unusual, undeserved, or disproportionate hardship" test to be appropriate when determining H&C applications under s. 25 of the *IRPA.*[97]

61. The chief difficulty with the Appellant's argument is that in fact, in both circumstances, whether under *Chirwa* in the IAD, or in the H&C application context, an applicant for relief is

[93] IP 5 Manual – Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds, at 5.16 [RBOA vol II, tab 59]
[94] FCA Decision, 2014 FCA 113, paras 52-55; see also FC Decision, 2013 FC 802, para 30
[95] *Legault, supra,* at para 20 [RBOA vol I, tab 31]; *Baker, supra,* at para 72 [RBOA vol II, tab 13]
[96] *Baker, supra,* at para 56 [RBOA vol I, tab 13]
[97] *Lim v Canada* (*MCI*) 2002 FCT 956 (TD), at paras 11-13, 16-17 [*Lim*] [RBOA vol I, tab 32]; *Qiu v Canada (MCI),* 2003 FCT 15, at para 41 [RBOA vol II, tab 45]; *Dang v Canada (MCI),* 2007 FC 290 (TD), at paras 14, 27-28 [RBOA vol I, tab 23]; *Pan v Canada (MCI),* 2008 FC 1303, at para 14 [RBOA vol II, tab 42]; *Rizvi v Canada (MCI),* 2009 FC 463, at paras 14-16 [RBOA vol II, tab 50]; *Jung v Canada (MCI),* 2009 FC 678, at para 34 [RBOA vol I, tab 29]; *Aoanan v Canada (MCI),* 2009 FC 734, at paras 34, 39-40 [RBOA vol I, tab 11]; *Serrano Lemus v Canada (MCI),* 2012 FC 1274, at para 16 [RBOA vol II, tab 55] (overturned but not on this point *Lemus v Canada (MCI)* 2015 FCA 114)

required to show compelling circumstances that would warrant an exemption from the normal and expected application of the *IRPA* or *Regulations*. The factors that have developed over time for the consideration of the exercise of this discretion by the IAD or in an H&C application are in fact similar in both cases.

62. *Chirwa* was an appeal to the Immigration Appeal Board [IAB] (now the IAD) under the then *Immigration Appeal Board Act*,[98] which provided that the IAB could quash or stay the execution of a deportation order and direct that the person be granted entry or landing having regard to "the existence of compassionate or humanitarian considerations" that in its opinion warranted "the granting of special relief." Commenting on this jurisdiction and the phrase "compassionate considerations", the IAB stated that it must "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 provision of the Immigration Act."[99]

63. Thus, although *Chirwa* may provide a general description of "humanitarian and compassionate" considerations, it does not help in determining what types of considerations those might be, or when they would warrant granting special relief.

64. By contrast, the "unusual and undeserved, or disproportionate hardship" test which is outlined in the Guidelines, and applied in H&C applications under the *IRPA* and the *Immigration Act* before that,[100] provides meaningful content to the requirement that the considerations must "warrant" the granting of the special relief. This test assists H&C Officers in determining *what type or degree of hardship* warrants H&C relief for a foreign national who does not comply with the necessary requirements.

---

[98] *Immigration Appeal Board* Act, 1966-67 (Can.), c 90, ss 15(1)(b)(ii) [RBOA vol I, tab 5]
[99] *Chirwa*, *supra*, at para. 27-29 [RBOA vol I, tab 22]; See also: *Yhap*, *supra*, at para 36 [RBOA vol II, tab 58]
[100] *Arduengo v Canada (MCI)*, [1997] 3 FCR 468, at para 30 [RBOA vol I, tab 12]; *Baker*, *supra*, at para 72 [RBOA vol I, tab 13]; *Samuels v Canada (MCI)*, [1999] FCJ 927, at paras 1-2, 5 [RBOA vol II, tab 53]; *Bernard v Canada (MCI)*, 2001 FCT 1068, at para 31 [RBOA vol I, tab 14]; *Ming v Canada (MCI)*, 2001 FCT 1253, at para 16 [RBOA vol II, tab 38]

65. Thus, the test applied by H&C Officers is a gloss on the test formulated in *Chirwa*, not a narrowing of it, as is reflected in Justice Dawson's observation in *Lim* that there may not be any significant difference between the guidance offered in the Guidelines in CIC manual Chapter IP-5 and that offered by the jurisprudence of the IAB in *Chirwa*. She concluded that "[c]ircumstances of unusual and undeserved, or disproportionate hardship would seem ... to be generally co-extensive with those which would excite a desire to relieve misfortune within the *Chirwa* definition."[101]

