

Court File No.: 35990

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

BETWEEN:

JEYAKANNAN KANTHASAMY

APPELLANT
(Respondent)

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

- and -

**CANADIAN ASSOCIATION OF REFUGEE LAWYERS, JUSTICE FOR CHILDREN
AND YOUTH, BARBRA SCHLIFER COMMEMORATIVE CLINIC AND
CANADIAN CENTRE FOR VICTIMS OF TORTURE, and PARKDALE
COMMUNITY LEGAL SERVICES**

INTERVENERS

**FACTUM OF THE INTERVENER,
JUSTICE FOR CHILDREN AND YOUTH**
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

**JUSTICE FOR CHILDREN AND
YOUTH**
1203-415 Yonge St.
Toronto, ON M5B 2E7

Emily Chan
Samira Ahmed
Tel.: (416) 920-1633
Fax: (416) 920-5855
Email: chane@lao.on.ca

**Counsel for the Intervener Justice for
Children and Youth**

SUPREME ADVOCACY LLP
100-340 Gilmour St.
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Agent for the Intervener Justice for
Children and Youth**

JACKMAN, NAZAMI AND ASSOCIATES

Barristers and Solicitors
3-596 St. Clair Avenue West
Toronto, ON M6C 1A6

Barbara Jackman

Tel.: (416) 653-9964
Fax: (416) 653-1036
Email: barb@bjackman.com

Counsel for the Appellant

ATTORNEY GENERAL OF CANADA

The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, ON M5X 1K6

Marianne Zoric

Kathryn Hucal

Tel.: (416) 954-8046 /952-0625
Fax: (416) 954-8982
Email: marianne.zoric@justice.gc.ca
kathryn.hucal@justice.gc.ca

Counsel for the Respondent

NEIGHBOURHOOD LEGAL SERVICES

333 Queen St. East
Toronto, ON M5A 1S9

David Matas

Richard Goldman

Jamie Liew

Jennifer Stone

Tel.: (416) 861-0677
Fax: (416) 861-1777
Email: dmatas@mts.net
carmtl@gmail.com
Jamie.liew@uottawa.ca

Counsel for Intervener, Canadian Council for Refugees

OTTAWA COMMUNITY LEGAL SERVICES

422-1 Nicholas Street
Ottawa, ON K1N 7B7

Michael Bossin

Tel.: (613) 241-7008
Fax: (613) 241-8680
Email: bossinm@lao.ca

Ottawa Agent for Counsel for the Appellant

DEPARTMENT OF JUSTICE

Litigation Branch
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Christopher Rupar

Tel.: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for Counsel for the Respondent

PERLEY-ROBERTSON, HILL & MCDOUGALL LLP/S.R.L.

1500-340 Albert Street
Ottawa, ON K1R 0A5

Jacqueline Bonisteel

Tel.: (613) 566-2845
Fax: (613) 238-8775
Email: jbonisteel@perlaw.ca

Ottawa Agent for Counsel for Intervener, Canadian Council for Refugees

REFUGEE LAW OFFICE

20 Dundas Street West, Suite 202
Toronto, ON M5G 2H1

Alyssa Manning and Aviva Basman

Tel.: (416) 977-8111
Fax: (416) 861-1777
Email: manninga@lao.on.ca
basmana@lao.on.ca

**BARBRA SCHLIFER
COMMEMORATIVE CLINIC**

489 College St., Suite 503
Toronto, ON M6G 1A5

Rathika Vasavithasan

Tel.: (416) 323-9149
Fax: (416) 323-9107
Email: r.vasavithasan@schliferclinic.com

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

**PARKDALE COMMUNITY LEGAL
SERVICES**

1266 Queen Street West
Toronto, ON M6K 1L3

Toni Schweitzer

Tel.: (416) 531-2411
Fax: (416) 531-0885
Email: schweit@lao.on.ca

**POULTON LAW OFFICE
PROFESSIONAL CORPORATION**

596 St. Clair Avenue West, Suite 6
Toronto, ON M6C 1A6

Ronald Poulton

Tel.: (416) 653-9900
Fax: (416) 653-1036
Email: ronald.poulton@sympatico.ca

**Counsel for Intervener, Parkdale
Community Legal Services**

**OTTAWA COMMUNITY LEGAL
SERVICES**

422-1 Nicholas Street
Ottawa ON, K1N 7B7

Laila Demirdache

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

**Ottawa Agent for Counsel for the
Intervener, Barbra Schlifer
Commemorative Clinic and The Canadian
Centre for Victims of Torture**

**SOUTH OTTAWA COMMUNITY
LEGAL SERVICES**

1355 Bank Street, Suite 406
Ottawa, ON K1H 8K7

Jean Lash

Tel.: (613) 733-0140
Fax: (613) 733-0401
Email: lashj@lao.on.ca

**Ottawa Agent for Counsel for Intervener,
Parkdale Community Legal Services**

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

REFUGEE LAW OFFICE

20 Dundas Street West, Suite 202
Toronto, ON M5G 2H1

Laura Brittain

Joo Eun Kim

Tel.: (416) 977-811
Fax: (416) 977-5567
Email: brittail@lao.on.ca
Email: kimi@lao.on.ca

