

CANADIAN BAR ASSOCIATION ANNUAL MEETING

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COMPASSION IN CANADA'S IMMIGRATION PROGRAM:

**DISCRETIONARY RELIEF IN IMMIGRATION PROCESSING AND A REVIEW OF THE
REFUGEE DETERMINATION PROCESS**

Canada is internationally recognized as a humanitarian nation. Whether it be our Refugee Determination program, which has been recognized by the UNHCR with the Nansen Refugee Award in 1986, peacekeeping abroad, or the consideration of applications for entry to Canada. Throughout our overall immigration program are numerous examples of this humanitarian tradition built into our statute: the Immigration and Refugee Protection Act. Indeed, the very name of our statute reflects this general attitude. This paper will review both the elements of discretion within the immigration process, as well as generally review our Refugee Determination system.

The Immigration and Refugee Protection Act ("IRPA" or "the Act"), provides for the exercise of discretion by immigration officials in a large many different situations.

An immigration officer outside of Canada considering an application by a skilled worker to be admitted to Canada as a permanent resident has the discretion to accept an application even if the prospective immigrant does not obtain sufficient points to meet the requirements set out in the Immigration and Refugee Protection Regulations ("the Regulations"). By the same token an officer can refuse an application even if the applicant meets the required number of points. In either case, the officer has the discretion to determine that the number of points is not an accurate reflection of the person's ability to successfully establish herself in Canada.¹

In the case of a person seeking entry to Canada who is determined to be inadmissible, the officer either at a Canadian Embassy outside of Canada or at the port of entry has the discretion to issue a temporary resident permit to allow the person to enter Canada.²

¹ See IRPA Regulations 76 (3): 76 (3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer *may* substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

² See IRPA section 24 (1): 24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the

In the case of a person who fails to meet the residency requirement set out in section 28 of IRPA, the Act provides for a discretion that permits the officer to exempt the person from that requirement on humanitarian and compassionate grounds.³ If the application is refused then the permanent resident has a right to Appeal to the Immigration Appeal Division where that Division can exercise discretion on humanitarian and compassionate grounds.⁴

In the case of persons who are inadmissible to Canada on grounds of security,⁵ on grounds of serious criminality⁶, or organized criminality,⁷ the Act allows the Minister to grant an exemption to overcome this inadmissibility if the Minister determines that it is appropriate to do so.⁸

In the case of a person who an immigration officer believes might be inadmissible to Canada, the Act gives the officer discretion to determine whether or not the circumstances warrant the writing of a report which might lead to a finding of inadmissibility and an order to leave Canada.⁹ In some cases the officer may allow the person to withdraw her application to enter Canada. In others the officer may decide that it is not necessary to proceed with a finding of inadmissibility because the person has already been ordered to leave the country.

In cases where a report is written, the case is then referred to a more senior officer, the Minister's Delegate, who determines whether or not to commence deportation proceedings. Again the wording of the provision suggests that the officer has discretion and that he need not refer the matter for an admissibility determination if she determines that it is not necessary to do so.¹⁰

opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

³ The residency requirement means that a person must reside in Canada for two out of every five year period. However section 28 (2) (c) allows an officer to exempt a person from the requirement on humanitarian and compassionate grounds.

⁴ See IRPA section 63 and 67 (1)

⁵ See IRPA section 34

⁶ See IRPA section 36

⁷ See IRPA section 37

⁸ In the case of persons inadmissible on grounds of security or organized criminality the decision to grant the exemption must be made by the Minister personally (see IRPA sections 34 (2) and 37 (2)). In the case of a person inadmissible on grounds of serious criminality if the conviction occurred in Canada the only way it can be overcome is with a pardon. In the case of a person convicted outside of Canada the person can apply for a finding of rehabilitation pursuant to section 36 (3) (c).

⁹ See IRPA section 44 (1)

¹⁰ See IRPA section 44 (2): 2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

In addition to discretionary decisions made by an immigration officer, the legislation also provides for the exercise of discretion by the Immigration and Refugee Board. The discretion arises within the context of appeals made to the Appeal Division of removal orders or in appeals by sponsors where the application for permanent residence of their sponsored dependent has been refused. In addition permanent residents who have been determined to be in breach of their residency requirement also have a right to appeal to the Appeal Division.¹¹

Quasi Judicial Discretionary Decisions By the Appeal Division of the Immigration and Refugee Board

The quasi-judicial tribunal with jurisdiction to hear appeals in immigration cases, the Immigration and Refugee Board (IRB), has jurisdictional to hear appeals against removal orders in some circumstances, appeals of refusals to accept applications for permanent residence by sponsored applicants and appeals by permanent residents where a determination has been made that they lost their permanent residence status through failure to comply with the residency requirement. The IRB can allow the appeals on humanitarian grounds. In so doing the tribunal is required to consider all of the circumstances of the case including the best interests of the child. Within the context of the quasi judicial hearing, the tribunal is required to act in accordance with the principles of natural justice. The person appealing the decision has a right to counsel, a right to present oral and documentary evidence.

