TAB 1

PRRA and H&C Backlog Reduction Strategy

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19th Annual Immigration Law Summit – Day Two

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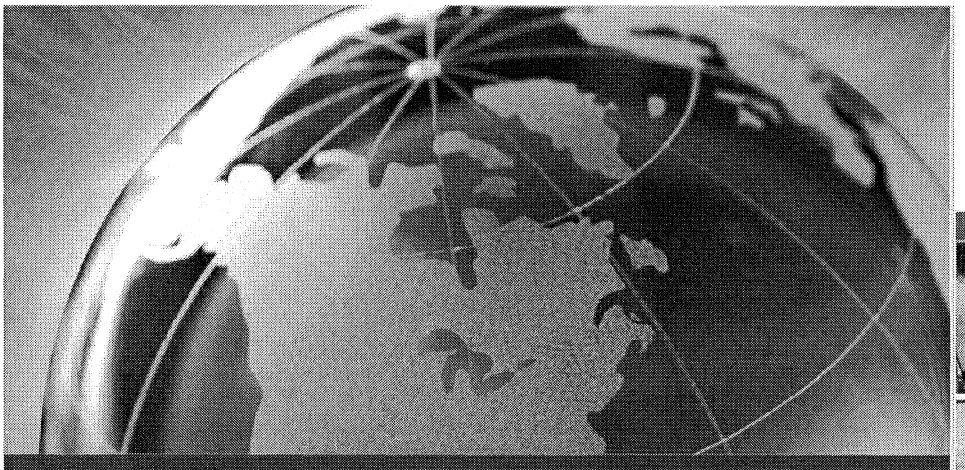

Citizenship and Immigration Canada

PRRA and H&C backlog reduction strategy

Canada

Background

- Implementation of the *Balanced Refugee Reform Act (BRRA)* brought important changes to Canada's asylum system.
  - Transfer of the bulk of CIC's PRRA function to the Immigration and Refugee Board (IRB) one year after *BRRA* comes into effect. CIC remains responsible for processing applications under A112(3) and A115(1).
  - Elimination of consideration of risk elements (A96 and A97) for H&C applications received on or after June 29, 2010. Assessment on country conditions that have a direct negative impact on applicants, on discrimination and on lack of critical medical/health care remains.
  - Concurrent H&C applications are no longer allowed
  - Implementation of the pilot project on CIC ministerial reviews and interventions before the IRB.

Backlog reduction strategy

What is it?

- Creation of a national PRRA and H&C inventory

Why?

- Obtain consistent processing times
- Complete processing of pending PRRA applications before the function is transferred to the IRB

Backlog reduction strategy (cont.)

Who is part of this strategy?

- All CIC inland offices
- All PRRA offices i.e. Toronto & Montreal
- New offices created:
  - Backlog Reduction Office in Vancouver (BRO-V)
  - Backlog Reduction Office in Montréal (BRO-M)
  - Backlog Reduction Office in Niagara Falls (BRO-NF)

Backlog reduction strategy (cont.)

What are the functions of each office?

- **BRO-V:** new centralized processing centre
  - All H&C and PRRA applications must be sent there
  - Role:
    - Triaging applications and identifying priority applications
    - Preparing files
    - Rendering decisions
    - Based on the distribution criteria, sending applications for processing to the network
  - Distribution criteria:
    - Processing capacity of each office
    - Other criteria such as province-specific particularities (e.g. medical issues, sponsorships)

Backlog reduction strategy (cont.)

- **BRO-NF/M and PRRA offices:**
  - ❑ Rendering decisions on H&C and PRRA applications as per capacity
  - ❑ Processing permanent residence applications (step 2)

- **Role of CIC Inland Offices:**
  - ❑ Rendering H&C decisions as per capacity
  - ❑ Processing permanent residence applications (step 2)

Backlog reduction strategy (cont.)

What is different from the former model?

- H&C applications will no longer be processed by the Case Processing Centre in Vegreville (CPC-V). They will be processed at BRO-V.
- BRO-V manages a national PRRA and H&C inventory.
- Capacity will be the key criterion for referring a case to the network, ***not*** the applicant's residence.
- All applications for **renewal** of temporary residence (visitor, work or study permit) must still be sent to CPC-V. They **should not** be included with H&C applications.
- **New temporary resident applications** (work or study permit) that are **linked to Approval in Prinicple (AIP)** of an H&C application can be submitted to BRO-V to be matched up.

Backlog reduction strategy (cont.)

Where to send PRRA and H&C applications and additional submissions?

- H&C Applications are sent to BRO-V by mail.
- PRRA applications are sent to BRO-V by mail, fax or email.
- BRO-V's coordinates are:

Address: CIC – Backlog Reduction Office

1148 Hornby Street

Vancouver BC V6Z 2C3

Fax number: 604-666-1116

E-mail: cic-vancouver-BRO-BRA@cic.gc.ca

- All submissions and additional documentary evidence must be sent to BRO-V via mail, fax or e-mail (no acknowledgement of receipt). CIC will render its decision based on the information recorded on the file at the time of review.

TAB 1a

H & C Applications and Medical Issues

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19th Annual Immigration Law Summit – Day Two

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING PROFESSIONAL DEVELOPMENT

H & C APPLICATIONS AND MEDICAL ISSUES

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1. Inadequate Medical Treatment as an H&C Factor

Inadequate medical treatment in the country of origin is a ground that can lead an officer to conclude that an applicant faces unusual, undeserved or disproportionate hardship if returned. The current version of Operational Manual IP5 states (at section 5.16):

> **Inability of a country to provide medical treatment**
>
> If an applicant alleges he will suffer hardship if returned to his country of origin because of a medical condition, the officer must be satisfied that the applicant requires the treatment, and that the treatment is not available in the applicant's country of origin.
>
> The onus is on the applicant to provide the following:
>
> - Documentary evidence from the applicant's doctor(s) confirming the applicant has been diagnosed with the condition, the appropriate treatment, and that treatment for the condition is vital to the applicant's physical or mental wellbeing; and
>
> - Confirmation from the relevant health authorities in the country of origin attesting to the fact that an acceptable treatment is unavailable in the applicant's country of origin.
>
> For cases involving a suspected or known health inadmissibility (A38), please refer to Section 5.25 "*Applicants with inadmissibilities*".
>
> In order to substantiate an applicant's claims, the officer may wish to access reliable, unbiased internet resources for information on medical care available in the country of origin, for instance:
>
> - UK Home Office Country of Origin reports: http://rds.homeoffice.gov.uk/rds/country_reports.html
> - World Health Organization: http://www.who.int/en/
> - UNAIDS (for HIV cases): http://www.unaids.org/en/CountryResponses/Countries/default.asp
> - International Organization for Migration: http://www.iom.int/jahia/jsp/index.jsp.

Client consent may be required if case specific information is requested from third parties.

Evidence gathered to counter the applicant's submissions must be disclosed to the applicant and an opportunity for reply provided.

If there are medical services readily available in the country of origin that the applicant could access, that fact cannot be ignored when conducting an analysis of hardship. The applicant cannot refuse to access those services in order to support his claim for hardship in the H&C application — the hardship must be assessed by the officer based on all of the evidence of services available to the applicant. If the applicant acknowledges that treatment is available but submits that it is at a prohibitively high cost, or that the treatment itself, hospital conditions, availability of medicines, etc., are inadequate or substandard, these factors, if substantiated, should be taken into account and weighed in the balance with the other H&C factors. Positive consideration may still be given in such cases if other positive factors are evident in the applicant's submissions.

If the officer is satisfied that because of a medical condition the applicant would suffer hardship if returned to his country of origin, this and other positive factors (evidence of establishment in Canada, lack of family ties in the country of origin, best interests of the child considerations, etc.) should be weighed against any negative factors, such as the existence of an inadmissibility. Where positive consideration may be warranted, but there exists a serious inadmissibility, i.e. an inadmissibility that falls under Sections A34, A35, A36(1), or A37, or where the applicant is inadmissible under Section A38, the officer should forward the case to the Director of Case Review, NHQ for a Stage 1 assessment. See Section 10, *Referral to NHQ for procedures.*

A) Evidence from client's health care providers in Canada

It is good practice for counsel to write to a client's health care providers in Canada to request evidence (as opposed to having the client request it) in order to ensure their letter includes all of the relevant information. As suggested in the above passage from IP5, this evidence should include:

- the diagnosis
- the required treatment
- the health consequences if the required treatment is not available
- if applicable, the health consequences if a less satisfactory form of treatment is relied upon in lieu of the required treatment

In many cases (for example, HIV or mental health), while the ideal treatment may not be available in the country of origin, some type of treatment often is. In those cases, it will be important to specifically request the Canadian health care provider to address the consequences for the client of having to rely on the less satisfactory form of treatment.

For example, anti-retroviral treatment for HIV is now available free-of-charge in many places in the developing world. However, the specific country evidence may indicate that only older medications are available, or that important routine

blood testing is not available. It is also common in poorer countries with only some access to anti-retroviral treatment that there will be frequent shortages of medications. In these cases, the Canadian health care provider should comment on how a less advanced form of treatment, or inconsistent access to treatment would impact the health condition.

B) Evidence regarding treatment options in the country of origin

It can often be difficult to obtain accurate up-to-date information on current treatment options in the country of origin. However, this evidence is critical and as much effort as possible should be put into this task.

** NOTE: Canadian medical professionals are almost never in a position to give evidence on treatment options in a country of origin, unless they have specific expertise. H&C officers will be quick to seize on the fact that counsel has relied only upon the opinion of a Canadian doctor to say health care is inadequate in the country of origin. For this reason, I specifically request Canadian health care providers to refrain from commenting on the health care situation in the country of origin in order to bolster their own credibility.

As much as possible, the foreign medical evidence should speak to the client's specific situation and address issues such as:

- the cost of treatment
- barriers to accessing treatment such as geography and waitlists
- consistency in the supply and quality of treatments / prescription medications

Sources of Foreign Medical Evidence

In addition to the sources noted in IP5 above, counsel should consider approaching:

- NGOs operating in the country of origin that provide health care or social services assistance to people with the medical condition (e.g. national diabetes associations, cancer societies, AIDS service organizations, etc.). For HIV/AIDS cases, the website www.aidsmap.com has lists of the HIV/AIDS NGOs operating in various countries
- private physicians working in the country of origin
- Canadian organizations doing development work in the country of origin (e.g. the Stephen Lewis Foundation for HIV cases)
- media reports and other internet sources

In my experience, and for obvious reasons, the governmental health authorities in the country of origin are often reluctant to provide evidence which demonstrate inadequate health care.

Note on UNAIDS Country Progress Reports

UN member countries submit periodic reports to UNAIDS to update their progress on fighting HIV/AIDS. These reports are referred to as "Country Progress Reports" and "National Composite Policy Indices". It should be noted that these reports are authored by the national government of the relevant country for presentation to the United Nations and in other international forums. I have argued that because of the political nature of these reports, they ought not to be taken as purely objective evidence of the HIV/AIDS situation in the country of origin.

Note on Canadian medical officer opinions

Some H&C officers obtain opinions from Canadian medical officers (at visa offices or Health Management Branch in Ottawa) on the availability of medical treatment in the country of origin. This evidence should be disclosed by the officer prior to a decision as extrinsic evidence. In my experience, these opinions are rarely nuanced, and rarely address issues such as the specific forms of treatment available, cost of treatment and other barriers to accessing treatment. They can be countered with expert evidence specifically tailored to your client.

C) Non-medical considerations

Many medical conditions result in hardship for clients that extends beyond the strict confines of health care. The obvious example is discrimination and stigma faced by persons living with HIV/AIDS. Clients with mental health issues may also face serious hardship in the form of social ostracism and discrimination. Counsel should not neglect to address these issues and should inquire with clients and/or experts as to how they would expect to be mistreated because of their medical condition.

In making these arguments, it may also be important to address how a client's medical condition would become known to their family, in the community, etc. In this regard, it may be important to obtain evidence and/or make submissions on:

- deficiencies in doctor-patient confidentiality in the country of origin
- any physical manifestation of the medical condition that would lead others believe the person had a certain illness
- whether all patients with a particular illness would access the same medical facility and therefore be suspected of having the medical condition simply by being seen attending that place

2. Medical Inadmissibility and H&C Applications

Rule of Thumb: The greater the medical hardship or the strength of the H&C application generally, the more likely your client will avoid medical inadmissibility. Never dissuade a client with a real medical hardship or a strong H&C application from applying simply because of medical inadmissibility considerations.

A) Medical Inadmissibility for Excessive Demand

CIC considers an applicant medically inadmissible under s. 38(1) of the Act if the applicant's health condition might reasonably be expected to cause an "excessive demand" on health or social services. "Excessive demand" is defined in the Regulations as being above the average per capita cost of these services for Canadians. This figure is published by the Canadian Institute for Health Information (CIHI) on an annual basis. The latest figure, for 2010, is **$5,505** per year. Fairness letters from CIC officers often erroneously quote figures from previous years.

A preliminary finding that your client is inadmissible for excessive demand may be challenged. Although outside the scope of this panel, counsel will want to consider:

- the actual health costs for your particular client (as opposed to those generally with the medical condition)
- the availability of private health insurance, particularly where the excessive demand is caused by high prescription drug costs (see *Companioni v. MCI*, 2009 FC 1315)
- if the excessive health costs are not currently incurred but are anticipated, expert medical evidence may demonstrate that the costs will come outside the 5 or 10 year windows contemplated in the Regulations

B) Changes in Processing of H&C Applications with Known Inadmissibilities

Under changes to IP5 published in August 2009, a known or suspected medical inadmissibility (or any inadmissibility) is now to be taken into account at the same time that a first stage decision is made. This is a change from previous practice when inadmissibilities would generally only be considered after a positive first stage decision.

The general idea is that the medical inadmissibility will be balanced against the H&C considerations in the application. If it is determined that the H&C factors

are sufficient to overcome the medical inadmissibility, a waiver will be granted on H&C grounds. However, because local CIC officers do not have the delegated authority to grant H&C waivers from medical inadmissibility (as they do for other grounds such as financial inadmissibility), IP5 now dictates that H&C applications are to be transferred to the Director of Case Review at Case Management Branch at NHQ for first stage decisions where the local officer believes that the H&C factors may warrant a waiver.