**Counsel for Intervener, Canadian
Association of Refugee Lawyers**

LEGAL AID ONTARIO

73 Albert Street, Ground Floor
Ottawa, ON K1P 1E3

Karima Karmali

Tel.: (613) 238-7931
Fax: (613) 238-3410

**Ottawa Agent for Counsel for Intervener,
Canadian Association of Refugee Lawyers**

TABLE OF CONTENTS

	<u>PAGE</u>
PART I – STATEMENT OF FACTS	1
PART II – INTERVENER’S POSITION ON THE QUESTIONS IN ISSUE	1
PART III – STATMENT OF ARGUMENT	1
a) Two Components to JFCY’s submissions	2
b) In the Procedural Process	2
c) The BIOC is a fundamental principle of law	3
d) BIOC is “the” Primary Consideration.....	4
e) Alternatively	6
f) Substantive Decision Making Analysis – this applies to both our main and alternative position taken with respect to the Procedural process, as set out above.....	6
g) Multitude of Factors.....	7
i. Perceptions & Passage Time factor	7
ii. Establishment factor.....	8
iii. Family and Wider Environment factor	8
iv. Hardship.....	8
v. Non-refoulement.....	9
h) Conclusion	9
PART IV – SUBMISSIONS RELATING TO COSTS.....	9
PART V – ORDER REQUESTED.....	10
PART VI – TABLE OF AUTHORITIES.....	11
PART VII – STATUTORY PROVISIONS.....	14

PART I – STATEMENT OF FACTS

1. *Overview of the Intervener’s Position:* JFCY’s position is that when a child is the principal applicant in a Humanitarian and Compassionate application (H&C)¹, the appropriate test for decision making is the Best Interests of the Child (BIOC), a fundamental principle of law.² In recognition of the child’s vulnerable position, and in order to comply with Canadian law and International Human Rights instruments, the BIOC must be the primary consideration.
2. *Facts:* JFCY accepts the facts as presented by the Appellants and Respondents and takes no position where they might disagree.

PART II – INTERVENER’S POSITION ON THE QUESTIONS IN ISSUE

3. The H&C Officer erred in applying the “unusual and undeserved, or disproportionate hardship” test and failed to properly apply the BIOC analysis when denying the Appellant’s H&C application.

PART III – STATEMENT OF ARGUMENT

4. JFCY’s submissions focus on the rights of a child, who is the principal applicant in a H&C application, as set out in *IRPA*, Canadian law, and Canada’s international obligations. A principal child applicant has been identified as uniquely vulnerable in International human rights treaties and discourse. The child applicant may be “unaccompanied,”³ “separated,”⁴ or making a

¹ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 25(1) [*IRPA*].

² *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 70-71, SCJ No 39 (QL) [*Baker*] Appellant’s Book of Authorities at Vol I, Tab13 [ABOA].

³ Committee on the Rights of the Child, *General comment No 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, UNCRCOR, 39th Sess, UN Doc CRC/GC/2005/6 at para 7 [CRC Comment No 6]: “**Unaccompanied children**” (also called unaccompanied minors) are children, as defined in article 1 of the UNCRC, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. Justice for Children and Youth’s Book of Authorities [JBOA Vol 1 Tab 29].

⁴ *Ibid* at para 8: “**Separated children**” are children, as defined in article 1 of the UNCRC, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members. See *Kaneza v Canada (Minister of Citizenship and Immigration)*, 2015 FC 213, FCJ No 211 (QL) [*Kaneza*] [JBOA Vol 1 at Tab 15]; *Diakité v Canada (Minister of Citizenship and Immigration)*, 2009 FC 165, FCJ No 217 (QL) [*Diakité*] [JBOA Vol 1 at Tab 10]; and *Patel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1090, 221 ACWS (3d) 705 [JBOA Vol 1 at Tab 21].

claim on their own.⁵

5. Ordinarily, H&C Officers consider the BIOC in the context of a principle applicant who is an adult,⁶ typically a parent who does not have status in Canada.⁷ In the unique circumstance where the principal applicant is a child, the appropriate analysis must:

- a. be suited to the unique domestic and international legal obligations owing to the child;
- b. respond to the distinct needs and vulnerabilities of childhood; and
- c. see the applicant as a child first and foremost, and as a child, he or she requires special protection with regard to human rights norms in addition to the *Children's Convention*,⁸ for example, the *Convention Relating to the Status of Refugees* ("Refugee Convention").⁹

6. *Two Components to JFCY's submissions:* When the principal applicant for an H&C is a child, the BIOC principle requires a comprehensive application in (i) the procedural process and (ii) in the substantive analysis of decision making. The procedural process requires protectionary measures in that the BIOC must be the primary consideration; and the substantive analysis requires that a BIOC framework be applied in the decision making process.

