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"AFTER A THOROUGH AND SYMPATHETIC REVIEW":
THE STATE OF HUMANITARIAN APPLICATIONS
IN CANADA

MICHAEL BOSSIN*

RéSUMÉ

En vertu du paragraphe 114 (2) de la Loi sur l’immigration, les personnes sans statut au Canada peuvent demander que le ministre de la Citoyenneté et de l’Immigration facilite leur établissement pour des raisons humanitaires et de compassion. Cette disposition est largement utilisée par les personnes qui sont mariées à un(e) citoyen(ne) canadien(ne) ou à un(e) résident(e) permanent(e) et par ceux et celles qui ne correspondent pas facilement à l’une des autres catégories reconnues par l’immigration. Souvent, il s’agit d’une mesure de dernier recours pour ceux et celles qui veulent désespérément demeurer au Canada. Il existe une certaine confusion à propos de l’étendue du pouvoir du ministre en vertu du paragraphe 114 (2) de cette loi, particulièrement dans les cas où le demandeur est inadmissible au Canada en raison d’un passé criminel ou d’inquiétudes quant à sa santé. La première partie de cet article examine le pouvoir discrétionnaire du Ministre d’accorder le droit d’établissement pour des raisons humanitaires. On aborde également la question du bien-fondé de l’émission du permis du Ministre dans les cas où il y a passé criminel ou non-admissibilité pour raisons de santé. Dans la seconde partie de ce document, l’auteur étudie la jurisprudence récente relative à la révision judiciaire de décisions concernant des demandes prises conformément au paragraphe 114 (2). En particulier, on y discute des implications de la cause type dans ce domaine, Shah c. Canada. Les instances révisionnelles sont extrêmement hésitantes à interférer avec les pouvoirs discrétionnaires d’un agent à accorder une exonération en vertu du paragraphe 114 (2). La question est de savoir si la cour fédérale fait preuve de trop de déférence envers les agents d’immigration, particulièrement dans les cas où la santé ou la sécurité du demandeur peut être en danger s’il retourne dans son pays d’origine. On suggère de classifier les directives pour permettre aux demandeurs de mieux connaître les normes auxquelles ils doivent se conformer. Ceci pourrait également rendre le processus décisionnel plus transparent. Dans la cause Baker c. Canada, on a demandé à la Cour suprême du Canada d’étudier une cause où le demandeur invoque des raisons humanitaires et qui implique quatre enfants nés au Canada. La question abordée devant

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la Cour est de savoir si en de telles circonstances le meilleur intérêt des enfants ne devrait pas être la principale considération. L'auteur aborde brièvement les questions soulevées dans cette cause. Finalement, il examine de manière critique les changements apportés à la réglementation relative aux demandes pour des raisons humanitaires proposés dans le récent document de discussion de l'actuel Ministre.

INTRODUCTION

In November 1998, the bar in Ottawa organized a conference on Immigration law. Officials from Citizenship and Immigration Canada were asked to address the question: “What constitutes humanitarian and compassionate grounds?” They refused to participate. It was, alas, a sign of the times.

In recent years, persons seeking to remain in Canada on humanitarian grounds have fought an increasingly uphill battle for recognition. The courts, for one, have not shown them much compassion. In Schelkanov v. Canada (Minister of Employment and Immigration), Strayer J. of the Federal Court Trial Division stated that staying the removal of a person from Canada is particularly inappropriate where the person concerned is awaiting a decision on an application based on humanitarian and compassionate grounds. Strayer J. described such applications as being “completely undisciplined”. In Shah v. Canada (Minister of Employment and Immigration), the Federal Court of Appeal held that the duty of fairness in humanitarian applications is “minimal”.

Immigration officers have so much discretion in deciding applications based on “humanitarian and compassionate grounds” that it is often difficult for applicants, not to mention their counsel, to know what those words mean. The refusal on the part of Immigration authorities to participate in the Ottawa conference was simply indicative of a general lack of transparency in this area.

This paper will attempt to examine the current state of humanitarian and compassionate applications in Canada. In particular, it will consider the scope of the humanitarian provisions in the Immigration Act; the legacy of the 1994 decision of Shah v. Canada (Minister of Employment and Immigration); new Citizenship and Immigration guidelines for officers considering humanitarian applications; the situation involving applicants with Canadian-born children; and, finally, proposed changes to the procedure for processing and evaluating applications based on humanitarian grounds.

2. Ibid at 154.
4. Immigration Act, R.S.C. 1985, c.I-2, as am. [hereinafter Act].
THE SCOPE OF SUBSECTION 114 (2) OF THE IMMIGRATION ACT

The legislative basis upon which humanitarian applications are made is subsection 114 (2) of the Immigration Act. Under that provision, the Minister of Citizenship and Immigration may exempt any person from any regulation made under the Act, or otherwise facilitate the admission of any person, where the Minister is satisfied that the person should be exempted from the regulation, or that the person’s admission should be facilitated owing to the existence of compassionate and humanitarian grounds. Section 2.1 of the Immigration Regulations authorizes the Minister to grant landing where sufficient humanitarian and compassionate considerations are found to exist.

There is some confusion over the extent to which subsection 114 (2) can assist an applicant seeking landing on the basis of humanitarian grounds. If one’s application is accepted, does that merely entitle one to apply for landing from within Canada, does it mean that the applicant will be granted permanent status on account of those humanitarian considerations, or does it provide the applicant with a type of middle-status, a so-called “approval-in-principle”?