The tribunal is under an obligation to carefully consider all of the circumstances and to provide written reasons for the determination. If the tribunal fetters its discretion,¹² ignored relevant evidence¹³ or failed to consider the totality of the evidence when exercising its discretion the decision can be set aside.¹⁴

As we shall see below, discretionary decisions by immigration officers are subject to different considerations. The principles of fairness will vary depending on the circumstances. In many cases an oral interview will not be required. They may or may not be a right to counsel. Reasons will usually be required but the requirement of providing reasons can often be met by providing a copy of the file notes which explain the basis for the decision.

JUDICIAL REVIEW OF EXERCISE OF DISCRETION BY THE IMMIGRATION AND REFUGEE BOARD

A decision of the IRB is subject to judicial review before the Federal Court of Canada. The application must be commenced by an application for leave to commence an application for judicial review. If leave is granted then the Court will consider the application for judicial review. When assessing the exercise of discretion the Court will

¹¹ See IRPA sections 63 (1)-(4) and 65

¹² see *Pushpanathan v MCI* 1999 FCJ 380

¹³ see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35

¹⁴ see *Archibald v MCI* 1995 FCJ 747

afford considerable deference to the decision of the Appeal Division and will only interfere if the decision is not *reasonable*. A decision is not reasonable if it is one which is rendered without taking into account relevant evidence or where the officer has fettered his or her discretion. When reviewing the decision on judicial review the Court will consider whether the reasons for decision properly reflect the evidence before the tribunal and that they set out a possible conclusion that could have been reached based on the evidence before the tribunal.¹⁵

EXERCISE OF DISCRETION BY IMMIGRATION OFFICERS MAKING ADMINISTRATIVE DECISIONS.

When officers exercise their discretion, there are several issues which arise. The first is the scope of the duty of fairness that will be required during the course of the decision making process. The jurisprudence indicates that the degree of fairness will vary depending on the context. The Supreme Court of Canada set out the criteria that are to be applied by the Courts when assessing the duty of fairness applicable to any given decision in the leading case of *Baker v MCI*.¹⁶ The factors are

- a. the nature of the decision being made and process followed in making it;
- b, the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- c. the importance of the decision to the individual or individuals affected;
- d. the legitimate expectations of the person challenging the decision;
- e. the choices of procedure made by the agency itself.

The Federal Court of Appeal has applied the Baker factors in a series of cases. In the case of *Cha v MCI*¹⁷ the Court held that the presence of the word *may* in section 44 (2), does not always require that the Minister receive submissions and consider all of the circumstances of the case before exercising her discretion to commence deportation proceedings. The nature of the duty of fairness will depend on a series of factors:

1. The nature of the decision;
2. Its impact on the person;
3. The person's claim to remain in Canada; and
4. The basis for the inadmissibility.

¹⁵ see *Khosa v Canada* 2009 SCJ 12

¹⁶ 1999 2 SCR 817

¹⁷ See 2007 1 FCR 409

In the *Cha* decision, regarding a foreign national who had committed a criminal offence, the discretion of the officer was very limited and as a result, there was no duty to consider humanitarian factors. The Court did note however, that in other circumstances, there might be a duty to consider such factors. In terms of the duty of fairness the Court held that given the context the person had the right to know the allegations in advance and to respond to them. The Court held that there was no duty to advise the person in advance of a right to counsel. In this regard the Court contrasted the circumstances in the *Cha* case with that of *Ha v MCI*¹⁸ where the Court concluded that there was a breach of the duty of fairness when counsel was not allowed into an interview. The Court distinguished *Ha* noting that the case did not stand for the proposition that the person should be notified of a right to counsel but only that the officer ought to have allowed counsel to attend the interview when he was present,

The Court has considered the duty of fairness and the scope of discretion within the context of a removals officer's discretion to defer removal. The Court noted that an officer charged with arranging for the removal of a person from Canada has discretion to defer removal in certain circumstances.¹⁹

In *Wang v. M.C.I.*²⁰, the Federal Court concluded that the discretion was very limited and save exceptional circumstances or cases where there was a risk of torture, the discretion would generally be limited to short term issues related to the actual timing of the removal. However, an application for consideration on humanitarian and compassionate grounds made pursuant to section 25 (1) and in a timely fashion, might warrant a deferral.²¹ Moreover, although the discretion is limited, there are cases where the Court has set aside a decision not to defer removal where the officer failed to consider special circumstances.²² In terms of the duty of fairness, the officer is required to give the person an opportunity to make submissions, to consider all of the evidence presented and to provide some reasons for decision.²³

DUTY TO ACT FAIRLY WITHIN THE CONTEXT OF AN HUMANITARIAN AND COMPASSIONATE APPLICATION

The Federal Court of Appeal in *Shah v. Canada (Minister of Employment & Immigration)*²⁴ had concluded that there is minimal duty to act fairly in cases involving applications on humanitarian and compassionate grounds. In essence, the court concluded that there was no requirement for reasons or for an interview. The officer had a broad

¹⁸ 2004 3 F C 195

¹⁹ See Section 48 (1)

²⁰ [2001] 3 F.C. 682

²¹ *Simoes v. Canada (MCI)* [2000] F.C.J. No.936 (T.D.)