7. *In the Procedural Process:* The H&C process is an important procedural safeguard that aims to ensure that Canada's humanitarian tradition is upheld in the immigration context, and to allow the consideration and assessment when an applicant would not otherwise fit into *IRPA*.¹⁰

⁵ See: *Weng v Canada (Minister of Citizenship and Immigration)*, 2014 FC 778, 29 Imm LR (4th) 152 [JBOA Vol 1 at Tab 25]; *Charlery (Designated Representative) v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 993, 108 ACWS (3d) 354 [JBOA Vol 1 at Tab 8]; Global Consultations on International Protection, *Refugee Children*, UNHCROR, 2002, 4th Mtg, UN Doc EC/GC/02/9 at paras 4-6 [JBOA Vol 2 at Tab 35].

⁶ Citizenship and Immigration Canada, Inland Process Manual 5: Immigrant Application in Canada Made on Humanitarian or Compassionate Grounds, available online, 2011-04-01 [IP 5 Manual]. Comment: the IP 5 Manual speaks to children as dependants and fails to account for a child who is the principal applicant [RBOA at Vol II, Tab 59].

⁷ *Kaneza*, *supra* note 4 at para 41 [JBOA Vol 1 at Tab 15].

⁸ Jason M Pobjoy, "A Child Rights Framework for Assessing the Status of Refugee Children" (2013) 4:7 University of Cambridge Faculty of Law Legal Studies Research Paper Series 1 at 3-4 [JBOA VOL 2 at Tab 40].

⁹ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954, accession by Canada 4 June 1969) [UNCRSR] [JBOA Vol 2 at Tab 33]; Committee on the Rights of the Child, *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UNCRCOR, 62nd Sess, UN Doc CRC/C/GC/14 at para 75 [CRC Comment No 14] [JBOA Vol 1 at Tab 30]; *Canada (Minister of Citizenship and Immigration) v Patel*, 2008 FC 747, [2009] 2 FCR 196 [JBOA VOL 1 at Tab 4].

¹⁰ *IRPA*, *supra* note 1 at s 25(1); IP 5 Manual, *supra* note 6 [RBOA at Vol II, Tab 59].

IRPA requires that the BIOC be taken into account in the H&C assessment when a child¹¹ is directly affected.¹² *IRPA* as a whole is to be applied and construed in a manner that, *inter alia*, ensures decisions made under it are consistent with the *Charter* and comply with international human rights instruments to which Canada is a signatory.¹³

8. The UN Convention on the Rights of the Child (*Children's Convention*),¹⁴ *Refugee Convention*, and their consequent guidelines, commentary and reports provide essential guidance for the interpretation of what is required when the principal applicant is a child under the BIOC framework,¹⁵ as *IRPA* does not otherwise define the meaning of BIOC.

9. *The BIOC is a fundamental principle of law*: This Honourable Court has held that Canadian laws must be interpreted to comply with Canada's international treaty obligations¹⁶ and that "(c)hildren's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society".¹⁷ The recognition of the inherent vulnerability of children and the importance of attention to their unique interests has consistent and deep roots in Canadian law and has been repeatedly recognized by this Honourable Court.^{18 19}

¹¹ IP 5 requires that the "BIOC must be considered when a child is under 18 years of age at the time the application is received.": see Citizenship and Immigration Canada, *The humanitarian and compassionate assessment: Best interests of a child*, (Canada: CIC) online: <<http://www.cic.gc.ca/english/resources/tools/perm/hc/processing/child.asp>> [IP5 BIOC] [JBOA VOL 1 at Tab 28]. The Federal Court has found that this clearly articulated provision in a publicly available ministerial guideline creates a legitimate expectation that an H&C Officer would consider the BIOC regardless of a child aging out between the time of filing the application and its consideration. See *Noh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 529 at para 65, 11 Imm LR (4th) 98 [*Noh*] [JBOA Vol 1 at Tab 20]; *Yoo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 343, 80 Imm LR (3d) 97 [*Yoo*] [JBOA Vol 1 at Tab 27]; *Kaneza*, *supra* note 4 [JBOA VOL 1 at Tab 15].

¹² *IRPA*, *supra* note 1 at s 25(1).

¹³ *Ibid* at s 3(3)(d) and 3(3)(f).

¹⁴ *Convention on the Rights of the Child*, 28 May 1990, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) [UNCRC] [JBOA Vol 1 at Tab 32].

¹⁵ *Pobjoy*, *supra* note 8 at 3-4 and 38-40 [JBOA VOL 2 at Tab 40].

¹⁶ *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 32, 1 SCR 76 [JBOA Vol 1 at Tab 5].

¹⁷ *Baker*, *supra* note 2 at para 67 [ABOA at Vol I Tab 13].

¹⁸ The importance of shielding children from psychological and physical harm, and safeguarding their unique position in Canadian society is demonstrated through a variety of legal measures, including the inherent *parens patriae* power of our courts, child welfare legislation in every province and territory.