Therefore, the general process, according to IP5, for H&C applications with a known or suspected medical inadmissibility is now:

1) **If the local CIC office suspects there is a medical inadmissibility, the applicant is sent for an Immigration Medical Examination (IME) if one has not already been done in the context of the H&C application.**

2) **Based on the result of the IME and the opinion of the medical officer, the local CIC office makes a preliminary determination on the medical inadmissibility and sends a fairness letter to the applicant.**

3) **The applicant can respond with evidence demonstrating there is no medical inadmissibility, or can acknowledge the inadmissibility and request a waiver from the inadmissibility on H&C grounds or, in the alternative, the issuance of a 3-year a Temporary Resident Permit.**

4) **If the local CIC office upholds the medical inadmissibility determination, and believes the H&C considerations may warrant a waiver, the H&C file is forwarded to NHQ for a simultaneous first stage decision and waiver decision.**

5) **NHQ makes the first stage decision. If positive, it will also grant a waiver from the medical inadmissibility (and any other applicable inadmissibility). If negative, NHQ can recommend the issuance of a Temporary Resident Permit. (The time to process at NHQ varies but generally takes at least 8 months or more.)**

6) **NHQ returns the file to the local CIC office to advise the client of the decision.**

Despite the August 2009 change in policy, I have continued to see PRRA officers making positive first stage decisions despite an apparent medical inadmissibility. However, as PRRA officers are phased out of H&C decision-making under the *Balanced Refugee Reform Act*, it seems likely that NHQ exclusively will make first stage decisions whenever there is a known medical inadmissibility.

The process for referral to NHQ is outlined in IP5 (at sections 5.25 and 10):

Upon request, officers may grant an exemption from inadmissibility if ... they are of the opinion that it is justified by H&C considerations; and they have the delegated authority to grant the exemption. If the officer is of the opinion that the H&C considerations might justify an exemption but they do not have the delegated authority to grant the exemption, the entire case should be forwarded to the Director of Case Review at NHQ for assessment (see Sections 4.2, Delegated authorities and 10, Referrals to NHQ. , If the officer believes that H&C factors are sufficient to justify an exemption and if the inadmissibilities fall under A34, A35, A36(1), A37 or A38, the case should be forwarded to NHQ for consideration. In order to avoid situations where there is more than one decision-maker on file (when the applicant or officer, on their own initiative, requests exemptions and both a CIC officer and NHQ are delegated), the higher authority will assess both exemptions.

(...)

Cases involving a suspected or known health inadmissibility (A38)

Medical results may already exist in the applicant's file. These may alert an officer to a potential inadmissibility. However, no decision on medical inadmissibility should be made without medical results specific to an application for permanent residence. Results of a temporary residence medical examination may not be used to refuse an application for permanent residence.

No Stage 1 approval can be rendered without all known inadmissibilities considered and assessed, including health inadmissibilities (Quebec cases are an exception, see Section 13.3).

If there are no medical results available but the officer suspects a medical inadmissibility, whether at Stage 1 (see Section 11.7, Health inadmissibility) or Stage 2 (see Section 16.6, Health inadmissibility (A38) discovered at Stage 2) of the process, the officer must send a letter to the applicant instructing them to report to a Designated Medical Practitioner for a medical examination [R30(1)(d)]. The delegated authority at NHQ will not contact provincial authorities directly on medically inadmissible cases. Therefore, consultation with the provincial health authorities should be done at the regional level. The results of the consultation should be included as part of the referral package for NHQ.

If provincial health authorities have been consulted and do not favour granting the exemption, the delegated authority must consider this position when weighing all the factors.

It is the responsibility of each regional office to develop the liaison procedures with their provincial health authority counterparts.

Medical officers' opinions and provincial health authorities' opinions are considered extrinsic information (see Section 6, Definitions). If the applicant is the subject of a medically inadmissible opinion they should, therefore, be informed of such and be given an opportunity to make submissions on the matter.

For cases involving an inadmissibility under excessive demand on social services [A38(1)(c)], please see OB 063 dated September 24, 2008, and OB 063B dated July 29, 2009.

10. Procedures: Referrals to National Headquarters

The case should be forwarded to the Director of Case Review at NHQ:

- if it involves inadmissibilities A34, A35, A36(1), A37 or A38; **and**
- where, in the officer's opinion, the H&C factors **might justify an exemption**.

The Director will assess the entire case and determine whether an exemption regarding the inadmissibility and eligibility requirements is justified.

Note: The Director of Case Review does not communicate directly with the client or their representative. The Director's role is to examine the application to see if an exemption from the inadmissibility is warranted. Carriage of the file and communication with the client as well as finalization of the application remain the responsibility of the forwarding office.

Below are tables which illustrate the procedures to follow for each delegated authority:

Process for the CIC Officer	
Steps	**Action**
1	Ensure that applicant is indeed inadmissible under A34, A35, A36 (1), A37 or A38.
2	In keeping with procedural fairness, send a letter to the applicant to advise them of the suspected inadmissibility and provide them with an opportunity to make submissions to include in the information for NHQ. Review reply from client to ensure applicant is still inadmissible prior to sending the package to NHQ.
3	Prepare a package for the Director of Case Review containing copies of relevant documents for H&C decision-making. It should include: • a brief factual case summary (see Appendix C for template). Detailed assessment is not required because the delegated decision-maker must still review the case in its entirety; General guidelines to write the case summary: o be objective (i.e. use neutral terms and avoid comments on the credibility of the information, do not record your opinions or interpretations of the facts, do not include a recommendation); and o use point form whenever possible. Some situations may warrant more complete notes (e.g. for issues which are crucial to the decision or where there is a complicated history and several parties involved); a copy of the entire H&C case file including any submissions related to the case; • any correspondence between CIC and the applicant as well as notes from an interview with the applicant regarding the application; • if the case involves a health inadmissibility: o a medical notification; o the client's submissions following the procedural fairness letter; o the results of consultations with the provincial/territorial health authorities, when required by the province or territory, or a statement confirming that the province or territory

	does not require a consultation; o detailed information on the medical condition and the associated costs (this may be available from the Health Management Branch). This information should be disclosed to the applicant to allow them an opportunity to respond prior to referring the case to NHQ; o for cases involving A38(1)(c), the officer's assessment (see Appendix G); o if the applicant states that treatment is not available in their country of origin and the officer has information to the contrary (e.g. obtained from the responsible visa office), this information should also be forwarded, after disclosure to the applicant to allow them an opportunity to respond. • for Quebec cases (see Section 13), if available, the selection result from the *Ministère de l'Immigration et des Communautés culturelles* (MICC); • a conviction certificate and any police/intelligence report (e.g. a CBSA file containing police reports, Correctional Services reports or Canadian Police Information Center reports). This information should be disclosed to the applicant to allow them an opportunity to respond prior to the case referral to NHQ; expert evidence (i.e. a report from a health care professional explaining how being removed from Canada would affect the applicant's health and well-being); • if risk factors are cited (in applications received before June 29, 2010) and the PRRA officer gathered information resulting from the research, these documents should be included in the package to NHQ); • if the applicant is awaiting a decision on a Ministerial Relief request, this should be flagged in the case summary; and • other relevant documents in the file (e.g. if new information becomes available to the officer after the package is referred to NHQ, the officer must advise NHQ and send the new information). If the applicant was a refugee claimant who was excluded from refugee protection by the RPD, under Article 1F(a), (b) or (c) of the Convention Relating to the Status of Refugees, the officer must reach a conclusion as to whether the exclusion equates to an inadmissibility under IRPA (refer to Section 5.25 *Inadmissible applicants*). Please include this analysis in your summary sent to the Director, Case Review. Any extrinsic evidence should be forwarded to CMB along with the file and an indication of whether any of it has already been disclosed to the client.
4	Indicate in FOSS when the application has been forwarded to NHQ for consideration and specify the date of the referral. Officers should: • update CS screen (APL remarks) and if applicable insert a remark in the appropriate Work in Process (WIP) Event

	screen.
5	Receive decision from the delegated authority at NHQ.
6	Enter the decision in the FOSS APL screen. If an exemption has been granted, the officer should enter the following remark, "An exemption is hereby granted from the inadmissibility under [provide Section or Subsection] of the IRPA for [name of person(s)]". If an exemption has not been granted, the officer should enter the following remark, "An exemption is hereby not granted from the inadmissibility under [provide Section or Subsection] of the IRPA for [name of person(s)]".
7	Send a letter to inform the applicant of the decision-maker's decision. See the template letters in Appendix D of this chapter.
8	If the exemption is granted, the application proceeds to Stage 2 – Assessment of the permanent residence application.
9	If the client makes an application for leave and judicial review, the local office should: • forward the request from the Federal Court for a Rule 9 or Rule 17 (to the decisionmaker at NHQ along with the actual refusal letter which was sent to the client). See http://laws.justice.gc.ca/eng/SOR-93-22/FullText.html • The record will be prepared at NHQ, where the decision was made.

Process for the Director of Case Review (for inadmissibilities A36(1) and A38)	
Step	**Action**
1	Receive the H&C application package from the CIC officer.
2	Determine whether the file is at Stage 1 or Stage 2: **No Stage 1 Decision:** If client has a **known inadmissibility,** then the local office has no authority to make a positive Stage 1 decision and the Director, Case Review must assess whether there is (a) sufficient H&C grounds to warrant a positive Stage 1 decision and if yes, then also (b) assess whether there is sufficient H&C to warrant granting an exemption. **Note:** Quebec cases with a known medical inadmissibility need to be done in two steps. The Director Case Review first decides whether there is sufficient H&C grounds to warrant a positive Stage 1 decision. If yes, the Director, Case Review then informs the local office that they should proceed to contact MICC regarding the issuance of a CSQ and to provide any costing information. This can be done by email – no separate decision is required. Once MICC's input is received at the local office, it should be forwarded to the Director, Case Review who will then examine the case in more detail and write a final decision on whether or not to grant a waiver of the medical inadmissibility. See also Appendicies H&I. **Stage 1 Decision taken:** If the client already passed Stage 1 and the inadmissibility was revealed at Stage 2, then the Director, Case Review decides only on the exemption(s) in question.
3	Review all material submitted by the applicant. **Note:** If the H&C factors do not justify the exemption, the Director

	assesses any risk factors cited by the applicant
4	Render a decision after weighing all the information submitted. **Note:** For cases in which more than one inadmissibility has been identified, the Director, Case Review must address whether the waiver (if granted) applies to each/all inadmissibilities (e.g. client inadmissible pursuant to both A39 and A38).
5	Prepare reasons for the decision, taking into consideration all the relevant information in the file, including recent FOSS entries.
6	Convey the decision to the forwarding office.

C) Arguments to Consider Making when Requesting a Waiver from Medical Inadmissibility

Each case will turn on its own facts and counsel will always want to highlight the general H&C considerations in a client's application. It is also important to keep in mind that the waiver decisions are made at a very high level, by the Director of Case Review, and in my experience the evidence is very carefully scrutinized. I have made successful arguments at the waiver stage along the following lines:

- it would be unfair and even perverse to refuse the application on the basis of excessive demand when the H&C considerations in the client's case largely involve inadequate health care in the country origin

- the cost of the client's care is only minimally above the excessive demand threshold

- the cost of the client's care is less than for those with the same medical condition (either because of the severity of the condition, or because the client's physician has indicated the client has been highly diligent in following treatment advice)

- the issuance of a 3-year TRP would increase the period of family separation where there are overseas dependants who the applicant would like to sponsor – a waiver would permit the client to be landed immediately and to apply to sponsor the dependants in the Family Class rather than waiting some 4 years or more to be landed in the Permit Holder Class (the 3-year TRP period plus processing time of the Permit Holder Class application)

- the issuance of a 3-year TRP would continue to disqualify the applicant from accessing benefits only available to permanent residents such as student loans or tuition rates for domestic students (as opposed to international)

- the client has avoided other forms of reliance on public funds (such as social assistance) and/or the client has consistently paid into the public purse through the income tax system

- the client has volunteered to assist others with the same medical condition or otherwise made positive community contributions which have lessened the burden on the public system

D) Some Notes on Temporary Resident Permits

If your client is refused a waiver, NHQ may direct the local office to offer a Temporary Resident Permit. Some things to be aware of are:

- the TRP is not issued automatically; the refusal letter received by the client will be accompanied by another letter inviting the client to apply for a TRP to the local office within a certain timeframe; the client MUST do this

- clients should be counselled to be diligent to always apply for a TRP renewal prior to the expiry date; if the TRP lapses, the client will lose eligibility to later apply in the Permit Holder Class

- clients holding these TRPs for medical inadmissibility **are eligible for OHIP** as of changes made by the Ontario government in summer 2009

- after being on the TRP for three years, the client can apply for permanent residence again in the Permit Holder Class; this application will involve a new Immigration Medical Examination, but as long as the client is not inadmissible on any new ground, their medical inadmissibility will not bar a grant of permanent residence

- overseas family members cannot be included as accompanying dependants in a Permit Holder Class application

TAB 1b

Humanitarian and Compassionate Applications after *BRRA* Amendments

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19th Annual Immigration Law Summit – Day Two

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Humanitarian and Compassionate Applications after *BRRA* Amendments
Geraldine Sadoway, Staff lawyer, Parkdale Community Legal Services
November 2011

Section 25 as amended by *Balanced Refugee Reform Act*, implemented June 29, 2010:

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.

Payment of fees

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

Exceptions

(1.2) The Minister may not examine the request if the foreign national has already made such a request and the request is pending.

Non-application of certain factors

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

Provincial criteria

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

2001, c. 27, s. 25;
2008, c. 28, s. 117;
2010, c. 8, s.

Introduction

For the most part, counsel will be assisting clients making applications pursuant to section 25 of the *IRPA,* both for applications from within Canada and applications by foreign nationals who are outside of Canada.

- If applicant is in Canada, the Minister **must consider** the application.
- If applicant is outside of Canada, the Minister **may consider** the application.

This means that not everyone outside of Canada has the right to a decision on an H&C application. There is nothing in the legislation that indicates when an application made outside of Canada to a visa officer will be considered. However when this amendment was made there was an understanding that H&C applications by **family members**, who cannot be sponsored – such as over-age dependants, *de facto* dependants, or dependants who are excluded from the family class under section 117(9)(d) would be considered (if an application is made) pursuant to section 25 of *IRPA.* And it is clear that the Federal Court of Appeal sees this jurisdiction of the Minister to consider H&C grounds, as an answer to some of the restrictions on the processing of family class immigrants that came in with *IRPA*: see *De Guzman v. Canada (MCI)* 2005 FCA 436.