²² see *Prasad v. M.C.I.*, [2003] F.C.J. No. 805

²³ see *Prasad v MCI* 2003 FCJ 805

²⁴ (1994), 170 N.R. 238, [1994] F.C.J. No. 1299 (C.A.)

discretion to make a determination. Unless the officer ignores relevant information, makes perverse findings of fact with respect to the information or unduly fetters his or her discretion, the decision will not be reviewable. The standard of review according to the Court of Appeal in *Shah* was that the decision must be found to be patently unreasonable.

The *Shah* decision has now been overruled by the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)*.²⁵ In *Baker*, the Supreme Court expressly disagreed with the decision of the Federal Court of Appeal in *Shah*. Madame Justice L'Heureux-Dubé writing for the court concluded that although the decision was a discretionary one there was a duty to act fairly and given that the decision had important implications for the individual the duty to act fairly required that the applicant and other affected parties be given a full opportunity to be heard; to make full submissions; to an unbiased decision-maker; and to reasons for any adverse decision. An oral hearing was not, however, considered by Her Ladyship to be an essential aspect of the process. Her Ladyship noted:

¶ 32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah, supra*, at p. 239, that the duty of fairness owed in these circumstances is simply “minimal”. Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

¶ 33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see for example, *Said, supra*, at p. 30.

¶ 34 I agree that an oral hearing is not a general requirement for H&C decisions. An interview is not essential for the information relevant to an H&C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer,

²⁵ (1999), 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39.

information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

¶ 35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to a breach of the principles of fairness.

¶ 43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H&C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

The duty of fairness moreover will require that the officer allow the applicant to respond to any extrinsic evidence that the applicant is not aware of.²⁶ Thus, if the immigration officer receives adverse information from a third party, be it an immigration official or some other individual, the officer is required to disclose that information to the applicant and give the applicant an opportunity to respond. Consideration of this extrinsic evidence without providing notice to the applicant will constitute a breach of the principles of fairness.

In *Chan v. Canada (Minister of Citizenship and Immigration)*,²⁷ Reed J. quashed a decision based on the consideration of extrinsic evidence. In *Bayovo v. Canada (Minister of Employment & Immigration)*,²⁸ Rouleau J. again quashed a decision based upon a breach of the duty of fairness. He noted:

I am satisfied the decision should be set aside and the matter returned for reconsideration. The principles of natural justice and fairness require the immigration officer to convey to the applicant sufficient information so as to enable him to know the reasons for the refusal and to provide the applicant with an opportunity to respond to those reasons. If the immigration officer had doubts with respect to the *bona fides* of the marriage, fairness required the applicant and his spouse be provided with an opportunity to respond to those concerns. No interview was held in the present case nor were written submissions invited.

In *Amoateng v. Canada (Minister of Citizenship & Immigration)*²⁹ McKeown J. held that an immigration officer breached the duty to act fairly when he considered notes made by another officer which had not been brought to the attention of the applicant. The applicant had sought permanent residence from within Canada, based upon a marriage to a permanent resident. The application was refused. A second application was made to another immigration officer and this application was refused, without any interview being held or any notification by the official that he was considering the adverse information obtained from the previous immigration officer.

There will be no breach of the duty to act fairly if an immigration officer consults with his or her superiors before making a decision in a complex case. In *Virk v. Canada*

²⁶ See *Shah v. Canada (Minister of Employment & Immigration)* (1994), 170 N.R. 283, [1994] F.C.J. No. 1299 (C.A.).

²⁷ [1994] F.C.J. No. 1830 (T.D.).

²⁸ [1994] F.C.J. No. 1939 (T.D.).

²⁹ [1994] F.C.J. No. 2000 (T.D.).

(*Minister of Employment & Immigration*)³⁰ Joyal J. dismissed an application for *certiorari*. The applicant had argued that the immigration officer had breached his duty to act fairly when he had consulted with his superiors before rendering his decision. The Court held that the officer could consult but that the officer must render the decision.