¹⁹ *AB v Bragg Communications Inc*, 2012 SCC 46 at para 17, 2 SCR 567 [JBOA Vol 1 at Tab 1]; *R v DB*, 2008 SCC 25 at para 48, 2 SCR 3 [JBOA Vol 1 at Tab 22]; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 151, 2 SCR 181 [JBOA Vol 1 at Tab 2]; *Baker*, *supra* note 2 at para 67

10. *BIOC is “the” Primary Consideration:* Article 3(1) of the *Children’s Convention* provides that: “(i)n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (emphasis added).”²⁰ This is the only primary consideration provided for within the *Children’s Convention*. This primacy is consistently identified in the UNHCR and Committee on the *Children’s Convention* materials regarding the rights of children. In the context of Child Migration, the Committee on the *Children’s Convention* recently stated that:

“In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child’s or their parent’s detention, return or deportation,” and, “States should make clear in their legislation, policy, and practice that the principle of the child’s best interests takes priority over migration and policy or other administrative considerations.”²¹ [Emphasis added]

The Committee on the *Children’s Convention’s* Report regarding Canada’s compliance with the *Children’s Convention*, urged Canada, inter alia, to:

“Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes ...”, and, “the Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child and that immigration authorities be trained on the principle and procedures of the best interest of the child.”²² [Emphasis added]

11. To date, there has been no appellate level judicial consideration of the appropriate analysis to be undertaken when making H&C decisions where the child is the principle applicant. The current caselaw, based on H&C decisions where adults are the principal applicant and the child is a dependent, establishes that:

- a. The decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them; and where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.²³

[ABOA at Vol I, Tab 13]; *Gordon v Goertz*, [1996] 2 SCR 27 at para 44, 134 DLR (4th) 321 [*Gordon*] [JBOA Vol 1 at Tab 13].

²⁰ *UNCRC*, *supra* note 14 at art 3 [JBOA Vol 1 at Tab 32].

²¹ Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, UNCRCOR at paras 72-73 [JBOA Vol 1 at Tab 31].

²² *Ibid* at para 74 [JBOA Vol 1 at Tab 31].

²³ *Baker*, *supra* note 2 at para 75 [ABOA at Vol I Tab 13].

- b. The interests of the children is a factor that must be examined with care and weighed with other factors. An Officer's mere mention of children is not sufficient; to mention is not to examine and weigh.²⁴
- c. The unusual and undeserved or disproportionate hardship test has no place in the BIOC analysis, as it is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship.²⁵
- d. When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.²⁶

12. In *Baker*, an adult applicant in a refugee claim, this Honourable Court said the BIOC is not *the* primary consideration, however, lower courts have identified difficulties giving meaningful effect to the BIOC analysis. Significantly, in applying the existing analysis that has evolved, in the context of adult principal applicants, the Federal Court has said, as noted above, that the undeserved hardship test has no place in the BIOC analysis, as it is ill-suited when assessing hardship on children as children will rarely, if ever be deserving of hardship.²⁷

13. Children are at a unique disadvantage to demonstrate “hardship” and “establishment” in a manner consistent with the test applied to adult applicants. The decisions of *Diakité* and *Kaneza*,²⁸ clearly demonstrate how H&C Officers may fail to apply the BIOC test or inappropriately apply the BIOC test. In light of their particularly vulnerable situation, a child on

²⁴ *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 13, 212 DLR (4th) 139 [JBOA Vol 1 at Tab 18].

²⁵ *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9, 222 DLR (4th) 265 [Hawthorne] [JBOA Vol 1 at Tab 14]; *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at para 33, 212 ACWS (3d) 207 [Williams] [JBOA Vol 1 at Tab 26]; *EB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110 at para 11, 96 Imm LR (3d) 66 [JBOA Vol 1 at Tab 11]; *Sahota v Canada (Minister of Citizenship and Immigration)*, 2011 FC 739 para 8, FCJ No 927 [JBOA Vol 1 at Tab 23]; *Akyol v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1252 at para 16, FCJ No 134 (QL) [Akyol] [JBOA Vol 1 at Tab 3]; *Etienne v Canada (Minister of Citizenship and Immigration)*, 2014 FC 937 at para 8, FCJ No 982 (QL) [Etienne] [JBOA Vol 1 at Tab 12]; *Mangru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 779 at para 27, 2 Imm LR (4th) 105 [JBOA Vol 1 at Tab 19].

²⁶ *Hawthorne*, *supra* note 25 at paras 41 and 43 [JBOA Vol 1 at Tab 14]; *Williams*, *supra* note 25 at paras 63-64 [JBOA Vol 1 at Tab 26]; *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258 at para 63, 2 FCR 639 [Chandidas] [JBOA Vol 1 at Tab 7].

²⁷ *Supra* note 25.