66. Indeed, the jurisprudence has itself evolved since *Chirwa* to provide practical guidance to the IAD as to the factors it should consider when determining whether to grant an appeal from a removal order on H&C grounds. These factors, known as the *Ribic* factors, were approved by this Court in *Chieu*. They are:

- the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation; or the circumstances surrounding the failure to meet the conditions of admission which led to the deportation
- length of time in Canada;
- establishment in Canada;
- family in Canada;
- support available to claimant within family and within community; and
- degree of hardship caused by return to country of nationality - language ability, family connections, availability of medical care, risk of physical harm.[102]

67. An examination of the factors considered in an H&C application pursuant to s. 25(1) demonstrates the similarity. These include but are not limited to:

- ties to Canada;
- establishment in Canada;
- consequences of the separation of relatives;
- the best interests of any children affected by the application;
- health considerations;
- family violence considerations;
- factors in the country of origin (this includes but is not limited to: medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in ss. 96 or 97) and/or

[101] *Lim*, *supra*, at paras 16, 17 [RBOA vol I, tab 32]
[102] *Chieu*, *supra*, at paras 41, 42 [RBOA vol I, tab 21]; *Ribic v Canada(MEI)*, [1985] IABD No 4 (QL), at para 14 [RBOA vol II, tab 49]

- any other relevant factor that an applicant wishes to have considered not related to ss. 96 or 97.[103]

68. Thus, there is considerable overlap in the factors. Indeed, as Justice Noël found in *Iamkhong*, the IAD itself may even apply this same hardship test. Indeed, in his view, the issue is well settled; the legal test in *Chirwa* is subsumed into the "undue, undeserved or disproportionate" examination of hardship.[104]

69. With respect to *Yhap*, on which the Appellant also relies, the Federal Court there did not reject the unusual and undeserved or disproportionate hardship test or the Guidelines *per se.* Indeed, the Court noted that the H&C Guidelines are "the sort of "general policy" or "rough rules of thumb" which are an appropriate and lawful structuring of the discretion conferred by s. 114(2) [predecessor to s. 25(1)].[105] It was the improperly narrowed categories of applicants described in the particular backlog guidelines that constituted the fettering in that case.[106]

70. Notwithstanding the Appellant's preference for the description of H&C as phrased in *Chirwa*, it offers little in the way of guidance for when such relief ought to be granted, and what factors should be considered. That guidance has developed in the subsequent jurisprudence of the IAD and exists for H&C Officers in the Guidelines found in processing Manuals. Therefore, it was not unreasonable for the H&C Officer to apply the test that has guided H&C applications over many years.

(b) Purpose: H &C discretion

71. As already explained, the intention of the H&C provision is to provide the Minister with flexibility to approve those compelling and exceptional cases not anticipated in the *IRPA.* Since approval of an H&C application provides an exemption from having to comply with the usual requirements imposed by the *IRPA* for permission to remain in Canada permanently, it is not intended as an alternative immigration stream.

---

[103] FCA Decision, 2014 FCA 113, at para 44; IP5 Manual - Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds, at 5.11
[104] *Iamkhong v Canada (MCI),* 2011 FC 355, at para 36 [*Iamkhong*] [RBOA vol I, tab 27]
[105] *Yhap, supra*, paras 36 and 38 [RBOA vol II, tab 58]
[106] *Yhap, supra*, paras 37-39 [RBOA vol II, tab 58]

72. What is required is not merely the existence of H&C considerations but rather the existence of H&C considerations that justify an exemption from requirements that are otherwise applicable. Such considerations were found not to exist in the Appellant's case.

(c) Context: H&C Applications and IAD Appeals

73. The Appellant's reliance on dictionary definitions for words like "humanitarian" and "compassionate", without regard to their immediate context or their role in the legislative scheme, is not in keeping with the modern approach to statutory interpretation which requires a contextual interpretation.

74. As argued above, in substance, the tests applied by the IAD and H&C Officers result in the same kinds of factors being considered. To the extent that there are differences or differences in emphasis, this is because the two tests have developed along separate jurisprudential lines in light of their being distinct entities that apply H&C, under separate statutory provisions, and in light of the immigration status of the types of applicants who access this H&C consideration in either case. Therefore any differences in approach accord with the differences in context.