The most important decision of the court on the duty to act fairly in the context of an humanitarian and compassionate application is the case of *Haghighi v. Canada (Minister of Citizenship and Immigration)*. The issue raised was whether or not the humanitarian and compassionate officer was required to disclose the risk assessment which was provided to the humanitarian and compassionate officer when that officer considered the question of risk. The court concluded that there was an obligation to disclose this evidence. The court noted at paras. 37 and 38:

In my opinion, the duty of fairness requires that inland applicants for H&C landing under subsection 114(2) be fully informed of the content of the PCDO's risk assessment report, and permitted to comment on it, even when the report is based on information that was submitted by or was reasonably available to the applicant. Given the often voluminous, nuanced and inconsistent information available from different sources on country conditions, affording an applicant an opportunity to comment on alleged errors, omissions or other deficiencies in the PCDO's analysis may well avoid erroneous H&C decisions by immigration officers, particularly since these reports are apt to play a crucial role in the final decision. I would only add that an opportunity to draw attention to alleged errors or omissions in the PCDO's report is not an invitation to applicants to reargue their case to the immigration officer.

In view of the potentially grave consequences for an individual who is returned to a country where, contrary to the PCDO's report, there is a serious risk of torture, the increased accuracy in the decision likely to result from affording the respondent the procedural right sought here justifies whatever administrative delays might thereby be occasioned. In order to minimize delay, it would be appropriate for immigration officers to give to applicants a relatively short time within which to submit written comments on the report.³¹

CONCLUSIONS ON THE DUTY TO ACT FAIRLY

³⁰ [1991] F.C.J. No. 413 (T.D.).

³¹ [2000] 4 F.C. 407, [2000] F.C.J. No. 854 (T.D.)

As a result of the *Baker*¹ decision the duty to act fairly when assessing a humanitarian and compassionate application now encompasses the following obligations:

(a) The applicant and *any other persons who may be affected by the decision should be given a full and fair opportunity to be heard*. This requirement however does not impose an obligation to conduct an oral interview if all the necessary information can be properly gathered by way of written submissions—*Baker v. Canada (Minister of Citizenship & Immigration)*.

(b) The applicant should be provided with notice of any extrinsic evidence and be given an opportunity to respond to it prior to a decision being rendered. This includes opinions obtained from PRRA officers concerning issues of risk— *Haghighi v. Canada (Minister of Citizenship & Immigration)*; *Shah v. Canada (Minister of Employment & Immigration)*.

(c) Written reasons for the decision should be provided—*Baker v. Canada (Minister of Citizenship & Immigration)*. The reasons should provide the basis for the decision of the officer.

(d) Policy guidelines which are designed to assist the officers in rendering their decisions are acceptable—*Baker v. Canada (Minister of Citizenship & Immigration)*.

(e) However if the guidelines unduly fetter the discretion of the officer than they are improper and any decisions taken pursuant to the guidelines will be quashed—*Yhap and Vidal*.

(f) When assessing the application the officer can take into account all relevant circumstances. The officer in the exercise of his or her discretion must consider all of the relevant facts and ought not misconstrue or ignore relevant evidence. If the officer considers all of the relevant facts and the reasons properly explain the basis for decision the decision ought not to be interfered with by a reviewing court.

JUDICIAL REVIEW OF DISCRETIONARY DECISIONS BY OFFICERS

As a result of the decisions of the Supreme Court in *Baker and Khosa* the standard to be applied by the Court when reviewing the exercise of discretion by an officer will be reasonableness.

APPLICATIONS FOR AN EXEMPTION ON HUMANITARIAN AND COMPASSIONATE GROUNDS

Of all of the instances where discretion is exercised in the immigration context, applications for an exemption from the usual immigration criteria pursuant to section 25

(1) of IRPA is the most frequently invoked section. A person either inside or outside of Canada can make an application for consideration on humanitarian and compassionate grounds to be exempted from any of the criteria that would normally be applied in assessing the application. Once the person makes the application it must be considered by an officer. The officer must consider all of the evidence and must render a decision and provide written reasons for it.

Section 25 (1) of IRPA provides that:

The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or 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 obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

Thus when a foreign national who is inside or outside of Canada seeks an exemption from any requirements of the Act or Regulations, the Minister is required to consider the application and *may* grant the exemption.

Duty to Consider the Application

The wording of the provision which states that the Minister **shall** examine the circumstances of a request indicates that there is a positive duty on the Minister to consider the application. This is a reflection of the jurisprudence of the Federal Court of Appeal in *Jiminez-Perez v. Canada (Minister of Employment & Immigration)*³² where the Federal Court of Appeal held that an immigration officer is under a duty to consider a request for exemption. In that case, a Canadian citizen sought to sponsor the application for permanent residence of her husband Jiminez-Perez, a citizen of Mexico who had overstayed his visit to Canada. Jiminez-Perez had been the subject of an immigration hearing and had been ordered to leave the country. Immigration officials refused to consider the sponsorship application on the basis that “[i]mmigration legislation does not permit us to consider an undertaking in isolation from an application for permanent residence made by your fiancé which in accordance with s. 9 of the *Immigration Act* must be made at one of our offices abroad and assessed by a visa officer”. The Court held that the statute required the Minister to consider the application and that the application was to be considered by local officers.³³

³² [1983] 1 F.C. 163 (C.A.).