²⁸ *Diakité*, *supra* note 4 [JBOA Vol 1 at Tab 10]; *Kaneza*, *supra* note 4 [JBOA Vol 1 at Tab 15].

his or her own will face significant challenges in securing appropriate resources to make an application,²⁹ and opportunities for judicial review are limited.³⁰

14. JFCY submits that the domestic caselaw³¹ and international law establish that when the child is in the uniquely vulnerable position of being a principal applicant, the BIOC is the appropriate test and it must be the primary consideration.

15. *Alternatively:* If this Honourable Court finds that the BIOC is not *the* primary consideration, JFCY's alternative submission is that the arguments before you require that all factors within the categories provided in IP 5 (Hardship, Establishment and BIOC),³² be viewed from the BIOC framework, as set out below.

16. *Substantive Decision Making Analysis – this applies to both our main and alternative position taken with respect to the Procedural process, as set out above:* The BIOC is not simply a “category” alongside Hardship and Establishment. The BIOC assessment is a substantive analysis that requires a flexible, adaptable and holistic approach and a contextually sensitive consideration of the applicant child's emotional, social, cultural and physical welfare needs.³³ This Honourable Court, in the context of an adult primary applicant, found that, while the BIOC is not determinative of an H&C outcome, it is an important factor that must be given substantial weight and that the decision maker must be alert, alive and sensitive to children's best interests.³⁴

²⁹ Jacqueline Bhabha, “David and Goliath: Children's Unequal Battle for Refugee Protection” in Jacqueline Bhabha, *Child Migration & Human Rights in a Global Age* (Princeton: Princeton University Press, 2014) 203 at 221 [JBOA Vol 2 at Tab 38].

³⁰ *Hawthorne*, *supra* note 25 at para 52 [JBOA Vol 1 at Tab 14].

³¹ *Williams*, *supra* note 25 [JBOA Vol 1 at Tab 26]; *Chandidas*, *supra* note 26 [JBOA Vol 1 at Tab 7]; *Akyol*, *supra* note 25 [JBOA Vol 1 at Tab 3]; *Kaneza*, *supra* note 4 [JBOA Vol 1 at Tab 15].

³² IP 5 Manual, *supra* note 6 [RBOA at Vol II, Tab 59].

³³ See *Legault*, *supra* note 24 says at para 20: the IP 5 guidelines are not binding but they “are accessible to the public, and the Supreme Court, in *Baker*, at para 72, qualified them as being “of great assistance” to the court.”; see also CRC Comment No 14, *supra* note 9 at paras 48-49 and 55 [JBOA Vol 1 at Tab 30]. BIOC content refers to content that is in IP5 BIOC, *supra* note 11 [JBOA Vol 1 at Tab 28]. *Gordon*, *supra* note 19 at para 44 [JBOA Vol 1 at Tab 13].

³⁴ *Baker*, *supra* note 2 at para 75 [ABOA at Vol I Tab 13]; *Legault*, *supra* note 24 at para 13 [JBOA Vol 1 at Tab 18]; *Hawthorne*, *supra* note 25 at para 32 [JBOA Vol 1 at Tab 14].

17. In order for an H&C officer to be properly "alert, alive and sensitive" to a child's best interests, they must have regard to the child's circumstances, from the child's perspective,³⁵ and consider the real life impact of a negative decision on a child.³⁶ Demonstration of being alert, alive and sensitive to the BIOC as required by *Baker*, has been described by the Federal Court as:

- a. **Alert:** by noting the ways in which those interests are implicated.
- b. **Alive:** by demonstrating that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably be determined.
- c. **Sensitive:** by clearly articulating the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief.³⁷

18. *Multitude of Factors:* IP 5 contains a list of factors that are often present for directly affected children in H&C applications, while significantly citing Madame Justice McLachlin's (as she was then) finding that, "The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty."³⁸

19. The specific elements of the BIOC analysis will inevitably be unique to each child and each child must be viewed as more than a component of a family that must be made whole.³⁹ A review of some key factors below will assist in clarifying why the BIOC must be *the* primary consideration and why all other considerations in an H&C assessment for principal child applicants must be made through the BIOC framework.

20. *Perceptions & Passage Time factor:* A BIOC analysis will recognize that the passage of time and perceptions of time are different for young people than for adults; a few months in the life of a child may acquire great significance; and years go by crystallizing situations that

³⁵ *Catholic Children's Aid Society of Metropolitan Toronto v CM*, [1994] 2 SCR 165 at para 25, 1994 CanLII 83 [CM] [JBOA Vol 1 at Tab 6]; *Akyol*, *supra* note 25 at para 18 [JBOA Vol 1 at Tab 3]; *Etienne*, *supra* note 25 at para 9 [JBOA Vol 1 at Tab 12]; *Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at para 35, FCJ No 1116 [JBOA Vol 1 at Tab 24]; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at para 11, 166 ACWS (3d) 352 [Kolosovs] [JBOA Vol 1 at Tab 17]; and CRC Comment No 14, *supra* note 9 at paras 43 and 53 [JBOA Vol 1 at Tab 30].

³⁶ *Chandidas*, *supra* note 26 at para 71 [JBOA Vol 1 at Tab 7].