75. There are contextual factors that distinguish ss. 25(1) and 67(1) from each other. First, the test for relief in these provisions is not identical. Under s. 25(1) the Minister is to examine the humanitarian and compassionate circumstances "relating to the foreign national" whereas under s. 67(1) the IAD must allow an appeal if sufficient humanitarian and compassionate considerations warrant special relief "in light of all the circumstances of the case." [emphasis added]

76. The types of appellants entitled to seek relief from the IAD have been distinct from those who make H&C applications. The IAD's jurisdiction is to deal with appeals brought by Canadian citizens, permanent residents, and protected persons, or others who, at least initially, were determined to meet the selection criteria for admission, and a permanent resident visa. Therefore, they had status in Canada, or had qualified for it. These persons may appeal to the

IAD to seek special relief from matters affecting their inadmissibility, or that of a sponsored family member.[107]

77. By contrast, foreign nationals who wish to remain in Canada must rely on H&C applications pursuant to s. 25(1) because they have no right of appeal to the IAD.[108] In *Espino*, the Federal Court considered the provisions at issue in this case, and, relying on *Chieu*, determined that there is "no obligation on the Minister to treat such illegal residents or persons without durable status in the same fashion that citizens, permanent residents, or permanent residents facing removal are treated." It concluded that "different tests may exist as to what constitutes humanitarian and compassionate considerations, depending on an applicant's status under the Act."[109]

78. As recognized in *Chiarelli*, "non-citizens do not have an unqualified right to enter or remain in the country." A necessary consequence of this principle is the adoption of immigration legislation by Parliament and the development of policy which prescribes the conditions under which non-citizens will be permitted to enter and remain in Canada.[110] Consistent with this is the acknowledgement of this Court in *Chieu* that under immigration legislation, individuals may be treated differently depending upon their status. In *Chieu*, an appeal in relation to the IAD's jurisdiction, Justice Iacobucci wrote:

> In fact, the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas, and from illegal residents. It is an important aspect of the statutory scheme that these different categories of individuals are treated differently with appropriate adjustments to the varying rights and contexts of individuals in these groups. I need only point out that permanent residents have rights under both the Charter and the Act that other non-citizens do not, including

---

[107] Only a limited category of persons have a right of appeal to the IAD. For example, Canadian citizens or permanent residents may appeal from the refusal of a sponsored application of a member of the family class, permanent residents may appeal a decision in relation to their residency obligations, and, permanent residents, permanent resident visa holders, or protected persons who are subject to a removal order can also appeal to the IAD. See *IRPA* sections 63(1)(3)(4) [RBOA vol I, tab 6]

[108] *Espino, v. Canada (MCI),* 2007 FC 74, [*Espino*], affirmed [2008] FCJ No.327, 2008 FCA 327 at paras 44-45 [RBOA vol I, tab 25]

[109] *Espino, ibid,* at paras 44-45 [RBOA vol I, tab 25]

[110] *Canada (MEI) v Chiarelli*, [1992] 1 SCR 711 at 733-734 [RBOA vol I, tab 18]; See also: *Medovarski v Canada (MCI),* 2005 SCC 51, at para 46 [RBOA vol II, tab 36]

> mobility rights under s.6(2) of the Charter and the right to sponsor individuals to Canada under s.6(2) of the Act.[111]

79. Thus, persons who have or had a certain status have access to the IAD while others must apply for H&C consideration. The IAD is guided by its jurisprudence and the Minister's Delegate, the H&C Officer, by the Guidelines, which are themselves also informed by the jurisprudence. Within appropriate limits, these entities may properly develop interpretations that are nuanced in distinct ways depending on the wording of the provision, the context in which the H&C relief is exercised, the relief sought and the facts of the case including the background and status of the applicant.

(d) Guidelines may guide and are a relevant interpretive aid

80. The Minister is entitled to issue guidelines that structure the discretion of the H&C Officers who act on his or her behalf in the interpretation of the enabling legislation. This Court has confirmed that policies may be necessary to guide the action of public servants who administer programs and the Minister is entitled to set that policy within legal limits.[112] Contrary to the Appellant's assertions, the Guidelines do not become law or fetter discretion. Rather, they assist the H&C Officer when reviewing the facts of any H&C application and determining whether discretion is warranted in a particular case.