³³ *Jiminez-Perez v. Canada (Minister of Employment & Immigration)*, [1983] 1 F.C. 163 at p. 171 (C.A.).

The effect of this decision is that a foreign national in Canada can apply for an exemption from any of the provisions of the Act or Regulations. Once the application is made it must be considered and a decision rendered.

In the case of persons outside of Canada the person can apply for an exemption and the Minister will be required to consider it. However, the provisions of section 87.3 of IRPA allow the Minister to issue instructions with respect to the processing of applications under section 25 (1) made outside of Canada. It would be possible to direct officers to not consider humanitarian applications made outside of Canada. However, to date no such instructions have been issued and as a result if an application for consideration on humanitarian and compassionate grounds is made outside of Canada it must still be considered by the officer.

WHO RENDERS THE DECISION?

The wording of section 25 (1) indicates that the application must be made to the Minister. However, the Act allows for the delegation of most powers that are vested in the Minister to officials. A specific statutory instrument has delegated the power to render decisions on most applications made under section 25 (1) to immigration officers. Decisions made with respect to applications for exemptions from some of the inadmissibility provisions dealing with security, serious or organized criminality or violations of human rights must be considered by senior officials in Ottawa. Moreover decisions to grant ministerial relief pursuant to sections 34 (2), 35 (2) or 37 (2) must be made personally by the Minister.

As applications for an exemption on humanitarian and compassionate grounds make up the majority of applications in an immigration context, when an officer is required to exercise discretion, we will focus our analysis on those applications. However the basic principles enunciated below apply to all exercises of discretion.

THE NATURE OF THE HUMANITARIAN AND COMPASSIONATE PROCEDURE

In the decision of *Baker v. Canada (Minister of Citizenship & Immigration)*,³⁴ the court dealt with the nature of the humanitarian and compassionate procedure and described it in the following terms:

¶ 13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in

³⁴ (1999), 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39.

relation to it.

¶ 14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the Act, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H&C) considerations arises from s. 2.1 of the Immigration Regulations. ...

¶ 15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the regulations, an H&C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565, at p. 569. In addition, while in law, the H&C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

¶ 16 Immigration officers who make H&C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. These guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a

situation. It also states that although officers are not expected to “delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated”.

¶ 17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined—public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, become established, and has become an “illegal de facto resident”, and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if “unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada”. The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person’s home country should also be considered.

INDEPENDENCE OF THE DECISION MAKER AND THE USE OF GUIDELINES

Given that the decision-making process is delegated to an immigration officer, it is clear that that officer is the actual decision-maker. The Federal Court has indicated that the decision must be made by the decision-maker and that if the decision-making process is improperly fettered then the decision will be reviewable. Thus, in *Yhap v. Canada (Minister of Employment & Immigration)*,³⁵ where the guidelines provided to the immigration officer making the decision were so narrow and limited that it was virtually

³⁵ [1990] 1 F.C. 722, [1990] F.C.J. No. 205 (T.D.).

impossible for an officer to make a positive decision, the court concluded that the guidelines were not in accordance with the *Immigration Act* or Regulations in that they improperly fettered the discretion of the officer by eliminating their discretion almost completely. Thus although guidelines are permissible and indeed preferable as a mechanism for ensuring consistency in decision making they cannot so fetter the discretion of the officer as to render the exercise of his or her discretion a *fait accompli*.

In *Yhap* the court found these guidelines constituted a fettering of the discretion under s. 114(2) of the former *Immigration Act*. Jerome A.C.J. began by exploring the possible restrictions on the discretion in question:

In the context of this case, what constitutes *lawful* restrictions on the scope of the review, and to what extent may the Minister select and impose criteria to be applied in a review of this nature? The general position of Canadian Courts on the structuring of discretion has been articulated in Professor J.M. Evans' *de Smith's Judicial Review of Administrative Action*, 4th ed. (London: Stevens & Sons, 1980) where he states at 312:

“a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases.”

The importance of flexibility in the adoption of policy or guidelines as a means of structuring discretion is highlighted by D.P. Jones and A.S. de Villars in *Principles of Administrative Law* (Toronto: Carswell, 1985), where the difference between “general” and “inflexible” policy is described at 137:

“the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review.