There are departmental guidelines for inland and overseas processing of H&C applications. The inland processing H&C guidelines were completely re-written in April of 2011 [IP5]. The guidelines for the overseas processing of H&C applications [OP4] were last amended in 2008 and consist of about 30 pages, as compared to IP5 with over 100 pages. The departmental guidelines are available on line: **http://www.cic.gc.ca/english/resources/manuals.**

Inland processing of H&C after *BRRA*:

The $550 processing fee:

The principal changes brought about by BRAA are the specific requirement of paying the $550 application fee, and the issue of what can be argued under the heading of "hardship". The provision in section 25(1.1) is a direct response to the case of *Nell Toussaint et al v. MCI,* 2011 FCA 146, in which the FCA overturned the decision of Snider J who had rejected applicants' challenge to the $550 fee: the applicants in *Toussaint* had argued that section 25 itself could permit an exemption from the requirement of paying the Snider's decision; . Sharlow J. states at paragraph 55,

> I conclude that on a proper interpretation of subsection 25(1) of the *IRPA* the Minister is obliged to consider a request for an exemption from the requirement in section 307 of the *Regulations* to pay a fee for processing an application under subsection 25(1)...

However, the FCA restricted their decision to section 25 as it read prior to the *BRRA* amendments. The *Charter* arguments based on discrimination due to poverty, in that poor persons are unable to file the H&C application because of the fee of $550, was rejected by the FCA and on November 3, 2011 the SCC refused leave to appeal this part of the decision. So this whole matter of the barrier of the fee will continue to prevent many people in Canada from seeking to regularize their immigration status through the H&C provisions of section 25(1). It is

possible that a new case, challenging the 25(1.1) amendment could be brought to the Federal Court on the basis of the FCA decision in *Toussaint*.

Hardship v. Persecution

The other significant change under the *BRRA* is found in section 25(1.3): the exclusion of consideration of "**factors**" which are considered under sections 96 and 97(1), although "hardships" must be considered. The most significant changes that I have noted in the re-written IP5 guidelines relate to the issue of "hardships" and, in particular, the specific provisions concerning **health risks** and the more detailed treatment of **discrimination**. Both of these would be assessed as to whether they could qualify as "unusual, undeserved or disproportionate hardship."

IP5.16 includes in the examples of "hardships" that may be considered, "lack of critical medical/health care, discrimination that does not amount to persecution, adverse country conditions that have a direct negative impact on the applicant".

Health or medical risk is specifically excluded from the section 97 protection provisions under section 97(1)(b)(iv). Health risk may be very significant and even life-threatening. The Federal Court has found that health risk (including an immediate risk to life based on inadequate treatment available to the person in their own country), is appropriately dealt with by way of a humanitarian and compassionate application: see *Covarrubias et al v. Canada (MCI)* 2005 FC 1193, and *Covarrubias et al v. Canada (MCI)* 2006 FCA 365.

As has been established by case law, fear of discrimination or harassment is not sufficient to obtain refugee protection. Discriminatory treatment is not considered persecution for the purpose of section 96, although if it reaches a certain severity and the harm feared is very serious, discriminatory treatment can support a finding of well-founded fear of persecution.

However if fear of discrimination does not amount to persecution, it may constitute "unusual, undeserved or disproportionate hardship" for the purpose of an H&C application. Thus we might see persons refused protected person status on grounds that they are only experiencing discrimination, not persecution. These could be cases of sexual orientation, or of specific ethnic groups, such as the Roma groups being harassed and threatened in various parts of Europe – Hungary, Romania, Czech Republic and Slovakia.

The same facts that are found not to be grave enough for a successful claim to protection, could nonetheless result in a successful humanitarian application. This is the position our office is taking when we file H&C applications for refused refugees if the Board finds that they are facing discrimination, not persecution in their country of origin. All of the jurisprudence developed in recent years by the Federal Court on this issue therefore applies to these cases: *Pinter v. Canada (MCI)* 2005 FC *;Walcott v. Canada (MCI)* 2010 FC 456; *Damte v. Canada (MCI)* 2010 FC 456; *Sahota v. Canada (MCI)* 2007 FC 651;*Ramirez v. Canada (MCI)* 2006 FC 1404; *Ariyatnam v. Canada (MCI)* 2010 FC 608; *Selvarasa v. Canada (MCI)* 2008 FC 1125.

Unfortunately, despite the new IP5 guidelines on this issue, if everyone in the discriminated group experiences the same type of treatment, some officers will find that the discrimination is not "unusual or disproportionate" for members of that group – such as LGBT persons fearing

harsh and discriminatory treatment in certain countries. So the logic is that you are not a refugee because you only fear discrimination, but then you can't be accepted on H&C grounds because everyone like you is also facing discrimination, so it isn't "unusual, undeserved or disproportionate"!

Restrictive interpretation of Section 25(1) generally:

Despite the very broad discretion in section **25(1)** when enacted in 2002 [although this has been narrowed considerably by subsequent amendments to section 25], the *Regulations* still provide that if a person is exempted from the requirement of applying for an immigrant visa from outside of Canada, that person may be landed if he or she is not **inadmissible.** Section 66 of the *Regulations* **[R66]** provides that a foreign national in Canada must make a request for consideration under section 25 of *IRPA* **in writing**, accompanied by an application for landing [this also includes the cost recovery fee of $550 per adult and $150 per child]. **R68** provides that if an exemption is granted to a person in Canada under section 25(1) from paragraphs **R72**(1)(a)(c) and (d), they may be landed in Canada if they meet the requirements of section 72(1) (b) and (e) and if they or their family members are not **inadmissible**. **R65** provides that if the inadmissible person has been issued a Temporary Resident Permit under s. 24 of the *Act*, they might be landed after **3 years**, if their inadmissibility is based on **health grounds**, and after **5 years** if their inadmissibility is based on **criminality or any other ground of inadmissibility**, as long as they have not become inadmissible on any ground since the permit was issued.

Scope of discretion under section 25(1) of *IRPA*:

Thus, although the wording of section 25(1) as first enacted, appears to allow for a very broad discretion to the Minister to land someone if there are humanitarian and compassionate reasons to do so, and to exempt that person from **any requirement** of regulations or the *Act,* the Regulations have consistently been applied to restrict the interpretation of section 25(1) to the basic requirement of applying for permanent residence from outside of Canada. At PCLS we saw cases where persons who had been granted approval in principle on H&C grounds, were subsequently found **inadmissible** because they could not meet some other requirement of the Act or regulations. We consistently challenged the restrictive interpretation of section 25(1) in Federal Court, arguing that the restrictive regulations were *ultra vires* since they fettered the Minister's discretion under the *Act.*

In June of 2006, NHQ of CIC issued an **operational bulletin**, advising immigration officers of a policy change. Under this policy, H&C officers were advised that they have discretion to exempt the H&C applicant from a number of inadmissibility criteria including minor criminality A36(2), financial inadmissibility (A39), misrepresentation (A40), non- compliance with the Act (A41) and inadmissible family member(A42). Furthermore, if an applicant is inadmissible on medical grounds, the officer can seek an exemption from section 38(1)(c) from the Director of Case Review in Ottawa, and can also decide to issue a TRP for 3 years to the person who is medically inadmissible. For inadmissibility under section 34, 35, 37, 36(1), an exemption can only be granted by the Director of Case Review at NHQ. **See revised IP5, section 4.2 for details the delegated authority for granting different exemptions.**

A person who has been granted a 3-year TRP due to medical inadmissibility may still wait for a long time to get landed as a member of the **permit holder class** when they apply after three years. If they have dependants outside of Canada, those dependants will have to be examined and found to be admissible as part of that landing application. Recently, one of our clients who was granted AIP in 2001 on her H&C application based on a serious medical condition, and then found inadmissible on health grounds (the same serious medical condition) and issued a 3-year TRP – was finally given a date to be landed this month, more than three years after completing the three years on the TRP, and more than ten years (and 2 applications to Federal Court for judicial review) after the approval of her humanitarian application.

IP-5 formally established the two-step procedure. The first step, now referred to in the new IP5 as the **Stage 1 assessment,** is to determine whether there are H&C grounds to allow the applicant to apply for landing from within Canada - exemption from section 11(1) of the *Act*. The second step, the **Stage 2 assessment**, is to see whether the person qualifies as an immigrant - do they meet admissibility criteria, as set out above in R68. Thus, according to IP5, persons who are approved on H&C grounds may not be landed if they are inadmissible. In such cases, the inadmissible person who has been granted approval in principle on H&C grounds must obtain a Temporary Resident Permit or be removed from Canada. **However, under the new policy directive of June 2006, an inadmissible person can be exempted from additional grounds of inadmissibility (see above) so it may not be necessary to put the person on the TRP at all.** There must be some good reason for putting the person on a TRP rather than simply exempting them from the specific inadmissibility: see *Brandford et al v.Canada (MCI)* 2007 FC 1113.

One positive feature of the two-stage procedure is that officers are instructed not to make decisions on inadmissibility, such as economic establishment, or medical or criminal inadmissibility, when dealing with the first stage of the decision, although such matters, as well as the potential inadmissibility of dependants abroad, can be a factor in making the H&C decision **and must be raised by the Applicant in requesting an exemption**. Although somewhat confusing to the officer, this can be a useful distinction for counsel.

For example, if an applicant has strong H&C grounds but has had to rely on social assistance due to inability to obtain a work permit while her application was in progress, the immigration officer should be clearly advised that her current lack of establishment which has been reasonably explained, should not preclude a positive **first-stage decision**. (Having a job offer as part of the H&C submission strengthens this argument.) After a positive H&C, the applicant is eligible for a work permit and should obtain one immediately. So by the time of the **second-stage landing interview**, admissibility on economic grounds can be dealt with and hopefully by that time the applicant is self-supporting.

However it should be noted that in cases of **financial inadmissibility under section 39** of the *IRPA*, it is also possible to get a positive H&C applicant landed, asking for an exemption from section 39. We have had such exemptions granted and our clients were landed: In one case, our client was an abused spouse of a permanent resident who had seven children and few job skills. We also argued that she would receive enough in Canada Child Tax Benefits to replace her OW income.

What kinds of situations merit positive H&C decisions on grounds of hardship;

5.10 of IP5 states as follows;

> The assessment of hardship in an H&C application is a means by which CIC decision makers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s). The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on Subsection 25(1), which means that these terms are more than mere guidelines.
> See *Singh v. Canada (Minister of Citizenship & Immigration)*; 2009 Carswell Nat 452; 2009 CF 11, 2009 FC 11.

The factors set out in IP5 to be considered consider in the assessment of hardship include (but are not limited to) the following:

- Establishment in Canada [5.14, 11.4, 11.5]
- Ties to Canada [12.1, 14.4]
- The best interests of any children affected by the application [5.12, 12.1,12.4, 12.8]
- Spouses and common law partners [5.13]
- Factors in their country of origin (this includes but is not limited to: medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships not described in A96 or A97 [5.15 – 5.20]
- Health considerations [5.16, 11.7, 16.6]
- Family violence considerations [12.7, 12.10]
- Consequences of the separation of relatives [12.1, 12.4, 12.5, 12.6, 12.8]
- Inability to leave Canada has led to establishment [11.4]
- Protected persons who have not applied for landing within the 180 days after the decision [7.2, 14.3]

The general list of **negative factors** are as follows:

- Suspected or known inadmissibility of applicant or family members 5.25, 11.8, 16.5, 16.6. 16.7
- Involvement with the police or other authorities 11.6, 16.5
- Medical inadmissibility 11.7, 16.6 (but see 5.11, 5.16, 13.3)
- Receiving social assistance 16.8 (but see OB 021)
- Fraud or misrepresentation 9.2
- Suspected of having committed criminal acts or omissions outside of Canada 11.6
- Subject of a "danger opinion" by the Minister 5.25, 11.6
- Subject to serious inadmissibility such as exclusion from Refugee Convention 4.2, 5.25

The factors to be considered to determine degree of **establishment** include (IP5 11.5):

- stable employment
- pattern of sound financial management
- integration into the community through involvement in community organizations, voluntary services or other activities

- professional, linguistic or other studies that show integration into Canadian society
- stable residence; living in one community or moving around
- good civil records of applicant and family members – no issues of domestic violence, etc..

If the application is based on **family relationships** in Canada, the officers are expected to consider whether there is a potential sponsorship and if not, why not [12.2], or whether there has been a withdrawal of sponsorship. **In the case of sponsorship withdrawal, the applicant is to be given an opportunity to provide additional information in light of the change of circumstances [IP5, 12.10].** If sponsorship withdrawal or sponsorship breakdown occurs ***after*** a positive H&C decision, the sponsorship undertaking is still valid. In considering relationship with Canadians, officers are advised to note the immigration status at the time the relationship was formed: i.e. at time of marriage or having children. The suggestion here is that if a person was living without status in Canada and then got married to someone or had a child, the marriage might not be *bona fide,* but rather a marriage of convenience. Officers might also think that children born to persons without status are "children of convenience". **Section 12 of the new IP5 should be carefully reviewed as there are a number of changes.**

In looking at the family relationships to Canadians, officers are also advised to consider whether there is an on-going relationship, as opposed to just a biological relationship, where the applicant is residing, previous periods of separation, issues of divorce, custody and access, family court proceedings or court orders, degree of psychological or emotional support, the option of being together as a family in another country or of maintaining contact, the impact on family members **especially children**, if the applicant is removed.[See IP5 12.1]

PRRA Officers have jurisdiction to decide the H&C application if the PRRA applicant had a pending H&C when the PRRA was submitted. This has sometimes resulted in a positive H&C decision by the PRRA officer, who then says s/he need not proceed to make a decision on the PRRA. However, some PRRA officers don't appear to understand H&C decision-making and just apply the same risk analysis in the H&C that they used in the PRRA application. This kind of negative H&C by a PRRA officer based on risk factors has been successfully reviewed in a number of cases. As noted above, this is the jurisprudence we may rely on in developing "hardship" arguments after a refused refugee claim. [*Walcott v. Canada (MCI)* 2010 FC 456; *Damte v. Canada (MCI)* 2010 FC 456; *Sahota v. Canada (MCI)* 2007 FC 651;*Ramirez v. Canada (MCI)* 2006 FC 1404; *Ariyatnam v. Canada (MCI)* 2010 FC 608; *Selvarasa v. Canada (MCI)* 2008 FC 1125]

With the new guidelines in IP5 on "hardship" and how it differs from risk of persecution or risk to life, etc. it is hoped that we will see better decision-making on the issue of hardship. It should be noted that officers are advised in IP5 that an appropriate **"threshold of proof"** for an H&C application based on the hardship of discrimination would be **"serious possibility"**– like the standard of proof used for determining well-founded fear of persecution in a refugee claim [IP5 section 5.8].

Cases involving children and the *Baker* decision:

The situation of children whose best interests may be affected by the H&C decision is dealt with in various parts of the new IP5. In section 5.12 it is noted that it is a "statutory obligation" to consider the best interests of children affected by the decision in a section 25(1) application. The wording from *Baker* is used – officers must be "alert, alive and sensitive to the interests of children when examining A25(1) requests through identification and examination of all factors related to the child's life".