81. An examination of guidelines is also a well-established aid to interpretation. As this Court stated in *Baker* regarding the H&C guidelines specifically, guidelines "are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section", and expressly direct officers to consider whether a negative decision would result in "unusual, undeserved, or disproportionate hardship."[113]

---

[111] *Chieu*, *supra*, para 59 [RBOA vol I, tab 21]
[112] *Canada (AG) v Mavi*, [2011] 2 SCR 504, 2011 SCC 30, at para 66 [RBOA vol I, tab 15]; *Thamotharem v Canada (MCI)*, [2008] 1 FCR 385, 2007 FCA 198, at para 56, leave to appeal dismissed [2007] SCCA No 394 [ABOA vol III, tab 80]; *Vaziri v Canada (MCI)*, 2006 FC 1159, 300 FTR 158, at paras 31-35, appeal dismissed as moot 2007 FCA 150 [RBOA vol II, tab 57]; citing to *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141, at 170-171 [RBOA vol I, tab 19]; *Canada (CRTC) v CTV Television Network Ltd*, [1982] 1 SCR 530, at 543-545 [RBOA vol I, tab 16]; *Carpenter Fishing Corp v Canada (Minister of Fisheries and Oceans)*, [1998] 2 FC 548, [1997] FCJ No 1811 (CA), at paras 28-29 [RBOA vol I, tab 20]
[113] *Baker*, *supra*, at paras 17, 72 [RBOA vol I, tab 13]

82. The interpretive utility of guidelines in the evaluation of a discretionary application was more recently affirmed in this Court's decision in *Agraira.*[114] In *Merck Frosst,* this Court relied, in part, on guidelines to arrive at the interpretation of a term at issue in that case.[115] Clearly, guidelines may be of assistance in informing the debate as to whether an interpretation of a provision is reasonable. Doing so does not, as the Appellant suggests, constitute an "inherently flawed approach".

(e) Requirement for hardship to be personal is appropriate

83. As Justice Kane said in her decision below, it is well settled that the hardship, alleged in an H&C application, must be that which is personal to the applicant.[116] Section 25 of the *IRPA* makes clear that the Minister may exercise discretion if it is justified by humanitarian and compassionate considerations "relating to the foreign national". Similarly, s. 25(1.3) emphasizes that this examination involves consideration of "...elements related to the hardships that affect the foreign national."

84. The Guidelines are consistent with s. 25(1) and 25(1.3) and reinforce the personal nature of the hardship, providing:

> 5.16. H&C and hardship: Factors in the country of origin to be considered
> While A96 and A97 factors may not be considered, the decision-maker must take into account elements related to the hardships *that affect the foreign national.* Some examples of what those "hardships" may include are:
> a. lack of critical of medical/healthcare;
> b. discrimination which does not amount to persecution;
> c. adverse country conditions *that have a direct negative impact on the applicant.*

85. The Appellant's argument takes issue with the need to demonstrate personal hardship in respect of conditions on his return to Sri Lanka. The argument suggests that on this basis every young Tamil male would qualify for admission to Canada on H&C grounds regardless of whether they would, in fact, experience any hardship on return. The consequence of this argument was pointed out by the Federal Court in *Lalane,* where it was noted that "...every H&C application

---

[114] *Agraira*, *supra*, at para 60 [RBOA vol I, tab 9]
[115] *Merck Frosst Canada Ltd v Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3, at para 112 [RBOA vol II, tab 37]
[116] FC Decision, 2013 FC 802, paras 21-23; *Lalane v Canada (MCI)*, 2009 FC 6, at paras 1, 43-44 [RBOA vol I, tab 30]; *Ramaischrand v Canada (MCI)* 2011 FC 441, at paras 7, 9 [RBOA vol II, tab 47]

made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application."[117]

86. The Appellant's claim that he would be subject to risk based on his profile as a young Tamil male was not accepted. While claiming that he would be discriminated against, he failed to support these statements with detailed information or evidence that he would suffer this discrimination.[118] It was the Appellant's obligation to provide the necessary elements of evidence to support his case[119] and he did not do so.

(f) Relief is exceptional

87. There is no merit to the Appellant's argument that the discretion in s. 25 is being improperly narrowed to require "exceptional" applicants. While the relief is clearly exceptional given that it provides an exemption from the obligation to qualify for permanent residence in accordance with the usual statutory requirements, the applicant need not be exceptional. Rather, the constellation of factors that the applicant puts forward must show that compliance with the ordinary and expected obligations of the *IRPA* and *Regulations* would, in his or her case, cause unusual, undeserved, or disproportionate hardship. The Appellant simply did not do so.