On the other hand, it would be incorrect to assert that a delegate cannot adopt a general policy. Any administrator faced with a large volume of discretionary decisions is practically bound to adopt rough rules of thumb. This practice is legally acceptable, provided each case is

individually considered on its merits.”³⁶

Jerome A.C.J. went on to find that the backlog guidelines were “rigid and inflexible” and that applicants who are *not* “members of official delegations, athletic teams or cultural groups” and who are *not* “close family members of a Canadian resident” would appear to be excluded from humanitarian and compassionate review subject to these criteria:

The problem in the present case is that the text of the Minister’s policy directive creates the risk that her officials will consider it a limitation on the category of humanitarian and compassionate factors. It is here that the importance of this application from a group of 25 claimants becomes apparent. No single case could prove that immigration officials have perceived and exercised this limitation on the category, but the evidence of the approximately 25 applicants satisfies me that immigration officials have done exactly that. The Minister has quite properly directed that in this process a preliminary interview on humanitarian and compassionate grounds is to take place. Simple consistency demands that the Minister must direct her mind to what the applicants feel are their humanitarian and compassionate circumstances, and not to a set of criteria which constitute inflexible limitations on the discretion conferred by the Act.³⁷

As a result in circumstances where the policy guidelines unduly fetter the discretion of immigration officers, the determinations made by officers in considering these policy guidelines will be quashed. The fact that in certain circumstances guidelines have been found to be an illegal fettering of discretion does not mean that guidelines in and of themselves are inappropriate. Indeed, Mr. Justice Jerome stated in *Yhap v. Canada (Minister of Employment & Immigration)* that in certain circumstances, guidelines were appropriate:

The discretion afforded an immigration officer by s. 114(2) of the Act is wide. The officer is asked to consider, with respect to the possible admission to Canada of a given applicant, “reasons of public policy” as well as the “existence of compassionate or humanitarian considerations”. Neither the section of the *Immigration Act* which sets out definitions of terms contained in the Act nor the Immigration Regulations describe in any greater detail how the section is to be applied, nor what interpretation the

³⁶ (1990), 9 Imm. L.R. (2d) 243 at p. 259, [1990] F.C.J. No. 205 (T.D.).

³⁷ *Yhap v. Canada (Minister of Employment & Immigration)* (1990), 9 Imm. L.R. (2d) 243 at p. 261, [1990] F.C.J. No. 205 (T.D.).

officer is to give to the rather broad terms contained therein. It is not surprising, therefore, that the Immigration Manual contains in c. 9 policy guidelines which assist an officer in the exercise of his or her discretion pursuant to, among other sections, s. 114(2) of the Act.³⁸

Therefore guidelines are appropriate and indeed even desirable. However, with regard to applications for exemptions made on humanitarian and compassionate grounds, guidelines cannot fetter the discretion of immigration officers to consider all of the relevant matters put before them in the exercise of their administrative function.

In some cases, policy guidelines can be found to be an illegal fettering of the discretion if they oblige officers to take into account irrelevant considerations or to give undue emphasis to considerations which are only partially relevant. This was the finding of Mr. Justice Joyal in the case of *Cabalfin v. Canada (Minister of Employment & Immigration)*.³⁹ In *Cabalfin*, the applicants applied for consideration as *de facto* residents. Persons who had entered Canada as part of an organized plan are specifically excluded from consideration based on the guidelines dealing with *de facto* residents. The immigration officer rejected the applications based upon his determination that the applicants had entered Canada on the basis of an organized plan. While Mr. Justice Joyal did not hold that this was a totally irrelevant consideration, he quashed the determination because he found that the policy guidelines illegally fettered the discretion of immigration officers when they raised the issue of the method of entry into Canada to the point where it became the only relevant factor to be considered when the application was processed by the immigration officer. While accepting that it was one relevant consideration, Mr. Justice Joyal felt that it should not be considered to the exclusion of all other factors and could not alone be the basis for rejection. He found that that portion of the guidelines were *ultra vires* and quashed the determination.

Pinto v. Canada (Minister of Employment & Immigration) involved the refusal of an application for a work visa made by a domestic worker. The visa officer had applied the provisions of the Immigration Manual in assessing the application. Mr. Justice MacKay quashed the decision, holding that the immigration officer had improperly fettered his discretion by applying the policy guidelines set out in the Manual, since these guidelines were in conflict with the provisions of the former *Immigration Act*¹ and *Immigration Regulations*.²

In some cases, immigration officers may well fetter their discretion by refusing to take into account relevant circumstances, or by considering circumstances which are clearly

³⁸ (1990), 9 Imm. L.R. (2d) 243 at p. 260, [1990] F.C.J. No. 205 (T.D.).

³⁹ (1990), 12 Imm. L.R. (2d) 287, [1990] F.C.J. No. 1156 (T.D.).

irrelevant to the application. This individual fettering of discretion can also result in breach of the duty to act fairly and can result in the decision being quashed. The fact that guidelines cannot actually fetter the discretion of the decision-maker is extremely important because this means that ultimately the individual decision-maker has the power to make a decision notwithstanding the guidelines if he or she determines that a case is deserving. Thus, it is important for counsel to emphasize the independence of the decision-maker when making submissions and to emphasize that the guidelines cannot fetter the officer's discretion. He or she must ultimately have regard for the totality of the circumstances in the case to determine whether or not the applicant ought to be accepted on humanitarian and compassionate grounds. The fact is that the Minister has determined that immigration officers are to be the decision-makers. Given this, and given the broad discretion given to immigration officers when deciding these applications it is clear that officers cannot refuse a case merely because it does not fall within the ambit of the guidelines and must carefully review the individual circumstances of the case to decide whether the exemption should be granted.