Officers are advised that they might need to obtain more information **in an interview**; they are advised that "any child directly affected" includes a Canadian or foreign born child and may also include a child who is outside of Canada; they are advised that "best interests of the child" does not mean that the child's interests outweigh all other factors – they are to be given "substantial weight" but only constitute "one of many important factors that officers need to consider." [N B: this is not consistent with Article 3 of the UN *Convention on the Rights of the Child*, which states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be **a primary consideration**."]

IP5 s.5.12 lists a number of factors for the officers to look at in making the BIOC determination:

- the age of the child;
- the level of dependency between the child and the H&C applicant or the child and
- their sponsor;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the H&C assessment is being
- considered;
- the conditions of that country and the potential impact on the child;
- medical issues or special needs the child may have;
- the impact to the child's education; and
- matters related to the child's gender.

The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. In dealing with cases involving children, see also section 12 of IP5 which deals generally with "Applicants with family relationships".

The decision of the Supreme Court in *Baker v. M.C.I. [1999] 2 S.C.R. 817*, provided important analysis of how the interests of children affected by the decision to deport should be treated by immigration officers considering H&C applications involving children. Although the Court held that international treaties have no direct application in Canadian law unless they have been expressly incorporated by statute, it determined that "the values reflected in international law may help inform the contextual approach to statutory interpretation and judicial review" [*Baker* at par. 70]. Of importance to counsel in preparing submissions in support of an H&C application involving children, Madame Justice L'Heureux-Dube determined that for a decision on an H&C application to be **reasonable** "requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society". [*Baker* at par. 67].

Post-*Baker* decisions in the Federal Court

Some post-*Baker* cases that must be considered in applications involving children are the following:

In *Legault*, the Federal Court of Appeal stated as follows:

> It is certain, with *Baker*, that the interests of the children are **one factor** that an immigration officer must examine with a great deal of attention. It is equally certain, with *Suresh*, that it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to re-examine the weight given to the different factors by the officers.
> ***M.C.I. v. Legault* Docket A-255-01, 2002 FCA 125, March 28, 2002**

In the *Hawthorne* case, the immigration officer had found that the child affected by the decision to deport the mother would not face "unusual or disproportionate hardship" and made a decision denying the mother's H&C application: The decision was overturned in the Federal Court and Pelletier J found as follows:

> There has yet to be a definitive statement of the meaning of the best interests of the child in the context of H&C applications. Nor has the Court received any guidance on the question of how one balances the best interests of a child against the deficiencies of the child's parent....For the purposes of this application however, I find that whatever the test of best interests of the child might be, **it is not the test of unusual, undeserved or disproportionate hardship** which the Minister's delegate applied in this case...Given that we are dealing with children whose conduct is not in issue, the test is inappropriate.
> ***Hawthorne v. M.C.I.* Docket number IMM-4962-00, 2001 FCT 1041, Sept 21, 2001**

[This point has recently been established in another Federal Court decision: In *Beharry*, the Court stated that "the unusual, undeserved, or disproportionate hardship test has no place in the best interests of the child analysis." *Beharry v. Canada (M.C.I.)*, 2011 FC 110 (CanLII), par. 11]

Pelletier certified a question for the Federal Court of Appeal in Hawthorne, and the FCA found as follows in dismissing the Minister's appeal:

> The best interests of the child are determined by considering the **benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada** or her own voluntary departure should she wish to accompany her parent abroad...To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases. **For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent. The requirement that the best interests of the child be considered may be satisfied, depending on the circumstances of each case, by considering the degree of hardship to which the removal of a parent exposes the child.**

Evans J. agreed with the result but wrote his own opinion that relied upon the UNCRC provisions that "In all actions concerning children...the best interests of children shall be a primary consideration." He concluded:

> It must be clear from the reasons given by an immigration officer for rejecting a subsection 114(2) application that the officer has been "alert, alive and sensitive" to the best interests of a child with a right to remain in Canada who is likely to be adversely affected by the decision. When made without express reference to the best interests of the child, an assessment of the harm that the parent's removal is likely to cause may, depending on the circumstances, indicate that the officer failed to give those interests the careful attention that they require.

Allowing the child to be heard

As noted in the above article, *Baker* did not provide for any meaningful participatory rights for the children being affected by an H&C decision. However, paragraph 12.8 of IP5 suggests that children affected by the decision involving the separation of relatives, should have their views considered "in accordance with the children's age and maturity, recognizing the increasing capacity of children as they mature, to present their own views."

It is our practice at PCLS to involve the children as much as possible, including bringing them to any interview that might take place. Personal statements by children who are ten or older, can be very moving and effective. Sometimes we may include drawings by children concerning their family life, school, and friendships in Canada. We also have the child interviewed by a professional child psychologist or social worker to obtain a report from an expert on the effect on the child of removal from Canada or separation from a parent.

The alternative of foster care rather than parental care

We have been asked by immigration officers to make submissions as to why **foster care** in Canada would not be a reasonable alternative for a child who would have the option of accompanying her parent to a country where the child's life or safety would be at risk, or remaining behind in Canada **without her parent**. In 2001 we obtained a letter from the Children's Aid Society in this regard which points out that a child should never be separated from a parent unless the parent is endangering the child and **that foster care is not a comparable substitute for parental care**. According to the CAS, the best interests of the children are served by remaining in the care of their own family "unless the safety and protection of a child is in jeopardy." Since economic factors are always of interest to CIC officers, it may be useful to point out the cost of foster care for children who cannot remain with their parents. The CAS noted that while the cost of involvement in supervision of a child kept in the care of his or her parents in their own home averages $109 per month, the cost of placing a child in **foster care averages $2, 550 per month.**

***Parens patriae* jurisdiction in the provincial Superior Courts**

Counsel have also tried to involve the provincial Superior Courts, invoking *parens patriae* jurisdiction to protect children from harm to them as a result of separation from a parent or harm to the parent. In this regard see *Juste, Winston and Harper through their Litigation Guardian*

June Callwood v. Canada, (A.G.) [1997] O.,J. No. 3331 (C.A.) and *Francis v. Canada (Minister of Citizenship &Immigration)* (1998), 40 O.R.(3d) 74; *Re Francis et al and M.C.I et al* (1999) O.J. 49O.R.(3d) 136 (C.A.)(leave to appeal to the Supreme Court of Canada denied); *Ratnavel v. Canada (Minister of Citizenship and Immigration)* (12 March 1999), 99-CV-163413 (Ont. Gen. Div.); *Nunez v. Canada (Solicitor General)* (11 July 1996), CA 018241...(B.C.C.A.).

Stay of removal in Federal Court, for H&C

The first decision in the *Francis* case was overturned on appeal to the Ontario Court of Appeal, as the Court found, post *Baker*, that there was no need for the Court to exercise its *parens patriae* jurisdiction over the children because an immigration officer dealing with an H&C application would have to pay very special attention to the situation of the children affected by the decision. One problem with this finding is that the **H&C application does not stop removal proceedings**, and Justice Nadon in the case of *Simoes v. M.C.I.* [IMM-2664-00, June 16, 2000] determined that a removals officer was not required to consider the situation of the children affected by a decision to proceed with removal, if there was a pending H&C application, because that would allow the removals officer to pre-empt the H&C officer. Thus counsel have had to argue for deferral of removal, or a Court stay of removal until the H&C is decided in some of these cases and often the deferral request or the stay application is refused.

In 2003, Justice Simpson of the Federal Court, granted a stay of removal until a pending H&C application was decided, reasoning that she was required to do that in accordance with the Objectives of *IRPA*, which require that the immigration legislation be interpreted in a manner consistent with **Canada's obligations under international treaties, such as the *UN Convention on the Rights of the Child.*** [See *Martinez v. Canada* [2003] FC 1341] Other useful cases relevant to issues of deportation of parent affecting best interests of children: *Harry v. M.C.I.* IMM-5248-00, October 20, 2000, *Boniowski v. M.C.I.* IMM-7113-03, *Paterson v. M.C.I.* IMM-196-00, January 28, 2000. Unfortunately, the *Martinez* case has not been consistently followed and it often depends on the attitude of a particular Federal Court judge as to whether a stay will be granted.

Non-removal order for child in Family Court

Another means of staying removal of a parent in cases in which there is a Canadian or permanent resident parent also involved with the child through access and or support, is to obtain a family court order granting custody to the parent facing removal and access to the parent remaining in Canada, including a provision that the children not be removed from the jurisdiction (the province) so that access can be effected. We have argued that this constitutes an "order made by any judicial body in Canada" that would be directly contravened if the removal order was executed. Section 50 of the *Immigration and Refugee Protection Act* provides as follows:

> 50. A removal order is stayed
> (a) if a decision that was made in a judicial proceeding - at which the Minister shall be given the opportunity to make submissions - would be directly contravened by the enforcement of the removal order....

If counsel is considering seeking a non-removal order, in tandem with a custody order granting custody to the parent facing deportation, **it is extremely important that the Removals Officer be served with notice of the Court proceedings and given an opportunity to make representations.** In 2003, in a PCLS application for a stay in Federal Court, the Department of Justice attempted to argue that there was no stay in place as a result of the Court order concerning our PCLS client [a probation order involving co-operation with the Children's Aid Society], because the Minister had not had an opportunity to make submissions. Fortunately, the year before, PCLS had provided the Removals Officer with a clear notice of the Court proceedings and we had proof of the notice. The Court granted the stay in this matter although no reasons were given.

In a decision by Family Court Judge Geraldine Waldman, *Alexander v. Powell*, Court File No. Toronto D30748/04, January 18, 2005, a Grenadian mother of two Canadian children was granted custody of her children and an order that they not be removed from Canada to Grenada for a period of six months, until the situation in Grenada following the September 2004 Hurricane Ivan had improved. Counsel still had to obtain a stay of removal in the Federal Court and it was granted on the basis of this order. However Justice Dawson of the Federal Court subsequently decided in *Alexander v. Solicitor General of Canada* [2005] FC 1147 that a non-removal order for a child issued by the Family Court when custody has been granted to the parent under a deportation order **does not create a statutory stay** of removal under section 50(a) of *IRPA* because the custodial parent can go back to the Court and request that the Court vacate the non-removal order. This issue was certified for the Federal Court of Appeal but at the appeal hearing in November of 2006, the Federal Court of Appeal decided that the issue was moot since at that point, Ms. Alexander's H&C application had been granted approval in principle.

Subsequently the Ontario Superior Court of Justice ruled in *J.H. v. D.H. [2008] O.J. No. 768* that unless there is a real ***lis*** or dispute between the parents of the child about where the child should live, the Family Court has no jurisdiction to grant a non-removal order affecting the execution of a deportation order against a custodial parent as this is an immigration matter properly dealt with by the Federal Court. However it is still a good practice to obtain a family court order because the decision by a family court judge that the removal of the children would not be in their best interests, could influence the granting of a stay by the Federal Court and could also influence the H&C decision-maker. In the case of *Canabate v. Ayala,* heard in December of 2009, Court File D481-10/09, Justice S.B. Sherr found that there was a genuine *lis* and made an order granting custody to the mother under deportation order, specific access to the father, and an further order that "The child shall not be removed from the Province of Ontario without prior court order or the written consent of the other party."

Reasons for negative H&C

Baker determined that officers must provide reasons for their decisions (although the "reasons" need only be the interview notes). This is a good development but the officers do not yet provide their notes unless requested.

Situations involving Family Violence:

The former policy for H&C determinations, IE9, provided specific guidelines to be followed by immigration officers in "Situations involving marriage breakdowns". In tacit recognition of the vulnerability of a spouse being sponsored from within Canada through a process that would normally take from one to two years, these guidelines were introduced to allow for continued processing of the application for landing if the applicant separated from an abusive sponsor. Officers were advised to consider whether an applicant was being subjected to "physical or mental cruelty in the relationship" such as "threatened withdrawal of sponsorship in order to keep the applicant subservient". In these cases, officers were to determine whether the marriage was originally *bona fide,* whether there was a pregnancy or a Canadian child who would suffer, and to assess "potential establishment" of the applicant without the sponsor. These guidelines allowed counsel to assist an applicant in an abusive relationship to extricate herself from the relationship without fear of being removed from Canada, converting the sponsored application into an independent application for landing by the abused spouse. The guidelines had been interpreted liberally to include cases in which there was no marriage but a common law relationship, especially if there were children of the relationship, and even in cases in which a sponsorship had never been submitted.

In the United States, under the *Violence Against Women Act* passed in 1994 and codified as part of the *Immigration and Nationality* Act, section 204(a), provisions were made for spouses and children of U.S. citizens or residents to "self-petition" or seek "suspension of deportation" without reliance on their abusive spouse if they could show subjection to battery or extreme cruelty during the marriage and if they could demonstrate that deportation would constitute extreme hardship for the petitioner or the petitioner's child. In the year 2000, the *Victims of Trafficking and Violence Protection Act* (dubbed *VAWA II*) addressed some of the problems encountered in the processing of cases under *VAWA* so that it is no longer necessary for a petitioner to prove extreme hardship, the victim must have resided with the abuser but not necessarily in the U.S., the self-petitioner remains eligible even if the abuser has lost his status in the past 2 years related to a domestic violence incident and even if a divorce occurred that was "connected" to domestic violence. [See *Analysis of Immigration Fixes in VAWA II 2000* by Gail Pendleton of National Immigration Project of the National Lawyers Guild, http://www.nig.org/nip/domestic-violence/domvioindex.htm]

However in Canada, under the IP5 guidelines [IP5 s. 12.7], the Family Violence case type is actually **less helpful** than the previous IE9 guidelines on marriage breakdown situations. Omitted from the family violence guidelines is any reference to mental cruelty such as threatened withdrawal of sponsorship in order to keep an applicant subservient. There is reference to information indicating abuse such as "police incident reports, charges or convictions, reports from shelters for abused women, medical reports" - leaving the impression that the victim's word in this regard is not enough. Officers are asked to consider whether there is "a **degree of establishment** in Canada" [Under the previous IP5 it was "significant degree of establishment". This is an improvement but it is still more than "potential establishment" in the IE9 guidelines.] Establishment can be an almost impossible barrier if the applicant has been kept subservient and dependent upon the abuser, or if there are language barriers and young children.

In her 2001 paper entitled *When 9-1-1 is Not an Option: State "Protection" of Abused Immigrant Women Without Immigration Status,* a former PCLS student described the significant problems faced by immigrant women in Canada who are vulnerable to abuse and compared the Canadian and U.S. experiences and approaches. The conclusion is that abused spouses and children who are without immigration status in Canada have **less access to state protection** than their counterparts in the U.S. **Canadian immigration policies are a key to this problem** because under current policies, women in Canada will not risk contacting the police for protection if they fear this will result in immigration enforcement action against them. This is especially true if there are children involved as women often fear separation from their children.