88. Ordinary consequences regularly associated with the requirement to comply with the *Act*, or if required, to leave Canada, are generally not sufficient. In *Irimie,*[120] Pelletier J. (as he then was) explained that "the H&C process is not designed to eliminate hardship; it is designed to provide relief from unusual and undeserved, or disproportionate hardship". The requirement to comply with the ordinary requirements of the legislation, including applying from outside of Canada, may well cause hardship, but it was not unusual and undeserved, or disproportionate.

89. The fact that one would be leaving behind friends, perhaps family, employment or a residence, as well as the cost or inconvenience of having to return home to apply in the normal

[117] *Lalane, supra*, at para 1 [RBOA vol I, tab 30]
[118] H&C Decision, AR Vol I, p 14
[119] *Owusu (FCA), supra*, at para 8 [RBOA vol II, tab 41]; *Lalane, supra*, at paras 42, 50 [RBOA vol I, tab 30]
[120] *Irimie v Canada (MCI)*, 2000 CanLII 16640; [2000] FCJ No 1906 (QL); 101 ACWS (3d) 995; 10 Imm LR (3d) 206, at para 26 [RBOA vol I, tab 28]

manner would not generally be enough to constitute hardship and thus warrant a positive H&C determination. These are the normal and expected consequences when someone who is not entitled to remain in Canada must leave.[121]

90. Or, in relation to establishment, as Nadon J. (as he then was) indicated in *Tartchinska,*[122] even self-sufficiency would not, in itself, guarantee or lead to a positive outcome in an H&C application without other factors, such that refusal of the request would cause unusual or disproportionate hardship.

91. Otherwise, as Pelletier J. concluded in *Irimie*, to make the H&C process "an *ex post facto* screening device which supplants the screening process contained in the Immigration Act and Regulations ... would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay."[123]

92. Indeed, even in *Chirwa* on which the Appellant relies, the IAB itself recognized that although it had the authority to "mitigate the rigidity of the law in an appropriate case", it was equally clear that Parliament did not intend that jurisdiction to be "applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations."[124]

93. The common theme in these cases is that everyone is expected to comply with the requirements of the *IRPA* and the *Regulations*. An exemption due to H&C considerations should not therefore follow simply because not all applicants will qualify for status otherwise. The ordinary inconveniences or hardships associated with complying with the law are, just that, ordinary. To relieve against those would mean that no one would be obliged to comply with the law.

[121] Irimie, supra, para 12 [RBOA vol I, tab 28]
[122] *Tartchinska* v. *Canada (MCI)*, [2000] FCJ No 373 (QL) at para 20 (TD) [RBOA vol II, tab 56]
[123] *Irimie, supra,* at para 26 [RBOA vol I, tab 28]
[124] *Chirwa, supra,* at p 350 [RBOA vol I, tab 22]

E. THE DECISION IS REASONABLE

94. The H&C Officer decided not to approve the Appellant's H&C application. It was reasonable for her to conclude that he had not demonstrated that he would personally suffer unusual and undeserved, or disproportionate hardship were he returned to Sri Lanka, either because of risk to his safety as a young Tamil male or due to his level of establishment in Canada.

95. The Appellant had several opportunities to present evidence and make submissions in support of his desire to remain in Canada. In fact, his H&C application was reopened when the H&C Officer learned that further submissions had been made that had not been considered. All of the evidence submitted by the Appellant was weighed and considered.

96. Contrary to the Appellant's submissions, the H&C Officer was not looking for proof that he had actually supported the LTTE but rather information to support his statements that he had suffered discrimination while in Sri Lanka or that he would suffer discrimination if returned to Sri Lanka.[125] The H&C Officer's reference to the security measures, which began as a part of emergency regulations in 2006, is not fairly described as "a justification of human rights abuses". It was part of her survey of the conditions in Sri Lanka and constituted a necessary review of the facts essential to determining whether the Appellant would face unusual and undeserved, or disproportionate hardship. The H&C Officer canvassed the country conditions information provided to her and concluded that the Appellant had failed to satisfy her that he would be targeted by security forces, and he provided insufficient evidence that he would be personally discriminated against because of his ethnicity on return to Sri Lanka. Considering this, and factors such as the Appellant's level of establishment in Canada, the presence of his parents and two siblings in Sri Lanka where he had lived most of his life, the H&C Officer determined the Appellant's return would not constitute unusual, undeserving or disproportionate hardship.[126]