THE OFFICER CAN CONSIDER ALL RELEVANT FACTS WHEN RENDERING HIS OR HER DECISION

An issue which was in dispute was whether or not an officer considering an application on humanitarian and compassionate grounds can take into account the person's immigration history. This matter has now clearly been settled by the Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)*. In *Legault* the court considered an appeal from the Minister against a decision by the Trial Division, which had allowed an application for judicial review against a negative decision by an immigration officer. *Legault* was wanted in the United States on criminal charges. However, he had spent many years in Canada without incident and had six children. The Court concluded that the officer assessing the humanitarian and compassionate application can take into account the actions, past and present, of the person who requests the exception.⁴⁰

THE BEST INTERESTS OF THE CHILDREN

Subsection 25(1) of IRPA requires an officer considering an application on humanitarian and compassionate grounds to consider the best interests of the child. This is explicitly stated in the section and is also reflective of the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*.⁴¹ In *Baker* the court held that Canada's international obligations should inform the exercise of the officer's discretion. The court also held that the best interest of the children affected by the

⁴⁰ (2002), 212 D.L.R. (4th) 139, [2002] F.C.J. No. 457 (C.A.)

⁴¹ 1999), 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39.

determination was an important factor to be taken into account by the officer making the determination.

This dictum in *Baker* was the subject of consideration by the Federal Court of Appeal in the case of *Legault v. Canada (Minister of Citizenship and Immigration)*.¹ In *Legault* the court held that the requirement to consider the best interests of the child did not require a specific result in any given case. Rather it was but one factor that the officer had to take into account when exercising his or her discretion. If the officer is sensitive to the impact of the decision on the children then the decision will be sustainable even if the result is adverse to the applicant. The court noted:

¶ 12 In short, the immigration officer must be “alert, alive and sensitive” (*Baker*, para. 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any “refoulement” of a parent illegally residing in Canada (see *Langner v. Canada (Minister of Employment and Immigration)* (1995), 184 N.R. 230 (F.C.A.); leave to appeal refused, S.C.C. File No. 24740, August 17, 1995 [reported 30 C.R.R. (2d) 188n]).⁴²

After *Legault* the Federal Court of Appeal again considered the issue of the best interests of the child in the case of *Hawthorne v. Canada (Minister of Citizenship and Immigration)*.⁴³ In *Hawthorne* the applications judge had allowed the application for judicial review based on the failure of the officer to properly consider the best interests of the child. The Court of Appeal upheld the decision and noted that the officer had failed to be sensitive to the child’s interests. Mr. Justice Decary described the role of the officer as follows:

¶ 5 The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her

⁴² (2002), 212 D.L.R. (4th) 139, [2002] F.C.J. No. 457 (C.A.).

⁴³ [2002] F.C.J. No. 1687 (C.A.)

parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the “child’s best interests” factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons must, of course, be carefully examined by the officer.

¶ 6 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 the 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 case of *Ahmad v. Canada (Minister of Citizenship and Immigration)*,⁴⁴ is an example of a post-*Legault*, post-*Hawthorne* decision, where the court quashed a decision based on the failure of the tribunal to properly consider the best interests of the child. The case involved the deportation of an Afghannee refugee claimant who had been excluded under Article 1 F (a). The applicant was married and had a Canadian child. The officer merely noted that the child could speak the language and could adapt but failed to consider the other circumstances.

In the case of *Enaboifoh v. Canada (Minister of Citizenship and Immigration)*,⁴⁵ the court quashed a decision where the officer refused an application even though the applicant would be removed in circumstances where the husband who would remain behind was not able to care for the child due to his illness. The court noted:

¶15 However, I am satisfied that the officer had enough information about the father’s accident to have been put on notice that she should have been “alert, alive and sensitive” to the effects that might have on the child’s best interests. Her reasons do not indicate that she gave those

⁴⁴ [2003] F.C.J. No. 826 (T.D.).

⁴⁵ [2005] F.C.J. No. 176.

considerations the careful attention that they deserved and thus they do not withstand a somewhat probing scrutiny. Accordingly, I find that the decision was not reasonable and the application will be granted.

In *Kolosovs v. Canada (Minister of Citizenship and Immigration)*,⁴⁶ the court indicated that the officer was to consider all of the relevant factors and was to be alert and sensitive to them. Failure to do so would vitiate the decision. In the case of *Shchegolevich v. Canada (Minister of Citizenship and Immigration)*,⁴⁷ the court quashed a decision on H & C grounds. The applicant was married but was inadmissible due to a criminal conviction. The officer concluded that no hardship would arise from the temporary separation. The court quashed the decision noting:

¶11 I am satisfied that the Officer's decision was unreasonable. I have concluded that the Officer erred by adopting an incorrect test for considering the best interests of Mr. Shchegolevich's young stepson, and by speculating about the prospects for Mr. Shchegolevich's return to Canada following a renewed spousal sponsorship application from overseas.