A much stronger policy on marriage or relationship breakdown due to abuse, complemented by training of CIC officers as to its implementation, is needed to overcome this problem. Although the Police Services Board in Toronto has adopted a "Don't Ask" policy, so that Toronto police called to investigate a situation of family violence are not supposed to ask for immigration status, this policy has not been systematically implemented and the police continue to argue that if they are advised (by the abuser) that the person involved is without immigration status, then they have a **duty** to report the person to Canada immigration. The issue of charging both parties whenever there is a situation of domestic violence is also a very strong incentive for an immigrant woman **not to call the police.**

PCLS had a case of a woman who was being abused by her husband who was in the process of doing a spouse in Canada sponsorship. The neighbours called the police and the police referred her to PCLS when they learned from her husband that she had no status. We advised her of the Family Violence policy and she requested that it be applied in her case – almost two years later she got a negative decision on her H&C and the officer stated in reasons: "She knew he was abusive and married him anyway". We eventually had this decision reviewed in Federal Court but Justice Crampton found that there is no presumption operating in favour of granting an H&C when the sponsorship breaks down due to violence [*Herman v. Canada (MCI)* 2010 FC 629, June 10,2010 at para. 34-36], so our "family violence" guidelines are inconsistently applied and ineffective as a means of persuading an abused spouse to separate from her abuser rather than to depend on the potential sponsorship. **N.B. We are very concerned that proposed changes to sponsorship regulations (proposed initially in March of 2011) will result in conditional landing for sponsored spouses – which will place many sponsored immigrant spouses in a more vulnerable situation than before.** Apparently "marriage fraud" is a bigger societal problem than domestic violence!

H&C Applications from Outside of Canada:

As noted at the beginning of this paper, section 25(1) was significantly amended even before *BRRA* by granting discretion to the Minister as to whether to deal with an H&C application made to a visa officer abroad. The operations manual about section 25(1) applications made from outside of Canada is OP 4 and it is quite short – 30 pages – although there are references to some of the principles set out in IP 5. There are no special forms for making applications on H&C grounds from outside of Canada. The basic IMM 0008 form must be completed by the applicant outside of Canada and a request in writing with any appropriate submissions, should accompany the form.

Although the OP 4 manual suggests that such applications can be in one of three categories: family class, economic or public policy, our office has only dealt with cases that are family class humanitarian. The types of cases we normally deal with for Family Class humanitarian consideration by the visa officer are the following:

- Overage dependants, especially if they are dependants of protected persons in Canada
- Excluded family members – excluded under section 117(9)(d)
- Family members whose sponsor in Canada is ineligible (sponsorship default, social assistance, doesn't meet LICO)

Since there are no specific forms for this procedure, we complete the sponsorship forms as though the person was being sponsored by the family member in Canada and we also have the IMM 0008 form completed by the person abroad. This is submitted to CPC Mississauga with a very clear cover letter indicating that it is a request for H&C consideration because there is no possibility of family reunification through regular processing. We accompany the letter with **affidavit evidence** and as much supporting documentation as possible to show the family relationship and to corroborate the humanitarian reasons to permit the family reunification. We get signed Use of Representative forms from our client in Canada and from all adult applicants abroad. We communicate with the visa offices abroad by email as much as possible and keep a careful copy of all such communication.

Refugee family reunification:
Refugees are in an entirely different situation *vis à vis* family reunification than immigrants. Immigrants choose when they leave their home country and can therefore plan to include all their dependent children. Those left behind can visit or be visited by the immigrant family members who come to Canada. In contrast, refugees **flee from persecution,** they flee when they have to flee and may not be able to include their dependent children when they flee. Usually they cannot easily return to visit any children left behind and the children might have the same difficulty leaving the country that the parents had. Furthermore, the circumstances that create refugee displacement are often very different than the circumstances that cause immigration. However, except for the concurrent processing of spouses and children of refugees, pursuant to the family reunification provisions of regulation 176, refugees must meet similar requirements to sponsor their dependent children that immigrants must meet. They must keep their older dependent children in full-time school attendance until they immigrate, they must provide documentation to prove relationships, and they must obtain the travel documents for the dependant children. We have seen heart-breaking situations of refugee families waiting for years to be reunited with their dependants because of the difficulties of the requirements for sponsorship that do not recognize the particular kinds of problems that refugee families are facing: difficulties obtaining identity certificates, economic hardship that makes it impossible to keep dependent children in full-time school attendance, dangerous situations that the family members are exposed to, etc. So the H&C process is a significant tool to use to resolve these problems.

We rely on the IRPA objectives for refugee family reunification:

> Section 3(2): The objectives of this Act with respect to refuges are… (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada.

We have used section 25(1) to bring *de facto* dependent children who were never formally adopted and to bring last remaining family members or over-age children to be reunified with their parent in Canada. We have also used this in cases of non-biological children and s. 117(9)(d) excluded children. Finally we are using the H&C to try to bring the overseas parent of an unaccompanied minor accepted as a refugee in Canada when the child is not able to sponsor their parent due to age, being on social assistance or not meeting LICO. These are difficult cases to win and require preparation that anticipates judicial review in the Federal Court.

The PCLS Checklist for H&C Applications: preparing the ground for judicial review

PCLS law students have had considerable success with H&C applications. We have often been thanked by immigration officers who see the extent of the preparation and appreciate this assistance. These are also very interesting applications to work on as they allow considerable scope for creative advocacy. And we try to get the client involved in a collaborative way, gathering material in support of the application. The following is a practical guide – the PCLS Checklist - to a good H&C application:

1. Thorough interview:

Explore why the client came to Canada and why she does not want to return. This sometimes results in information supportive of a refugee claim, particularly in cases involving domestic violence in the country of origin. In such cases we advise the client of the possibility of starting a refugee claim and that this can be done at the same time as the H&C application.

2. Check on the current situation of client:

At the time of this thorough interview, you should determine how the client is supporting herself and any dependants and whether any children involved are attending school and have appropriate health insurance coverage. A client who is living in a shelter might be able to leave the shelter and obtain temporary social assistance [OW] once an H&C application has been commenced [social assistance of about $560 per month is **less costly** to the taxpayer than support in a shelter at approximately $50 per day, or $1,500 per month]. Efforts can be made to ensure that children are in school and that they have appropriate health coverage. If the client is working without permission, she should be advised that she does not have authorization to work and cannot get it until her application has been granted approval in principle (unless she is also a refugee claimant). However proof of being able to work, support herself and accumulate savings, will be treated as **a positive factor** in the H&C assessment by the immigration officer.

3. Access Immigration File:

If the client has had any previous contact with immigration, have her fill in a Personal Information Request Form (PIRF) and send this with a letter to the immigration privacy coordinator in your region, requesting a copy of the entire immigration file of the client. The address used in the PIRF request can be counsel's address. When the file is obtained, review it carefully and summarize the immigration history. (If there was a refugee claim, obtain access to the IRB file as well.) If there is a warrant, advise the client that she may need to have a bondsperson or guarantor eventually and prepare her for the process of voluntarily turning herself in to execute the warrant. **Do not send a client who is under deportation warrant to the police station to obtain her police clearance because the police will arrest her and turn her over to CBSA, and unless a stay is granted, she will be removed from Canada before her H&C application is considered.** A police clearance can be obtained at a later stage in the proceedings, after the warrant has been executed.

4. Criminality issues:

If the client has had a criminal conviction, assist her to obtain a pardon from the National Parole Board – the fee is now $200. The client is eligible for a pardon three years after completion of sentence for a conviction prosecuted summarily, 5 years if prosecuted by indictment. If the client received an absolute or conditional discharge, obtain evidence of this from the Court in the form of a letter of disposition.

5. IMM 5001, 0008, 5283, 1344, etc:

Complete the appropriate immigration forms – these are now available on-line and can be filled out on line. Follow the checklist in the kits and obtain all the necessary documentation. **The immigration forms are changing all the time so be sure you have the most up-to-date version**. Have the client write her own answers to the supplementary information forms (IMM 5283 and IMM 5285) although you may expand on this after interviewing the client.

Clients living in Canada without status are concerned about providing their address on the form. **There is no choice about this** and counsel should not submit an application that does not contain the client's residential address. In fact, submitting the H&C application form with your address is "voluntarily" turning yourself in to CIC. If there is a warrant, the client is certainly subject to arrest by CBSA as CIC has instructions to inform CBSA of the address of a client with a warrant – so make arrangements to have the warrant executed at the time the application is being sent in.

6. Cost Recovery Fee:

This is a serious obstacle for some clients and sometimes we provide a letter for the client to seek a loan or gift from friends or relatives for the fee: $550 per adult, $150 per child. Have client pay fee at the bank and include the fee receipt with the application.

7. Supporting documentation:

We ask the client to obtain letters from friends and relatives, employers and community organizations in support of their application. Sometimes we provide the client with a short explanatory letter, addressed "to whom it may concern" explaining that the supporting letter should contain the date, the address of the writer, the status of the writer and relationship to the applicant, the basis of the writer's knowledge of the applicant, any reasons why the writer believes the applicant should be allowed to remain in Canada, and be signed by the writer with copies of the writer's identification attached. If the client has a lot of family members in Canada, prepare a complete **family tree**, showing all of the relatives in Canada and including information about their status, employment, etc. with proof of this attached.

8. Educational upgrading:
Obtain certificates for any courses, transcripts, letters from teachers, information about awards to the client, photographs of graduation, etc. for children, obtain school reports, letters from teachers, letters or drawing from school friends, etc.

9. Employment potential:

Detailed reference letters from employers, job offers, the portfolio of the client who may have exceptional talents (for example, have colour photocopies done of the portfolio of a client who is a photographer, an artist, a designer, a craftsperson or an architect, and perhaps include a letter of appraisal as to the client's potential by a professional in the field).

10. Pattern of savings:

If the client has been working and saving money, copy her bank records to establish a "regular pattern of savings".

11. Points assessment:

If the client would meet the 67 points criteria of an independent immigrant and has job skills on the NOC list, do a "points" assessment as part of the submission on establishment.

12. Issues of age or disability:

However, if the client is never going to be able to work due to age or disability, this is not necessarily a reason why she cannot be accepted on H&C grounds: See *Kowalik v. M.C.I.* IMM-956-98, March 30, 1999 in which Justice Sharlow stated as follows:

> The officer's rationale, as quoted above, indicates that the decision under review was based primarily on the applicant's failure to achieve economic independence in Canada and his resulting reliance on social assistance. In the circumstances of this case, that is an **unreasonable** basis for an adverse decision under subsection 114(2). It defies reason to suggest that in the case of a 73 year old person who may not be in good health, the lack of economic independence can be a basis for denying consideration on humanitarian and compassionate grounds.

In a situation like this, it is very important to request an exemption from section 39 financial inadmissibility with the application on H&C grounds.

13. Pictures that tell the story:

If it is a spousal application, pictures of the wedding and reception with all of the persons in the photos identified, pictures of children, family or friends with the applicant should be included. Get the client to bring in her photo albums and make a selection to be copied. Letters and cards can also be useful as evidence of relationship. If there are children of the marriage, photos of the children with the parents are useful and the clients should obtain the "long form" birth certificate of each child as this shows the parents' names. Since there are very few H&C interviews post *Baker*, pictures are also useful to give a more personal touch to the application on H&C grounds.

For applications that do not involve spouses, but involve family and friends, photographs can also be valuable to tell the story of the applicant's connections to Canada. Information about

community activities and volunteer work is also important. For example, in one case, we had a photograph of the client taken by the local newspaper when he received a special volunteer award for his work with the local food bank.

14. Medical evidence:

Obtain letters from family physician and specialist about particular medical condition of the applicant (or a dependent child) and confirmation that treatment is not available in country of origin. This will be checked by Immigration Medical Services so be sure to double check the information you receive. Find out about the actual cost of the treatment required in Canada.

15. Children in Canada affected by decision:

Whether or not the children are born in Canada, according to *Baker* their interests will be an important consideration. The wording of section 25(1), drawing particular attention to the best interests of a child, makes this even more significant. Get school reports on any children attending school. Speak to teachers or principals and get supporting letters. Sometimes you may want to have the child get letters written by her school friends. Document health concerns: for example, would the children require special immunization before accompanying a parent to the parent's country of origin? If one parent is a Canadian, then there is potential that the child will lose access to one of the parents or to support payable by the Canadian parent. Document this and if possible obtain a family court order dealing with the best interests of the child and whether the child should be removed from Canada by the custodial parent. **[As noted above, make sure that CIC is advised of any Court applications and hearing dates.]**

If the child is old enough, interview the child and have the child provide a written statement or a drawing, and/or have the child interviewed by an appropriate social worker or child psychologist and obtain a report on how the child would be affected emotionally by removal of the parent. Quote from the relevant international treaties and conventions. Quote from the most recent Committee on the Rights of the Child report on Canada from September of 2003 which continues to criticize Canada with regard to deportations that break up families and separate children from their parents.

16. Evidence concerning country of origin:

If hardship of return is one of the issues, try to obtain evidence from the most reliable sources as to the hardship of return for this particular client. If family members remain in the country of origin, obtain information from them if possible. Do a detailed family tree for relatives abroad, including whether they would be of any assistance to the applicant if she returned. Ask the client whether she has letters sent from abroad that might be relevant. If children are involved, get specific evidence on the status of children in that country, including access to education, health care, protection from abusive practices such as FGM, child labour, etc. Organizations such as *Save The Children* and are valuable resources in this regard.

17. Affidavit evidence from client and witnesses:

Provide the applicant's evidence in the form of a sworn affidavit or statutory declaration. This is very important because the officer cannot disregard sworn evidence unless there are reasons for doing so.[*Maldonado v. Canada (MEI)* [1980] 2 FC 302 (C.A.)] This can be the basis of a judicial review application if the client has not been interviewed and the officer does not accept the evidence provided in the client's affidavit or makes implied negative credibility findings on the grounds that there is no corroborating evidence.

18. Written submissions with supporting documentation:

Prepare submissions in clear and concise language, quoting from IP5 policy when appropriate, quoting from supporting documentation, and providing copies of supporting documentation organized and tabbed or paginated so as to be easy to follow. Bind submissions that are bulky so that documents won't get lost or misplaced and for ease of review. Ensure that you keep your own copy and that the client has a copy as well. Notify the officer at the conclusion of the submissions that if the officer has any questions or needs further corroboration of any evidence provided, you expect to be contacted in this regard. Advise the client to let you know of any changes in her circumstances so that this relevant information is communicated to the CIC.