³⁷ *Kolosovs*, *supra* note 35 at paras 9-12 [JBOA Vol 1 at Tab 17].

³⁸ IP5 BIOC, *supra* note 11 [JBOA Vol 1 at Tab 28]; *Gordon*, *supra* note 19 [JBOA Vol 1 at Tab 13].

³⁹ Jacqueline Bhabha, "Looking for Home: The Elusive Right to Family Life" in Jacqueline Bhabha, *Child Migration & Human Rights in a Global Age* (Princeton: Princeton University Press, 2014) 19 at 59 [JBOA Vol 2 at Tab 39].

become irreversible.⁴⁰ This will be especially true for a principal child applicant as the attachments they form, the significance of ties, and the level of commitment to things, such as school, will happen more quickly and more intensely.

21. *Establishment factor:* An assessment regarding a child's establishment in Canada must also be made with due regard for the unique realities of a child. What can be "expected" must be assessed from the perspective of the independent child applicant. Being dismissive about children doing only "what would be expected" is insufficient and the decision-maker needs to explain why evidence is insufficient.⁴¹ The child cannot be expected to be independent or entirely financially autonomous.⁴² This assessment of a child's attachment and/or settlement must include recognition that the goal is to create a durable solution⁴³ for the child and that children are expected to be a child first and foremost.

22. *Family and Wider Environment factor:* Existing bonds to people (including extended family) and places have an important psychological effect on developing and maintaining the child's inner stability and are a key factor in determining a child's best interests.⁴⁴ The preservation of the family environment encompasses the preservation of the ties of the child in a wide sense and applies to the extended family, such as grandparents, uncles/aunts as well as friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places.⁴⁵

23. *Hardship:* Considerations of hardship requires a decision maker to first, assess the harms that exist or may occur and second, to deny an H&C claim by a principal child applicant *only* when they can be effectively mitigated.⁴⁶ A child's experiences of harm are different than that of

⁴⁰ *CM*, *supra* note 35 at para 44; CRC Comment No 14, *supra* note 9 at para 93 [JBOA Vol 1 at Tab 6].

⁴¹ *Chandidas*, *supra* note 26 at paras 74-83 [JBOA Vol 1 at Tab 7].

⁴² *Diakit *, *supra* note 4 at paras 60-61 [JBOA Vol 1 at Tab 10].

⁴³ *UNHCR Guidelines on Determining the Best Interests of the Child*, UNHCR, 2008 at page 30 [UNHCR Guidelines] [JBOA Vol 2 at Tab 37]; CRC Comment No 6, *supra* note 3 at paras 79-89 [JBOA Vol 1 at Tab 29]; Executive Committee of the High Commissioner's Programme, *Children at Risk*, UNHCROR, 2007, 38th Mtg, UN Doc EC/58/SC/CRP.7 at para 17 [JBOA Vol 2 at Tab 34].

⁴⁴ UNHCR Guidelines, *supra* note 43 at para 71 [JBOA Vol 2 at Tab 37].

⁴⁵ CRC Comment No 14, *supra* note 9 at para 70 [JBOA Vol 1 at Tab 30].

⁴⁶ *Conka v Canada (Minister of Citizenship and Immigration)*, 2014 FC 985, FCJ No 1032 (QL) at paras 25-30 and 36 [*Conka*] [JBOA Vol 1 at Tab 9].

an adult.⁴⁷ Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm. To assess accurately the severity of harm and its impact on a child, it is necessary to examine the details of each case and to *adapt* the threshold for persecution to that particular child.⁴⁸ In the case of a child applicant, psychological harm may be a particularly relevant factor to consider⁴⁹ and requires expert reports from those who work with the child.⁵⁰ Children are more likely to be distressed by hostile situations, to believe improbable threats, or to be emotionally affected by unfamiliar circumstances. Memories of traumatic events may linger in a child and put him/her at heightened risk of future harm.⁵¹

24. *Non-refoulement*: A state must not return a principal child applicant to his country of origin where there are ‘substantial grounds for believing that there is a real risk of irreparable harm to the child,’⁵² unless those risks can be effectively mitigated.⁵³ When lower level risks exists, those risks must be given full attention and balanced against other rights-based considerations.⁵⁴

25. *In closing*: Protecting the rights of a child who is the principal applicant in an H&C and upholding the important international laws and norms for the special treatment of children under IRPA requires that a unique analysis be established making BIOC the primary consideration in both procedural and substantive decision making.

PART IV – SUBMISSIONS RELATING TO COSTS

26. JFCY does not seek costs and asks that costs not be ordered against them.

⁴⁷ *Kim v Canada (Citizenship and Immigration)*, 2010 FC 149 at para 58, [2011] 2 FCR 448 [JBOA Vol 1 at Tab 16]; *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UNHCROR, UN Doc HCR/GIP/09/08 at para 10 [UNHCR Asylum Guidelines] [JBOA Vol 2 at Tab 36].