The court noted also that the officer erred in law in incorporating into the assessment of the best interests of the children the concepts of undeserved hardship as these were irrelevant to that assessment.

In the case of *Laban v. Canada (Minister of Citizenship and Immigration)*,⁴⁸ the court set aside an H & C refusal. The court found that the officer was not alert or sensitive to the best interests of the children. In addition, the court found that the tribunal had erred in finding that the degree of establishment in this case was not unusual.

In the case of *Ranji v. Canada (Minister of Citizenship and Immigration)*,⁴⁹ the court quashed an H & C determination. The court concluded that the officer had erred by incorporating into an assessment of establishment the applicant's own particular circumstances as is mandated by s. 25(1) of IRPA when assessing the applicant's establishment in Canada. In terms of the assessment of the best interests of the child, the court concluded that the officer erred in concluding that the children would be able to continue their education in India because the applicant, a farmer, would have to return to rural India where the evidence disclosed that the chances of obtaining a good education

⁴⁶ [2008] F.C.J. No. 211.

⁴⁷ 2008] F.C.J. No. 660, 2008 FC 527.

⁴⁸ [2008] F.C.J. No. 819, 2008 FC 661.

⁴⁹ [2008] F.C.J. No. 675, 2008 FC 521.

were very limited.

In the case of *Tharmalingam v. Canada (Minister of Citizenship and Immigration)*,⁵⁰ the court quashed an H & C refusal. The applicant was applying for permanent residence based on the fact that she was an elderly widow who had all of her children in Canada. The officer concluded that the applicant was not dependent on her children because they did not meet the LICO. The court concluded the decision was unreasonable because the applicant had not been on welfare and hence, had been supported by her children. In addition, the court concluded that the finding that there was insufficient evidence that the son in Sri Lanka could not be located was unreasonable because there was no basis to conclude that the applicant could have provided other information. The finding of insufficient evidence regarding the inability to locate the son in Sri Lanka was found to be unreasonable. The court stated that there was no basis on which to conclude that the applicant could have provided other information.

The recent decision of the Federal Court of Appeal in *Kisana v MCI* 2009 FCA 189 the Court of Appeal considered an appeal from a decision of an officer dealing with an application made on humanitarian and compassionate grounds outside of Canada. The Court made several findings which are relevant to applications where the best interests of the children are to be considered.

1. An officer is required to consider the best interests of the child. In most cases the best interests will mitigate in favour of the children and or her parents being allowed to remain in Canada, The officer is required to balance this factor against other relevant considerations. The fact that the best interests mitigate in favour of a positive decision is not determinative and this factor must be balanced against all other relevant factors.
2. The Applicants have the burden of proving their claims. As a result the officer can draw an adverse inference from the lack of evidence to support a fact relied on by the Applicant.
3. The Majority held that the consideration of a child's best interests in an immigration context does not readily lend itself to a family law analysis where the true issues are those of custody and access to children. Contrary to family law cases where "the best interests of the children" are, it goes without saying, the determining factor, it is not so in immigration cases, where the issue is, as in the case before us, whether a child should be exempted from the requirements of the Act and its Regulations and allowed to become a permanent resident.
4. However, in concurring reasons Justice Trudel disagreed on this point noting: "As he points out, the best interests of the child are the determinative factor in a family law case; not so in the immigration context, where it is but one factor to be weighed along with others. This is not to say, however, that considerations and expertise regarding the moral, intellectual, emotional and physical needs of children ought not to be regarded and that, in this respect,

⁵⁰ [2008] F.C.J. No. 579, 2008 FC 463.

the expertise of family courts, where appropriate and relevant, cannot be looked at for valuable information.”

JUDICIAL REVIEW AND STANDARD OF REVIEW

Once a decision has been made by an Immigration Officer, the applicant(s) can apply for leave to have the matter judicially reviewed. Judicial review is available to challenge the decisions made by Citizenship and Immigration Canada or by those conferred with decision making power.

The *Dunsmuir v. New Brunswick* decision significantly altered the standard of review. The *Dunsmuir* decision, which has already been cited by over 1500 subsequent cases, stated that there “ought to be only two standards of review: correctness and reasonableness.”⁵¹ The judgment goes on to explain the distinction between these two standards of review:

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [47-50]

⁵¹ 2008 SCC 9

Therefore, although judicial review is available, after obtaining leave, the courts will generally give deference to the findings of fact made by the officer and will review the decision on a reasonableness standard. This position was affirmed in the case of *Khosa v MCI*⁵²

⁵² 2009 SCJ 12