19. Send Application and Await Response:

In some cases, the completed forms, with proof of payment of cost recovery fee can be sent with a cover letter from counsel advising that submissions will follow within a month**. It is best to send the full application with submissions at once, especially in a very strong case that could receive a positive decision from Vegreville CPC (marriage cases, cases of dependent children, etc.).** The application is sent to Vegreville and is usually acknowledged within three months. If Vegreville sends the application to a local CIC for interview, counsel is advised of this. The average waiting time for consideration of an H&C application in Toronto has been two to three years or longer if there are potential medical risk/medical inadmissibility issues involved.

Be sure to send in any new relevant information as it becomes available as a decision might be made without an interview although in most cases, a "30 day letter" is sent before a decision is made, asking if counsel has any further material to submit and requesting that the forms be updated. There is no requirement for CIC to send this 30-day letter, so CIC should be advised of all major changes when they occur. If a negative decision is made and you have just obtained some very important relevant evidence – ask for **reconsideration** based on this evidence. The H&C officers have been given guidelines on their jurisdiction to reconsider in the new IP5 section 5.23, pursuant to the FCA decision in *Canada (MCI) v. Kurukkal* 2010 FCA 230.

20. Keeping your client in Canada while H&C is Pending:

The existence of an outstanding H&C application does not stop removal proceedings if they have commenced already. The H&C will continue to be processed after removal and there is a

procedure to bring the applicant back to Canada if the H&C is successful. [See IP5, paragraph 15. 5]. In cases where there is already an effective removal order, removal action will proceed despite the pending H&C. In some cases if the H&C has been in the works for a year or more and your client is called in to make removal arrangements, you may be able to persuade the removals officer to **defer removal**.

Our practice in cases where we are seeking to defer removal is to provide a copy of the H&C application and supporting documentation and submissions and to make a written request to the removals officer, delivered in person at the interview for removal arrangements, asking for a deferral of removal and setting out the reasons why this is appropriate. We advise the officer that he or she has **discretion to defer removal**, based on section 48 of the *Act* which states that a removal order is to be executed "as soon as is **reasonably** practicable". This is similar to the wording of section 48 of the former *Immigration Act.* The Federal Court has found that since removal officers must exercise reason in arranging removals, this means that they have some discretion as to when to carry out the removal. [See *Poyanipur v. M.C.I.* 116 F.T.R. 4 and *Umukoro v. M.C.I.* IMM-1430-99, March 31, 1999].

If an officer states that he has no discretion and is bound by policy to remove as soon as possible, you have the basis of a judicial review of the officer's decision based on fettering of discretion. If the officer states that he has considered the request but refuses to defer removal, you can seek to review this decision on the ground that it is unreasonable in the circumstances. Your judicial review application would include a motion for a stay of removal while the application is being considered, based on the tri-partite test of irreparable harm, arguable case and balance of convenience.

21. Cooperation in obtaining travel documents and passports for children:

Sometimes there will be no travel documents and your clients will be asked to obtain these. Clients must cooperate to a certain extent and may be told that they will be detained if they refuse to apply for a travel document. In a situation in which the client truly fears to return to her country of origin and is unwilling, due to this fear, to apply for a travel document, this should be clearly explained to the officer in writing. Although the client **must answer all the questions and provide the information including her photograph and identity documents that the officer needs to make the application for the travel document on her behalf, we take the position that the client cannot be required to sign her name to such an application**. This would be an act against her conscience, analogous to a forced confession in criminal proceedings, or signing something under duress. We would advise a client in such a predicament who is afraid of being detained, to sign with a disclaimer that she is signing the document unwillingly and is being pressured to sign with a threat of detention by Canadian immigration authorities.

If there are Canadian citizen children involved, the client should not delay in obtaining a birth certificate and Canadian passport for her child. She can sometimes get assistance in this regard from the CBSA officer, who may even authorize payment for the documents if the client cannot afford to pay for them. Clients sometimes think that if they don't get the passports for their

children, they won't be deported. This is not correct and shows the client to be uncooperative. It has happened in such cases that the client has been deported without her children.

22. The H&C Interview:

In the rare event that there is an H&C interview, prepare for this carefully. Review the entire submission and up-date the information contained therein with the client. Advise the client of counsel's role - to assist but to let the CIC Officer take the lead. Encourage the client to tell her own story. If the client's first language is not English or French, encourage her to speak English (French) rather than to rely on an interpreter, but bring an interpreter if necessary. Prepare children for the interview and ensure that they are seen and heard by the officer, unless this would be traumatic for them. Have other supporting relatives attend and be available to be questioned. Bring all the original documents to the interview. Have supporting letters, bank books, employment letters, etc. updated prior to the interview. In most cases no interview will be held in Toronto. This may be the basis of a judicial review application if the decision is negative and if the officer made credibility findings without interviewing the client.

23. *Bona fide* marriage interview.

The interview to determine *bona fides* of a marriage requires special preparation of the applicant and the spouse as they may be interviewed separately to see if their stories are consistent. If unprepared for this, clients may panic and start guessing. Remind the clients that this is not a TV game show and there are no bonus points for a lucky guess! Remind them to say they don't know if, in fact, they don't know. Go over the significant things that most married couples would be likely to know about each other (nick-names, numbers of siblings, birthdays, where the spouse works, and what they had for dinner last night) and give them examples of how confusion might arise. Go over the details of how their relationship developed to ensure that both of them remember the same significant events. It is surprising how memories differ in this regard! Counsel's presence at this interview can often assist in clearing up confusion that could result in the officer being doubtful as to whether marriage is genuine.

24. The Decision: If positive

The positive "first stage" decision usually arrives in the mail and will have to be interpreted to the client as the letter is written in such negative language that the client may not understand it. After a positive H&C first stage decision, prepare for landing, including paying the Right of Permanent Residence Fee (now $490), applying for OHIP coverage, getting appropriate work and school authorizations, updating passports if possible, etc. The big worry at this stage is whether your client is inadmissible for any reason.

25. The Decision: If negative

The negative H&C decision requires **quick action**. Write to request reasons and notes from the officer who made the decision and also do a PIRF request to access the file in case you are not provided with comprehensive reasons and in order to check that some extrinsic information has not been relied upon. File a notice of **Application for Leave and for Judicial Review** within 15

days of notification of the negative H&C decision. State in the notice that reasons have **not** been provided. This triggers Rule 9 of the *Federal Court Immigration and Protection Rules*, so the time for preparing the Application Record (including the legal argument) does not start to run until the Rule 9 letter is sent to the Court Registry and to Counsel.

26. Judicial Review of the Negative H&C decision:

After reviewing the reasons and the notes, try to determine whether the decision was made in accordance with the principles of **fairness**, and whether the decision is **reasonable** in light of the analysis of a reasonable decision set out by the Supreme Court in *Baker*. Consider whether the officer **fettered his or her discretion**, took into consideration all **relevant information** or **relied on irrelevant information**. Consider whether the officer made comments or acted in a manner that might raise a reasonable apprehension of **bias**. If the applicant was not interviewed, consider whether the officer made **credibility findings** that should have been dealt with at an oral interview.

27. Making Another H&C Application?

There is no limit to the number of H&C applications an applicant can make, if she has the money for the processing fee and has not yet been removed from Canada. We have often done second H&C applications successfully when the first one was done without counsel and no application for judicial review was made following the negative decision. However, with a second H&C it is very important to provide the officer with **new information to distinguish the second H&C** from the previous H&C. CIC officers ignore relevant new information at their peril [see *Tse v.* M.C.I, IMM-1191-94, April 27, 1995] but officers are reluctant to disagree with a previous negative H&C without something new to distinguish their decision from the previous officer's decision. If negative credibility findings have been made in the first H&C - for example, regarding the *bona fides* of a marriage, it is important to provide affidavit evidence from third parties in the second H&C to counter this.

Conclusion:

A good H&C application is one that is succinctly presented, well-documented, and well-organized. It is not necessarily long with volumes of general materials and extensive quotes from case law. This might impress a client but will just be frustrating for overworked and under-resourced immigration officers. A good H&C will also be the best foundation for a successful judicial review in the Federal Court.

TAB 1c

H & C Applications in the Context of Deferral Requests

Richard Wazana
Wazana Law

19th Annual Immigration Law Summit – Day Two

1c

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING PROFESSIONAL DEVELOPMENT

H&C applications in the context of deferral requests

1. What needs to be in an H&C application?

    - The absence of a negative is a positive
        - You need to include evidence of every stated fact
        - The lack of evidence will negate that fact
        - Evidence of establishment

    - Hardship of return
        - Evidence of country conditions
        - Evidence of unemployment, health care, social services

2. Timing

    - When should you be filing H&C applications for your client?
    - When should you file a last minute H&C or spousal application?

3. Deferral requests

    - What is the jurisdiction of removal officers with respect to pending H&C applications?
        - The lessons from the *Williams* case
        - *Cortes*, *Mauricette*, *Hardware*, and *Ramada*

    - How to frame a deferral request based on a pending H&C application?
        - Timeliness
            - *Villanueva*
            - *Lisitsa*
            - *Nucum*
            - *Guan*
            - *Katwaru*

        - Imminence
            - *Villanueva* and *Bhagat*

        - H&Cs filed in a timely manner and stuck in the backlog
            - *Williams*

        - Compelling facts
            - *Ramada*
            - *Natoo*
            - *Shase*

- *Bonil Acevedo*

- Reasons for delay in filing

- Consequences of removal
  - Family separation
  - Economic hardship

- Best Interests of the Children
  - Need to be assessed prior to removal
  - Setting the stage for Irreparable Harm
  - *Mauricette*, *Natoo* and *Bonil Acevedo*
  - Recent cases

Immigration Law Summit, Day two, November 24, 2011

H&C applications in the context of deferral requests

By Richard Wazana
WazanaLaw

1. What needs to be included in a deferral request?

- A copy of the pending application needs to be included in the request
- Evidence of current situation
- Evidence of potential situation if removal is executed
- Medical/psychological evidence
- Financial/employment evidence
- Evidence of socio/economic conditions in country of removal
- Evidence of any issue affecting children

Tip: Try to include evidence of every key statement; otherwise, officer will assume the opposite.

2. Timing

- When should you be filing an H&C application for your client?
    - How does Court define "timely?"
        - Not filed to thwart removal; before being PRRA notified; at least one year prior to removal (mitigated by applicant's immigration history)
    - Ideally, after RPD JR is refused
    - Before being PRRA notified
    - At first available opportunity
    - Last minute application: explain reason and argue compelling facts
- When should you file a last minute H&C or spousal application?
    - *Matano*: compelling facts and good reason for last-minute application
    - *Gurini*: compelling facts focused on child custody and good explanation for last minute H&C
    - *Rodhaj*: risk of A never returning to Canada and hardship to wife and kids
    - *Glasgow*: risk to child's health can't be addressed in home country

Tip: if facts are compelling, the Court is willing to overlook lateness of H&C or spousal application

3. Deferral requests

A. Historical overview of case law

- What is the jurisdiction of removal officers with respect to pending H&C applications?

Simoes v. Canada (MCI), IMM-2664-00, June 16, 2000.

"[12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, **a removal officer may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system.**[7] For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer"s discretion to defer removal until the Applicant"s eight-year old child terminated her school year.[8]"

Wang v. Canada (MCI), 2001 FCT 148.

"[21]So the issue becomes, what discretion is conferred by the words "reasonably practicable"? The question first arose in *Poyanipur v. Canada (Minister of Citizenship and Immigration)* (1995), 116 F.T.R. 4 (F.C.T.D.), a case in which an Iranian national was to be deported to Iran. The removal officer in that case claimed to have no discretion. Simpson J. decided that the removal officer did have some discretion [at paragraph 9]:

What is clear, however, is that **removal officers have some discretion** under the *Immigration Act* concerning, among other things, the pace of the removal once they become involved in making deportation arrangements. This is so because the May Affidavit indicates in paragraph 8 that removals are to be carried out as soon as "reasonably" practicable. This language is also found in section 48 of the Immigration Act. In my view, **this language covers a broad range of circumstances which might include a consideration of whether it would be reasonable to await a pending decision on an H&C application before removal.** Accordingly, the removal officer does appear to have some decision-making power which is subject to judicial review.

[22]In light of this, the learned Judge found that the removal officer's claim of a lack of discretion raised the issue of fettering discretion. She found this issue serious enough to grant a stay of removal. The finding of a discretion applying to a broad range of circumstances was, on the face of it, a premise as opposed to a conclusion."

"[26]Another view of the discretion involved emerged in *Simoës v. Canada (Minister of Citizenship and Immigration)* (2000), 7 Imm. L.R. (3d) 141 (F.C.T.D.), a decision of Nadon J. [at paragraph 12].

In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. **In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications that**

were brought on a timely basis but have yet to be resolved due to backlogs in the system. (Please see *Paterson v. M.C.I.*, [2000] F.C.J. No. 139 (T.D.); *Imakina v. M.C.I.*, [1999] F.C.J. No. 1680; *Poyanipur v. M.C.I.*, 116 F.T.R. 4.) For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year."

"[28]In *Harry v. Canada (Minister of Citizenship and Immigration)*(2000), 9 Imm. L.R. (3d) 159 (F.C.T.D.), Gibson J. considered deferral of removal in the context of consideration being given to the interests of Canadian-born children where an H & C application had been outstanding for some 13 months. He concluded that **while *Simoës*, *supra*, held that the removal officer did not have the authority to consider the best interests of the children, it did not follow from this that their interests should not be considered when deferral on the basis of a pending H & C application was in issue.**

In considering the duty imposed and duty to comply with section 48, the availability of an alternate remedy, such as a right of return, should weigh heavily in the balance against deferral since it points to a means by which the applicant can be made whole without the necessity of non-compliance with a statutory obligation. **For that reason, I would be inclined to the view that, absent special considerations, an H & C application which is not based upon a threat to personal safety would not justify deferral because there is a remedy other than failing to comply with a positive statutory obligation."**

Ramada v. Canada (MCI), 2005 FC 1112.

- introduces "compelling personal circumstances" test

> "Enforcement officers have a limited discretion to defer the removal of persons who have been ordered to leave Canada. Generally speaking, officers have an obligation to remove persons as soon as reasonably practicable (s. 48(2), *Immigration and Refugee Protection Act*, S.C. 2001, c. 27; set out in the attached Annex). However, consistent with that duty, officers can consider whether there are good reasons to delay removal. Valid reasons may be related to the person's ability to travel (*e.g.* illness or a lack of proper travel documents), the need to accommodate other commitments (*e.g.* school or family obligations), or compelling personal circumstances (*e.g.* humanitarian and compassionate considerations)."