⁴⁸ UNHCR Asylum Guidelines, *supra* note 47 at para 15 [JBOA Vol 2 at Tab 36].

⁴⁹ See *Kaneza*, *supra* note 4: the Federal Court found that an H&C Officer failed to consider the psychological harm to a unaccompanied minor [JBOA Vol 1 at Tab 15].

⁵⁰ UNHCR Guidelines, *supra* note 43 at 8, 57, 66, 68 [JBOA Vol 2 at Tab 37].

⁵¹ UNHCR Asylum Guidelines, *supra* note 47 at para 16 [JBOA Vol 2 at Tab 36].

⁵² CRC Comment No 6, *supra* note 3 at para 27 [JBOA Vol 1 at Tab 29].

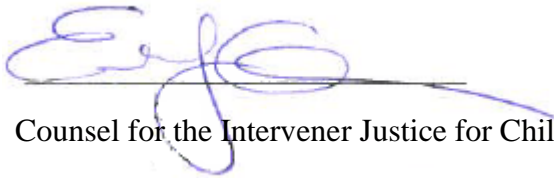
⁵³ *Conka*, *supra* note 46 at paras 31-36 [JBOA Vol 1 at Tab 9].

⁵⁴ CRC Comment No 6, *supra* note 3 at para 82 [JBOA Vol 1 at Tab 29].

PART V – ORDER REQUESTED

27. JFCY requests permission to present oral argument and that this Court grant the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of April, 2015.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

Counsel for the Intervener Justice for Children and Youth

PART VI – TABLE OF AUTHORITIES

TAB	Domestic Caselaw	Para
1.	<i>AB v Bragg Communications Inc</i> , 2012 SCC 46, 2 SCR 567.	9
2.	<i>AC v Manitoba (Director of Child and Family Services)</i> , 2009 SCC 30, 2 SCR 181	9
3.	<i>Akyol v Canada (Minister of Citizenship and Immigration)</i> , 2014 FC 1252, FCJ No 134 (QL).	11, 12, 14, 17
4.	<i>Baker v Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 SCR 817, SCJ No 39 (QL).	1, 9, 11, 16
5.	<i>Canada (Minister of Citizenship and Immigration) v Patel</i> , 2008 FC 747, [2009] 2 FCR 196.	5
6.	<i>Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)</i> , 2004 SCC 4, 1 SCR 76.	9
7.	<i>Catholic Children's Aid Society of Metropolitan Toronto v CM</i> , [1994] 2 SCR 165, 1994 CanLII 83.	17, 20
8.	<i>Chandidas v Canada (Minister of Citizenship and Immigration)</i> , 2013 FC 258, 2 FCR 639.	11, 14, 17, 21
9.	<i>Charlery (Designated Representative) v Canada (Minister of Citizenship and Immigration)</i> , 2001 FCT 993, 108 ACWS (3d) 354.	4
10.	<i>Conka v Canada (Minister of Citizenship and Immigration)</i> , 2014 FC 985, FCJ No 1032 (QL).	23, 24
11.	<i>Diakit� v Canada (Minister of Citizenship and Immigration)</i> , 2009 FC 165, FCJ No 217 (QL).	4, 13, 21
12.	<i>EB v Canada (Minister of Citizenship and Immigration)</i> , 2011 FC 110, 96 Imm LR (3d) 66.	11, 12
13.	<i>Etienne v Canada (Minister of Citizenship and Immigration)</i> , 2014 FC 937, FCJ No 982 (QL).	11, 12, 17
14.	<i>Gordon v Goertz</i> , [1996] 2 SCR 27, 134 DLR (4th) 321.	9, 18
15.	<i>Hawthorne v Canada (Minister of Citizenship and Immigration)</i> , 2002 FCA 475, 222 DLR (4th) 265.	11, 12, 13, 16
16.	<i>Kaneza v Canada (Minister of Citizenship and Immigration)</i> , 2015 FC 213, FCJ No 211 (QL).	4, 5,7, 13, 14, 23