97. The Appellant has mistakenly attempted to characterize treatment such as arrest, arbitrary detention where there is a risk of torture, disappearance or death - as discrimination. Such

[125] H&C Decision, AR Vol I, pp 5 and 14
[126] H&C Decision, AR Vol I, p 5, 11-15

treatment would in fact be persecutory.[127] However, the risk of the Appellant's exposure to this treatment was assessed twice – once by the RPD[128] and once by the PRRA Officer; the conclusion of these assessments was that the Appellant did not face a serious possibility of this treatment in Sri Lanka, and with respect to the PRRA, that the evidence did not warrant a finding of risk.[129] There was not more than a mere possibility of his facing the risks he asserted associated with being a young male Tamil from the north.[130]

98. While acknowledging that some Tamils are singled out for questioning and detained on suspicion of being LTTE supporters and sympathizers, the H&C Officer, examining the Appellant's circumstances through the lens of hardship, found that the Appellant could not demonstrate that he would personally be discriminated against or targeted by security forces because of his ethnicity as a Tamil. After assessing the evidence she had been provided, the H&C Officer concluded that she had been presented with insufficient evidence that the Appellant would face unusual and undeserved hardship upon his return to Sri Lanka.[131]

99. In response to the Appellant's assertion that his "best interests as a child", were not appropriately considered, it is noteworthy that the Appellant submitted his application one day before his eighteenth birthday. In any event, the H&C Officer gave regard to the Appellant's young age and found it would be in his best interests to return to Sri Lanka, where his parents and most of his siblings reside and could assist him in readjusting.[132]

100. The Appellant provided a psychological report in his supplementary submissions. The H&C Officer noted that there was no direct evidence in relation to the events that were recounted in the psychologist's report. Such a determination is not a credibility finding but rather a comment about the lack of direct evidence to support those facts. The psychologist had to rely on

[127] H&C Decision, AR Vol I, pp. 4, 11; *Sagharichi v Canada (MEI)*, [1993] FCJ No 796 (FCA) at para 3, leave to appeal to SCC denied, February 17, 1994, File No.: 23826 [RBOA vol II, tab 51]; *Medarovik v Canada (MCI)*, 2002 FCT 61, at paras 13, 16 [RBOA vol II, tab 35]
[128] PIF Narrative, AR Vol I, pp.101-103; Refugee Claim Decision, AR Vol I, pp 106-114
[129] Refugee Claim Decision, AR Vol 1, p 111, Appellant's Affidavit in support of PRRA application, AR Vol I, pp. 146-148; PRRA Decision, AR Vol I, pp 151-158, especially154-156
[130] PRRA Decision, AR Vol 1, pp 155-157
[131] H&C Decision, AR Vol 1, p 5
[132] H&C Decision, AR Vol I, p 14

the Appellant's statements of which the psychologist had no direct knowledge. As the H&C Officer acknowledged, the psychologist could at best confirm that the symptoms of which he complained were consistent with the events described.[133] In any event, a decision maker is not bound by the opinion of any expert, even if that opinion is uncontradicted.[134]

101. It was the Appellant's obligation to substantiate the elements on which his application was based and provide evidence that supports his claims. H&C applicants have the onus of establishing the facts on which their claim rests.[135] His failure to substantiate his case cannot be attributed to the H&C Officer.

Conclusion

102. The purpose of the H&C application is to provide flexibility to relieve against the consequences of unanticipated or unforeseen impacts of compliance with the law. It is not intended to routinely exempt applicants from the normal requirements of immigration legislation absent compelling reasons to do so.

103. Notwithstanding the Appellant's sincere desire to remain in Canada, he did not demonstrate that the hardship associated with his complying with these normal and expected requirements would be unusual and undeserved, or disproportionate. Taken together, his circumstances did not warrant relief.

104. The H&C Officer's decision is reasonable. It falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The deferential standard of review here allows the H&C Officer "substantial leeway" to determine the "proper purposes" or "relevant considerations" involved in the H&C decision.[136] The H&C Officer's reasonable exercise of discretion should not be disturbed.