- first mention in jurisprudence on deferral request of "compelling personal circumstances"
- even *Baron* refers to it "absent special consideration ..."
- remains the test today: if presented with CPC, officer must assess merits of request

Munar v. Canada (MCI), 2006 FC 761.

- Court relies on stay decision (2005 FC 1180) where Court found that:

"Therefore, I conclude that the applicant has raised a serious question, even on the more probing standard required in a case like this one, when claiming that the removals officer failed to exercise her discretion appropriately and was not "alert, alive and sensitive" to the children's best interests."

- Court found that insufficient attention had been paid to BIOC

"In this case, the interests of the children had received only a passing consideration and mostly in the context of their leaving Canada with the Applicant. The consequences arising from the other possibility of the children remaining behind (at least as reflected in the case file notes) received insufficient attention and were substantially over-ridden by concerns about the Applicant's behaviour."

- Court cites approvingly from the stay decision and states that in this case, children's interests should be in line with the Convention on the Rights of the Child:

"What he should be considering, however, are the short term best interests of the child. For example, it is certainly within the removal officer's discretion to defer removal until a child has terminated his or her school year, if he or she is going with his or her parent. **Similarly, I cannot bring myself to the conclusion that the removal officer should not satisfy himself that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. This is clearly within his mandate, if section 48 of the IRPA is to be read consistently with the Convention on the Rights of the Child**. To make enquiries as to whether a child will be adequately looked after does not amount to a fulsome H & C assessment and in no way duplicates the role of the immigration officer who will eventually deal with such an application (see Boniowski v. Canada (M.C.I), (2004) F.C.J. No. 1397)."

- The Court concludes that removal officers have a duty to be "alive and sensitive" to the BIOC where primary caregiver is facing removal:

"It is clear from this decision, and from others like it, that **a Removal Officer does have a duty to be alive and sensitive to the short-term interests of children facing the removal of a primary caregiver from Canada**: also see *John v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 583, 2003 FCT 420. If it is expected that children will remain in Canada, it is imperative to consider the adequacy of the arrangements that have been put in place for their care once the parent has left."

Cortes v. Canada (MCI), 2007 FC 78.

- *Court defines "reasonably practicable"*

"A deferral decision is intricate. The legal requirement is clear: the removal is to be immediate, but enforcement is based on practicability; that is, removal is to occur as soon as it is "able to [be] put into practice". But there is an important additional qualifier: **what is practicable must be**

reasonable; that is, "sensible" (*The New Shorter Oxford English Dictionary,* 4th edition (Oxford: Clarendon Press, 1993))."

Mauricette v. Canada (MCI), 2008 FC 420.

- Court emphasizes that discretion can be exercised once compelling facts are before officer

"[17] The decision to defer removal under ss. 48 (2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), is a discretionary decision and requires **that the Officer consider any relevant factors and circumstances unique to the particular case**. This includes a broad range of circumstances. (*Poyanipur v. Canada (Minister of Citizenship and Immigration)* (1995), 116 F.T.R. 4, [1995] F.C.J. No. 1785 (QL); *Wang*, above.)"

"[23] **There are no set conditions that must be met in order for an Officer to exercise his/her discretion to defer removal; therefore, where there are compelling circumstances that make it necessary for the Officer to defer removal, then, justice would require that the Officer exercise that discretion**."

Baron v. Canada (MPSEP), 2009 FCA 81.

Court cites approvingly from *Wang*:

- "In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, **absent special considerations**, such applications will not justify deferral unless based upon a threat to personal safety."

Tip: if you present compelling personal circumstances, you don't have to prove threat to personal safety.

Williams v. Canada (MPSEP), 2010 FC 274.

- Court lists three situations where officer can defer removal
    - Factors not related to travel arrangements but directly impacted by them
    - Factors directly related to travel arrangements
    - Process under the act which could lead to landing and could result in removal order becoming invalid or unenforceable AND failure to defer will expose A to risk of death, extreme sanction or inhumane treatment

- Court agrees with *Wang*, that absent "special considerations" H&C not based on risk to life will not justify deferral, since Applicant can return to Canada if application approved

- Court agrees that one of these special considerations is an H&C application that was filed in a timely manner and that is stuck in the backlog
- Court puts forth **three stages** for removal officer's assessment:

    - Was application filed in timely manner
    - Is backlog reason for delay in decision
    - If both answers are yes, then officer must assess whether deferral is warranted, and *assess relevant factors* present in circumstances before him

- Although there is no duty on officer to assess merits of H&C, officer must **consider circumstances related to H&C application and its potential impact on removal order**

B. How to frame a deferral request based on a pending H&C application?

Timeliness

- make your case for why H&C was filed in timely manner
- If application is not timely, and decision is not imminent, all you can do is emphasize compelling facts and hardship of separation (and hope CBSA poorly addresses BIOC)

    - *Villanueva v. Canada (MPSEP),* 2010 FC 543.

"[36] In my view, then, the Officer was asked to consider the significant backlogs in the system in the case of a timely H&C application that had been outstanding for a considerable period of time (15 months). The Officer ignored this request and refused to defer on the basis of, *inter alia*, "imminence" ,i.e. whether a decision on the H&C was about to be made, irrespective of the amount of time it had been in the system and the reasons for the delay."

    - *Lisitsa v. Canada (MCI),* 2009 FC 599.

- Applicant argues that officer misinterpreted his role and fettered discretion, as H&C was not filed in response to removal proceeding but is an application in process where timing of decision is controlled by minister

- Court concludes that filing of H&C 16 months before is a "special consideration" but that officer's reasoning (para 33) makes it difficult to see under which circumstances officer would defer for pending H&C

- officer's reasoning precludes "timely" H&C to be basis to grant deferral

  - *Nucum v. Canada (MPSEP),* 2010 FC 1187.

- Court finds same as in *Lisitsa*, that officer failed to consider fact that H&C is outstanding for so long would constitute a "special circumstance";

- failure to address this issue is reviewable

  - *Guan v. Canada (MPSEP),* 2010 FC 992.

> "[42] My review of the Decision convinces me that the Officer in this case, although he acknowledged the outstanding H&C application, failed to turn his mind to whether it amounted to a special circumstance on the facts of this case. The Applicant, at the material time, had a timely H&C application outstanding for some three years through no fault of the Applicant. **Not to recognize this as a possible factor in a deferral decision would be to secretly undercut the H&C process from the perspective of applicants. In my view, this is not entirely remedied by the fact that the H&C process can be continued outside Canada."**

- Court finds same error as in *Bhagat* (2009 FC 45, stay order), that officer calculated timeliness in terms of when application will be decided instead of when it was filed; refers to *Harry,* [2000] F.C.J. No. 1727 (F.C.);

- Officer failed to consider whether long standing H&C application was special circumstance that affected the reasonable practicality of removal

  - *Katwaru v. Canada (MPSEP)*, 2008 FC 1045.

    - officer failed to appreciate individual circumstances of Applicant

> "[34] In my opinion, having regard to the decision of the Federal Court of Appeal in *Powell*, the existence of an outstanding H & C application is highly relevant when it is the only means of redress, that is in the absence of a right to appeal from a deportation order."

Tip: prepare your deferral request with your Stay Motion in mind.

<u>Imminence</u>

  - *Villanueva, Bhagat and Katwaru*

- Court is in agreement that the imminence of a pending decision is not relevant; it is timeliness that matters since when a decision is finalized is not within an applicant's control

- Officer will err when s/he emphasizes imminence of a decision as opposed to the timeliness
- You would only emphasize imminence if you have written evidence that decision is weeks away

Compelling personal circumstances

- Case law is fairly unanimous that if an H&C was filed in a timely manner and is stuck in the backlog, then officer has to assess compelling facts
- You must highlight the compelling facts
- You must document compelling facts
    - Prove current situation
    - Prove potential situation
    - Document relevant facts concerning children

        - *Ramada v. Canada (MCI),* 2005 FC 1112.
        - *Joarder v. Canada (M.C.I.)*, 2006 FC 230.
        - *Natoo v. Canada (CIC)*, 2007 FC 402.
        - *Acevedo v. Canada (CIC)*, 2007 FC 401.
        - *Shase v. Canada (MPSEP),* 2011 FC 418
        - *Munar v. Canada (MCI),* 2006 FC 761.

    - Reasons for delay in filing H&C application
        - if there has been a delay in filing application, you must provide an explanation

    - Consequences of removal
        - Family separation: many cases granted based on this
        - Economic hardship for family
        - Hardship to children
        - None of this can be speculative; it must be documented

    - Best Interests of the Children
        - Case law says BIOC need to be assessed prior to removal
        - Set the stage for Irreparable Harm
        - *Mauricette*, *Natoo* and *Bonil Acevedo*

How long should you wait before filing your Stay motion?

- Ask for direction from the Court before filing without a decision on the deferral request
- Think twice before proceeding with a deemed removal
- Make sure your deferral request is filed late or the Court could refuse to hear an emergency motion

Case law summary on H&C applications and deferral requests

By Richard Wazana
WazanaLaw

Cortes v. Canada (MCI), 2007 FC 78.

- Removal must be practicable but what is practicable must be reasonable, i.e. sensible.

> "A deferral decision is intricate. The legal requirement is clear: the removal is to be immediate, but enforcement is based on practicability; that is, removal is to occur as soon as it is "able to [be] put into practice". But there is an important additional qualifier: **what is practicable must be reasonable; that is, "sensible"** (*The New Shorter Oxford English Dictionary,* 4th edition (Oxford: Clarendon Press, 1993))."

Mauricette v. Canada (MCI), 2008 FC 420.

"[17] The decision to defer removal under ss. 48 (2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), is a discretionary decision and requires that the Officer consider any relevant factors and circumstances unique to the particular case. This includes a broad range of circumstances. (*Poyanipur v. Canada (Minister of Citizenship and Immigration)* (1995), 116 F.T.R. 4, [1995] F.C.J. No. 1785 (QL); *Wang*, above.)"

"[23] There are no set conditions that must be met in order for an Officer to exercise his/her discretion to defer removal; therefore, where there are compelling circumstances that make it necessary for the Officer to defer removal, then, justice would require that the Officer exercise that discretion. "

- Court finds that officer focused exclusively on practicality of removal and not on reasonableness

Lisitsa (2009 FC 599)

- Applicants are from different countries; he's stateless, she's from Belarus
- RPD denied October 2003

- They file H&C application before the PRRA, and request deferral to wait for decision
- H&C was filed as soon as they found out about it from GTEC, June 2007
- Officer refuses request, in September 2008, says A waited long after negative RPD to file H&C, that decision is nor imminent, and that H&C is not impediment to removal and should not be used as impediment
- A argues that officer misinterpreted his role and fettered discretion, as H&C not filed in response to removal proceeding but is an application in process where timing of decision is controlled by minister
- Timely filed H&C that is in backlog may justify deferral (para 31)
- Court relies on *Baron*, which cites from *Simoes*, re timely H&C stuck in backlog

- Court cites from *Wang*, re possibility of return to Canada as mitigating factor
    - In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission. (para 51)

- Court concludes that filing of H&C 16 months before is a "special consideration" but that officer's reasoning (para 33) makes it difficult to see under which circumstances officer would defer for pending H&C; officer's reasoning precludes "timely" H&C to be basis to grant deferral

Williams (2010 FC 274)

- A came in 1994 and remained underground until 2006
- He had 2 children from previous wife, and business
- Remarried a woman with 3 children, and had child of their own
- While waiting for criminal conviction, files H&C application in April 2007
- Deferral request, feb 2009, was based on H&C application, BIOC and the business
- Removal date issued March 3, 2009
- 3 categories of situations where officer can defer
    - Factors directly related to travel arrangements
    - Factors not related to travel arrangements but directly impacted by them
        - Child's schooling
        - Canadian business
        - Decision requires judgment or discretion of officer
    - Process under the act which could lead to landing and could result in removal order becoming invalid or unenforceable AND failure to defer will expose A to risk of death, extreme sanction or inhumane treatment
        - No alternative remedy but deferral to ameliorate impact on A if removal order becomes invalid

        - Pending H&C applications fall under this category
        - Agrees with *Wang* that absent *special considerations*, H&C not based on risk to life … does not warrant deferral, because there is remedy: A can return to Canada if application is approved
- One potential special consideration is a pending, H&C application that was filed in timely manner and is stuck in backlog

    - Duty likely stems from two competing statutory duties of Minister: enforce removal and process applications for landing under the act
    - "Where an H&C application was filed promptly and the only reason why it has not been determined lies in the hands of the Minister, then the Minister should not be allowed to rigorously enforce his duty of removal when he has been delinquent in his duty to process applications that may make the removal unnecessary or invalid." (para 36)

- No need for officer to assess merits of H&C
    - **But must consider circumstances related to H&C application and its potential impact on removal order**
    - Officer must ask
        - Was application filed in timely manner
        - Is backlog reason for delay in decision
        - If both answers are yes, then officer must assess whether deferral is warranted, and *assess relevant factors* present in circumstances before him
    - Criminality is relevant in that it weighs against removal, but also relevant if it is a factor that will prevent family reunification

- Court agrees with officer that pending H&C (22 mths) not reasons for deferral given that Applicant was underground for 10 years and did not file timely application
- Court opines that A should have requested deferral based on pending birth of their child; better to ask for shorter deferral when stronger grounds exist
- Court does not send back for redetermination but sets decision aside

Nucum (2010 FC 1187)

- Applicants from Philippines
- RPD August 2004 RPD denied, June 2006 PRRA denied
- 2005, Mr. Nucum involved in serious car accident, and suffered stroke in January 2009
- A received three deferrals, in June 06, February 07, and March 07 due to Mr. Nucum's medical condition
- A filed H&C in May 2008; removal scheduled for January 2010
- Deferral request refused
- Officer finds that H&C was transferred instead of being approved in CPC-V

- Officer did not consider medical condition sufficient for deferral
- R argues H&C not timely; A argues same as *Lisitsa*
- Court finds as in *Lisitsa*, that officer failed to consider fact that H&C is outstanding for so long would constitute a "special circumstance"; failure to address this issue is reviewable
- Court does not address timeliness

Villanueva (2010 FC 543)

- Applicant came to Canada in 1995 at age 12; became PR; has mother and child in Canada
- Was convicted of drug trafficking in 2007 and sentence to 5 years, but released n 2008 for advanced parole
- Received deportation order, which he appealed to IAD, but latter lacked jurisdiction and refused to consider it
- As soon as released, he filed H&C application, prior to receiving deportation order
- Requests deferral request pending H&C decision, 15 months in process
- Officer says H&C not impediment to removal and consults CIC to find out that decision is not imminent
- Court relies on *Simoes* and *Baron* for proposition that timely filed H&C that is stuck in backlog can warrant deferral
- Court notes that H&C was filed before deportation order was issued, upon release from prison, at first available opportunity
- A had specifically referred to timeliness of application, in context of deferral request
- Court concludes that officer erred by considering imminence and not timeliness:

> "Nothing in the relevant jurisprudence states that a removals officer cannot or should not take into account backlogs in the system that have led to a long delay in an H&C application. Rather, recent Federal Court jurisprudence suggests that an officer can consider backlogs within the context of a removal order. See *Williams v. Canada (Minister of Public Safety and Emergency Preparedness)*2010 FC 274 at paragraph 42. And I note that, in considering a stay application in *Harry*, Justice Gibson was particularly concerned about backlogs in the system and the Minister's being "far from diligent in the pursuit of the applicant's H&C application," a matter of "particular import in the light of concern for the best interests of the applicants' Canadian-born child." See *Harry v. Canada (Minister of Citizenship and Immigration)*, 195 F.T.R. 221, [2000] F.C.J. No. 1727 at paragraph 15. In *Simmons v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 1400, 2006 CarswellNat 2861 at paragraph 8, Justice Harrington, citing relevant authority, expressed his view that an enforcement officer has "the discretion to await the pending decision on the H&C application."