17.	<i>Kim v Canada (Citizenship and Immigration)</i> , 2010 FC 149, [2011] 2 FCR 448.	23
18.	<i>Kolosovs v Canada (Minister of Citizenship and Immigration)</i> , 2008 FC 165, 166 ACWS (3d) 352.	17
19.	<i>Legault v Canada (Minister of Citizenship and Immigration)</i> , 2002 FCA 125, 212 DLR (4th) 139.	11, 16
20.	<i>Mangru v Canada (Minister of Citizenship and Immigration)</i> , 2011 FC 779, 2 Imm LR (4th) 105.	11, 12
21.	<i>Noh v Canada (Minister of Citizenship and Immigration)</i> , 2012 FC 529, 11 Imm LR (4th) 98.	7
22.	<i>Patel v Canada (Minister of Citizenship and Immigration)</i> , 2012 FC 1090, 221 ACWS (3d) 705.	4
23.	<i>R v DB</i> , 2008 SCC 25, 2 SCR 3.	9
24.	<i>Sahota v Canada (Minister of Citizenship and Immigration)</i> , 2011 FC 739, FCJ No 927.	11, 12
25.	<i>Segura v Canada (Minister of Citizenship and Immigration)</i> , 2009 FC 894, FCJ No 1116 (QL).	17
26.	<i>Williams v Canada (Minister of Citizenship and Immigration)</i> , 2012 FC 166, 212 ACWS (3d) 207.	11, 12, 14
27.	<i>Yoo v Canada (Minister of Citizenship and Immigration)</i> , 2009 FC 343, 80 Imm LR (3d) 97.	7
	<i>Weng v Canada (Minister of Citizenship and Immigration)</i> , 2014 FC 778, 29 Imm LR (4th) 152.	4
	Government Documents	
28.	Citizenship and Immigration Canada, <i>The humanitarian and compassionate assessment: Best interests of a child</i> , (Canada: CIC) online: < http://www.cic.gc.ca/english/resources/tools/perm/hc/processing/child.asp >.	5, 7, 15, 16, 18
	International Documents	
29.	Committee on the Rights of the Child, <i>General comment No 6 (2005): Treatment of unaccompanied and separated children outside their country of origin</i> , UNCRCO 39th Sess, UN Doc CRC/GC/2005/6.	4, 21, 23, 24
30.	Committee on the Rights of the Child, <i>General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)</i> , UNCRCOR, 62nd Sess, UN Doc CRC/C/GC/14.	5, 16, 17, 20, 22
31.	Committee on the Rights of the Child, <i>Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration</i> , UNCRCOR.	10
32.	<i>Convention on the Rights of the Child</i> , 28 May 1990, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991).	8, 10
33.	<i>Convention Relating to the Status of Refugees</i> , 28 July 1951, 189 UNTS 137	5

	(entered into force 22 April 1954, accession by Canada 4 June 1969).	
34.	Executive Committee of the High Commissioner's Programme, <i>Children at Risk</i> , UNHCROR, 2007, 38th Mtg, UN Doc EC/58/SC/CRP.7.	21
35.	Global Consultations on International Protection, <i>Refugee Children</i> , UNHCROR, 2002, 4th Mtg, UN Doc EC/GC/02/9.	4
36.	<i>Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees</i> , UNHCR, UN Doc HCR/GIP/09/08.	23
37.	<i>UNHCR Guidelines on Determining the Best Interests of the Child</i> , UNHCR, 2008.	21, 22, 23
	Secondary Sources	
38.	Jacqueline Bhabha, "David and Goliath: Children's Unequal Battle for Refugee Protection" in Jacqueline Bhabha, <i>Child Migration & Human Rights in a Global Age</i> (Princeton: Princeton University Press, 2014) 203.	13
39.	Jacqueline Bhabha, "Looking for Home: The Elusive Right to Family Life" in Jacqueline Bhabha, <i>Child Migration & Human Rights in a Global Age</i> (Princeton: Princeton University Press, 2014) 19.	19
40.	Jason M Pobjoy, "A Child Rights Framework for Assessing the Status of Refugee Children" (2013) 4:7 University of Cambridge Faculty of Law Legal Studies Research Paper Series 1.	5, 8

PART VII – STATUTORY PROVISIONS

<i>Immigration and Refugee Protection Act (IRPA) SC 2001 c.27</i>	
English	French
<p>Objectives — immigration</p> <ul style="list-style-type: none"> • 3. (1) The objectives of this Act with respect to immigration are <p>Application</p> <p>(3) This Act is to be construed and applied in a manner that</p> <p style="padding-left: 40px;">[...]</p> <ul style="list-style-type: none"> • (d) ensures that decisions taken under this Act are consistent with the <i>Canadian Charter of Rights and Freedoms</i>, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada; <p style="padding-left: 40px;">[...]</p> <ul style="list-style-type: none"> • (f) complies with international human rights instruments to which Canada is signatory 	<p>Objet en matière d’immigration</p> <ul style="list-style-type: none"> • 3. (1) En matière d’immigration, la présente loi a pour objet : <p>Interprétation et mise en oeuvre</p> <p>(3) L’interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :</p> <p style="padding-left: 40px;">[...]</p> <ul style="list-style-type: none"> • d) d’assurer que les décisions prises en vertu de la présente loi sont conformes à la <i>Charte canadienne des droits et libertés</i>, notamment en ce qui touche les principes, d’une part, d’égalité et de protection contre la discrimination et, d’autre part, d’égalité du français et de l’anglais à titre de langues officielles du Canada; <p style="padding-left: 40px;">[...]</p> <ul style="list-style-type: none"> • f) de se conformer aux instruments internationaux portant sur les droits de l’homme dont le Canada est signataire.
<p>Humanitarian and compassionate considerations — request of foreign national</p> <p>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 —</p>	<p>Séjour pour motif d’ordre humanitaire à la demande de l’étranger</p> <p>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</p>

<p>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.</p>	<p>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.</p>
--	---