---

[133] H&C Decision, AR Vol I, p 6
[134] *R v Molodowic*, 2000 SCC 16, at para 8, [2000] 1 SCR 420 [RBOA vol II, tab 46]
[135] *Owusu (FCA)*, *supra*, at para 8 [RBOA vol II, tab 41]
[136] *Baker*, *supra*, at para 56 [RBOA vol I, tab 13]

PART IV – COSTS

105. The Minister of Citizenship and Immigration seeks his costs of this appeal.

106. However, the Minister does not seek costs in respect of the Federal Court or Federal Court of Appeal proceedings, where no costs were awarded to either party. The Minister further asks that costs not be awarded in respect of those proceedings as there are no special reasons for such an order as is required by Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*.

> 22: No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.[137]

[137] *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, Rule 22 [RBOA Vol I, tab 4]

PART V – NATURE OF ORDER SOUGHT

107. The appeal should be dismissed with costs to the Respondent Minister.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 24th day of March 2015.

Marianne Zorić
Of Counsel for the Respondent

Kathryn Hucal
Of Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

Authorities		Paragraph(s)
A. Statutes and Regulations		
Balanced Refugee Reform Act, SC 2010, c.8, ss. 4 and 5		48, 51
Budget Implementation Act, 2008, SC 2008, c. 228, s. 117		48
Faster Removal of Foreign Criminals Act, SC 2013, c. 16, ss. 9 and 10		48
Federal Courts Immigration and Refugee Protection Rules, SOR/93-22, Rule 22		134
Immigration Appeal Board Act 1966-67 (Can.), c. 90, ss. 15(1)(b)(ii)		62
Immigration and Refugee Protection Act, SC 2001, c. 27		1, 40, 46, 47, 48, 51, 53, 66
Immigration and Refugee Protection Regulations, SOR/2002-227		1, 46
Protecting Canada's Immigration System Act, SC 2012, c. 17, ss. 13 and 14		48
B. Jurisprudence		
Agraira v Canada (MPSEP), 2013 SCC 36, [2013] 2 SCR 559		26, 38, 41, 42, 43, 83
Alberta (Information and Privacy Commissioner) v Alberta Teacher's Association, 2011 SCC 61, [2011] 3 SCR 654		38
Aoanan v Canada (MCI), 2009 FC 734		60
Arduengo v Canada (MCI), [1997] 3 FCR 468		64
Baker v Canada (MCI), [1999] 2 SCR 817		37, 45, 56, 58, 59, 64, 82, 104
Bernard v Canada (MCI), 2001 FCT 1068 (CanLII);		64

APPENDIX "A" – STATUTES RELIED ON

Federal Courts Immigration and Refugee Protection Rules, SOR/93-22, Rule 22

COSTS	DÉPENS
22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders. SOR/2002-232, s. 11.	**22.** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens. DORS/2002-232, art. 11.

Immigration and Refugee Protection Act, SC 2001, c.27, s. 25

As applicable to the Appellant's Application

Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, 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 considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
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.	Paiement des frais (1.1) Le ministre n'est saisi de la demande que si les frais afférents ont été payés au préalable.

Exceptions (1.2) The Minister may not examine the request if the foreign national has already made such a request and the request is pending.	Exceptions (1.2) Le ministre ne peut étudier la demande de l'étranger si celui-ci a déjà présenté une telle demande et celle-ci est toujours pendante.
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.	Non-application de certains facteurs (1.3) Le ministre, dans l'étude de la demande 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.
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.	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.

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.	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 résident 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 résident 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 considérations 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 devient un étranger désigné.

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.	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 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 devient un étranger désigné.
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).	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).
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.	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) 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.	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 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.	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 résidence habituelle —, il y serait, en cas de renvoi, exposé 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 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.	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.
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.	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.
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.	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 considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
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).	Dispense (2) Il peut dispenser l'étranger du paiement des frais afférents à l'étude de son cas au titre du paragraphe (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.	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
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.	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.
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).	Dispense (2) Il peut dispenser l'étranger du paiement des frais afférents à l'étude de son cas au titre du paragraphe (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.	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.
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.	Conditions (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 ministre ou d'obtenir un engagement. 2010, ch. 8, art. 5; 2012, ch. 17, art. 14

Immigration and Refugee Protection Act, SC 2001, c.27, s. 74(d)

Judicial review **74.** Judicial review is subject to the following provisions: (*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	Demande de contrôle judiciaire **74.** Les règles suivantes s'appliquent à la demande de contrôle judiciaire : *d*) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.