> [36] In my view, then, the Officer was asked to consider the significant backlogs in the system in the case of a timely H&C application that had been outstanding for a considerable period of time (15 months). The Officer ignored this request and refused to defer on the basis of, *inter alia*, "imminence" ,i.e. whether a decision on the H&C was about to be made, irrespective of the amount of time it had been in the system and the reasons for the delay.
>
> [37] I am not saying that the Officer had to grant the deferral based upon this request. But I do think he had the discretion to consider it and was obliged to say why it was left out of account. I see no evidence that the backlog factor was given the consideration requested. The Officer recognizes that the H&C application was timely, but in focussing upon "imminence" he neglected to consider whether significant backlogs in the system and a long-outstanding H&C application should impact his decision. In my view, this was a reviewable error and the matter should be returned for reconsideration."

Guan (2010 FC 992)

- A visits Canada in 2003, makes RPD in 2003, refused on lack of evidence of Falon Gong membership
- PRRA refused
- Files H&C in August 2006
- Removal scheduled for September 2009
- A requests deferral request for pending H&C
- Officer refuses, stating that still 18 months before officer assigned to file
- Officer finds insufficient evidence that A faced exceptional circumstances warranting a deferral of removal, based on his establishment in Canada
- Court comments on illusory remedy of H&C post removal

> "[20] Further, in concluding that the H&C application would continue following the Applicant's removal from Canada, the Officer failed to consider that the removal would effectively render illusory the purpose of the H&C application as a humanitarian remedy. Although not determinative, this consideration was relevant. See *Baker*, above.
>
> [21] The Applicant has waited three years for his H&C decision and must wait an additional 18 to 24 months. This is excessive. There are few, if any, cases where removal will not be attempted within five years. The Officer should have considered the importance of providing fair procedures, as was contemplated by Parliament when it provided for an inland H&C remedy for non-citizens in Canada."

- Court finds that officer erred by assessing risk as Falun Gong instead of considering whether there was sufficient evidence to give rise to credible concern

about risk such that H&C officer should assess it prior to removal. Officer failed to appreciate that A didn't understand PRRA and therefore hadn't provided new evidence, but was in the process of obtaining it.

- Court finds that H&C was timely and officer failed to consider whether application pending for 3 years constituted a special circumstance
    - Not to recognize this as a possible factor in a deferral decision would be to secretly undercut the H&C process from the perspective of applicants. In my view, this is not entirely remedied by the fact that the H&C process can be continued outside Canada. (para 42)

- Court finds same error as in *Bhagat* (2009 FC 45, stay order), that officer calculated timeliness in terms of when application will be decided instead of when it was filed; refers to *Harry*

- Officer failed to consider whether long standing H&C application was special circumstance that affected the reasonable practicality of removal

Katwaru v. Canada (MPSEP), 2008 FC 1045.

- officer failed to appreciate individual circumstances of Applicant

> "[34] In my opinion, having regard to the decision of the Federal Court of Appeal in *Powell*, the existence of an outstanding H & C application is highly relevant when it is the only means of redress, that is in the absence of a right to appeal from a deportation order."

Charlton (2008 FC 1355)

- Stay decision
- Court finds that officer's discretion was narrowed
- Officer erred in not assessing whether there were compelling personal circumstances that warranted deferral
- Compelling Personal Circumstances was first coined in Ramada, by Justice O'Reilly

Delisle (2009 FC 28)

- Court affirms the "compelling personal circumstances" test for deferral

Bhagat (2009 FC 45, stay order)

- Court again affirms "compelling personal circumstances" test
- Court also relies on J. Gibson's decision in Harry with respect to applications pending over a year as being timely
- Court finds that officer erred by focusing on imminence of decision and not when it was filed, timeliness

Glasgow (2009 FC 611)

- Court affirms "compelling personal circumstances" test

> "Having said this, an Enforcement Officer must consider compelling personal circumstances (see *Ramada v. Canada (Solicitor General)*, 2005 FC 1112, which is very much on point as that case involved the interests of a Canadian born child being treated at Sick Kids Hospital in Toronto when it was uncertain the child could obtain treatment in Portugal)."

- Court finds serious issue with officer's BIOC analysis

Shase v. Canada (MPSEP), 2011 FC 418

- Inland spousal filed one year early
- Officer refused deferral
- Court says officer ignored impact of family separation if removed
- Court finds application filed was timely

Federal Court Cour fédérale

Date: 20110727

Docket: IMM-4730-11

Ottawa, Ontario, July 27, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

EMILJANO RODHAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON motion dated the 25th day of July 2011, on behalf of the applicant, for an Order staying the execution of his removal to Albania, now scheduled to be executed on Thursday, July 28, 2011 at 18:10 p.m.;

AND UPON considering the evidence and the submissions contained in the motion records filed by the parties;

AND UPON hearing the oral submissions of counsel at the Court in Ottawa, Ontario via teleconference from the Court in Toronto, Ontario, on Wednesday, July 27, 2011;

AND UPON considering the conjunctive tri-partite test in *Toth v. Canada (Minister of Employment and Immigration)*, (1988) 86 NR 302 (FCA) and the higher threshold where an applicant is seeking to review a refusal of an enforcement officer to exercise his or her discretion to defer removal as stated by this Court in *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682;

AND UPON determining that the motion should be allowed for the following reasons:

1. The applicant has raised a serious issue on the stronger *Wang* test. That serious issue is whether the officer erred in failing to properly consider the best interests of the children and in engaging in speculation as to the ability of the applicant to be sponsored by his wife in an overseas application after removal. All of the evidence before the officer supports the view that the applicant's spouse would have to resort to social assistance to support her and her children, thus making such an application impossible. Further, it is mere speculation that she would be able to obtain employment when the evidence shows that she has no family or support in Canada and has worked only some 8 months in the 10 years she has been in Canada. It is also mere speculation that the applicant would be able to support her from Albania given the evidence of the very low wages he would be likely to earn there. Even given the limited basis on which removal orders may be deferred, the officer's decision, on the particular facts here, appears to be perverse.

2. I am also satisfied that he has established that he will suffer irreparable harm if the stay is not granted. *In Huang v. The Minister of Public Safety and Emergency Preparedness*, March 20, 2010, IMM-1540-10, I held that "Even if his spousal sponsorship application is rendered moot by his removal, there appears to be no impediment to him filing an application for permanent resident status with spousal sponsorship from abroad." Here there appears to be a very real impediment – the financial situation of the spouse and her inevitable reliance on social assistance. In my view, if a stay is not issued, there is a real likelihood that this family will be separated permanently and the applicant's child will be left fatherless and dependant on Canadian social services. While that may result if the pending spousal sponsorship application is not approved, that result in this motion constitutes irreparable harm.

3. The balance of convenience favours the applicant.

THIS COURT ORDERS that the removal order made against the applicant, which is now scheduled for execution on Thursday July 28, 2011, is stayed pending the final disposition of the applicant's application for leave and judicial review of the enforcement officer's decision dated July 21, 2011 refusing to defer the execution of the removal order.

"Russel W. Zinn"
Judge

Federal Court  Cour fédérale

Date: 20110311

Docket: IMM-1555-11

Toronto, Ontario, March 11, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

AIDA GURINI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPARDNESS

Respondent

ORDER

UPON motion dated March 9, 2011 on behalf of the Applicant for an Order to stay the execution of a removal order made against her, which is scheduled to be executed on Friday, March 11, 2011 to Albania, until (i) her Application for Leave and for Judicial Review of a decision, dated March 8, 2011 to refuse to defer her removal to Albania has been decided and, if leave is granted, until the Application for Judicial Review has been decided, and (ii) her application (H&C Application) under s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA) has been decided;

AND UPON considering the evidence and the submissions contained in the motion records filed by the parties;

AND UPON hearing the oral submission of counsel at the Court in Toronto, Ontario on short notice on Thursday, March 10, 2011;

AND UPON considering the conjunctive tri-partite test, set forth in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA), that must be satisfied before a stay of removal can be granted;

AND UPON considering the higher threshold that applies where an applicant is seeking to review a refusal of a Removal Officer to exercise his or her discretion to defer removal, as established by this Court in *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, at para. 11, and by the Federal Court of Appeal in *Baron v Canada (The Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, at para. 61;

AND UPON concluding that the Applicant has established that there is a serious issue to be tried, with respect to:

(i) Whether the Removal Officer reasonably exercised his or her limited discretion under section 48 of the IRPA and gave reasonable consideration to the Applicant's reasons for requesting a deferral of her removal, including her pending H&C Application, the possibility that her removal might have an adverse impact upon her prospects for success on that application, whether there were special circumstances

relating to her situation that warranted deferring her removal, more specifically the nature of the hardship that she will suffer if she is removed to Albania given that she (a) has no close relatives there except her ex-husband who has threatened her, has molested her on several occasions; and (b) the best interest of her children in that she will lose both the limited access she currently has to her children and more importantly any possibility of ever regaining their custody.

AND UPON further concluding that the Applicant has satisfied her burden of establishing that he faces a risk of irreparable harm, as contemplated by the jurisprudence (e.g.; *Melo v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 403 at para. 22;

AND UPON further considering the balance of convenience, the Applicant does not come before this Court with the cleanest of hands but what has motivated her actions and prompted her return illegally to Canada in 2008 has been the best interest of her children and her unrelenting pursuit to retain access to them and regain their custody. Furthermore, she voluntarily reported her fraudulent entry to the CBSA and has been reporting regularly to them ever since. The balance of convenience exceptionally in light of the particular circumstances of this case favour the Applicant; (*Makias v Canada (The minister of Public Safety and Emergency Preparedness and The Minister of Citizenship and Immigration)* 2008 FC 343 at par. 13);

AND UPON concluding that a test for a stay has been met;

THIS COURT ORDERS that this motion be allowed and that the Applicant's deportation scheduled for Friday, March 11, 2011 is stayed pending the resolution of the Application for Leave and for Judicial Review of the decision of the Enforcement Officer not to defer her removal.

I HEREBY CERTIFY that the above document is a true copy of the original issued out of/filed in the Court on the 11
day of MARCH A.D. 20 11
Dated this 11 day of MARCH 20 11

MAGGIE LAU
REGISTRY OFFICER
AGENT DU GREFFE

"André F.J. Scott"
Judge

Federal Court Cour fédérale

Date: 20110216

Docket: IMM-958-11

Ottawa, Ontario, February 16, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

FAROUK MATANO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

UPON motion by the applicant for an order staying his removal from Canada to Kenya which is scheduled to take place on February 16, 2011 at 5:45 p.m.;

AND UPON noting that the applicant is a citizen of Kenya who came to Canada 22 years ago. The applicant is a failed refugee claimant and his claim for permanent residence under the post-determination refugee claimant in Canada class was denied in 1993. In 1997, the applicant applied for permanent residence under the deferred removal order class. This application was denied because the applicant had previously been working while receiving social assistance and as a result, he was charged with fraud over $5,000 and received a conditional sentence, probation and a restitution order. He made payments pursuant to the restitution order as long as he could afford to

pay. In March 2001, the applicant and his wife filed an H&C application. The application was approved in principle but the applicant's application was denied at the second stage due to his conviction. His wife became a permanent resident in 2005. The applicant obtained temporary residence permits and work permits. In June 2009, he neglected to renew the temporary resident permit and was called in for a pre-removal risk assessment which was ultimately denied in February 2010;

AND UPON noting that the applicant submitted an application for permanent residence as a member of the in Canada spouse or common-law partner class in May 2010. The application is still pending;

AND UPON noting that the applicant is employed and is the main bread winner in the family as his wife only works part time;

AND UPON noting that the applicant has three Canadian born children ranging in age from 3 to 19 years. All three children are living with a disability. The youngest son is visually impaired, the middle son is a selective mute and the oldest son has been diagnosed with a mild intellectual delay. The applicant provides support for his sons' schooling and is the only person in the family with a driver's license;

AND UPON reading the filed material and hearing counsel on behalf of the parties;

AND UPON noting that in order to obtain a stay, the applicant must meet all three branches of the tri-partite test set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.) at page 305:

> This Court, as well as other appellate courts have adopted the test for an interim injunction enunciated by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396...As stated by Kerans J.A. in the *Black* case *supra*:

> The tri-partite test of *Cyanamid* requires, for the granting of such an order, that the applicant demonstrate, firstly, that he has raised a serious issue to be tried; secondly, that he would suffer irreparable harm if no order was granted; and thirdly that the balance of convenience considering the total situation of both parties favours the order.

AND UPON being satisfied that the applicant has raised serious issues to be tried, namely, did the officer err in her assessment of the timeliness of the spousal application and did the officer properly assess the best interests of the children as required of an enforcement officer?

AND UPON being satisfied that the applicant would suffer irreparable harm if the stay is not granted. Based on the facts of this case, the loss of the right to have his eight month old spousal application determined would amount to irreparable harm. As well, if a proper assessment of the best interests of the children was not completed, then this would constitute irreparable harm;

AND UPON being satisfied that the balance of convenience favours the applicant. If the applicant was removed, his spousal application would end. He will continue to be able to support his children. The respondent can remove the applicant if his application is not successful;

IT IS ORDERED that the removal of the applicant is stayed until leave is denied in his application for leave and for judicial review and if leave is granted, then his removal is stayed until his application for judicial review is disposed of by the Court.

"John A. O'Keefe"
Judge