Although in my view subsection 114 (2) provides the Minister with sufficient discretion to authorize a person’s landing (permanent resident status) on the basis of humanitarian and compassionate considerations, in practice this is rarely, if ever, the result. To understand why this is so, one must examine the way in which humanitarian applications are processed, the decisions of the Federal Court dealing with the scope of subsection 114 (2), and, finally, the government’s response to situations where humanitarian grounds are found to exist, but the applicant is inadmissible to Canada.

Citizenship and Immigration Canada divides the processing of humanitarian applications into two distinct parts: an application for a visa exemption; followed by an application for landing. In a practical sense, the relief granted to applicants seeking consideration under subsection 114 (2) of the Act is limited by the wording of the application form itself. One gets what one asks for. The forms specify that the applicant is submitting a “request for exemption from an immigrant visa requirement”. This is a reference to subsection 9 (1) of the Immigration Act, a provision which requires all persons seeking permanent residence in Canada to obtain an immigrant visa before appearing at a Canadian port of entry.

The practice of Citizenship and Immigration Canada, where sufficient humanitarian grounds are found to exist, is to convey to the applicant “approval-in-principle”. This means that the person may apply for permanent resident status from within Canada, and shall be landed, provided he or she meets all other requirements of the Immigration Act. Satisfying those requirements includes not being found inadmissible to Canada, for example, by reason of criminality or due to health concerns.

5. Ibid., s.114(2).
7. Section 19 of the Act prohibits the admission to Canada of persons for a variety of reasons, which
This situation invites the question: what if someone who has been “approved-in-principle” on the basis of humanitarian considerations is later found to be inadmissible to Canada? Does subsection 114 (2) authorize the Minister to override such a prohibition against landing? On this subject, there has been some difference of opinion amongst the judiciary. In *Orantes v. Canada (Minister of Employment and Immigration)*, for example, Muldoon J. of the Federal Court Trial Division held that subsection 114 (2) could not exempt someone who was inadmissible to Canada. In that case, the person was considered inadmissible because he was considered unwilling or unable to support himself without the receipt of social assistance. Muldoon J. stated:

Section 114 (2) provides that Cabinet may by regulation exempt any person from any regulation made under s. 114 (1). Cabinet cannot repeal, suspend, override or exempt anyone from any provision of the *Immigration Act* itself, just the regulations. Without parliamentary authority, the Governor-in-Council has no authority to exempt anyone from the law.

Reed J. took a similar approach to subsection 114 (2) in *Nyvlt v. Canada (Secretary of State)*. That case involved a family whose humanitarian application was based on the son’s medical condition. He had cystic fibrosis, and the evidence showed that he would be unable to receive adequate treatment in his home country Czechoslovakia, although such treatment was available in Canada. In her decision, Reed J. acknowledged that applicants should not be barred from applying for landing from within Canada simply because their motive in coming here was to avail themselves of better medical treatment than exists in their home country. At the same time, however, she states:

... There is nothing inherently improper in refusing a person permission to apply for landing from within Canada on the ground that the individual would be inadmissible in any event. A decision to allow an individual to apply for landing from within Canada is administrative and discretionary. An immigration officer cannot be faulted for refusing to exercise his or her discretion in favour of an applicant if it is known, at the time, that the process would be futile.

can be divided into four broad categories: those who are likely to be a burden on social services; those who are likely to pose a danger to the public; those who engage in unacceptable political activities; and those who are inadmissible due to an abuse of the immigration process or for other policy reasons.

8. (1990), 34 F.T.R. 184 [hereinafter *Orantes*].
9. A person is inadmissible to Canada under s.19(1)(b) of the *Act* if the person is unable or unwilling to support himself/herself, or is dependent on social assistance.
10. Before amendments in 1993, it was the Cabinet (i.e., the “Governor-in-Council”) which exercised the authority in s.114(2) applications. This power has now been delegated to the Minister of Citizenship and Immigration.
12. (1994), 26 Imm. L.R. (2d) 95 (F.C.T.D.) [hereinafter *Nyvlt*].
13. Ibid. at 99.
In other words, a subsection 114 (2) application cannot be refused at the outset, simply because the applicant is inadmissible to Canada. That would amount to a fettering of the officer’s discretion. However, the applicant’s criminal history or health record legitimately may be of “paramount concern” to the officer. Where such factors would, in the opinion of the officer, make an application for landing futile because it is apparent that the applicant is inadmissible, a refusal of the humanitarian application would be justified.

It is apparent that not all members of the Federal Court hold this view. In *Lovo v. Canada (Minister of Citizenship and Immigration)*, the applicant was determined to be medically inadmissible to Canada by an Immigration adjudicator prior to filing his subsection 114 (2) application. The basis for the humanitarian application was that the applicant could not be treated adequately for his illness in his native El Salvador. The application was rejected. On judicial review, MacKay J. overturned the decision. He found that the Immigration officer had relied on extrinsic evidence (indicating that medical services for the applicant were available in El Salvador) without providing the applicant an opportunity to respond to that evidence. Had Mr. Lovo’s medical inadmissibility been a bar to his being considered under subsection 114 (2), the existence of medical services in the applicant’s home country would have been irrelevant. On the other hand, according to the reasoning in *Orantes*, once it was known that the applicant was medically inadmissible, no further analysis of the officer’s decision by the Court would have been required.

Underlying the reasoning in cases like *Orantes* and *Nyvlt* is the Court’s assumption that subsection 114 (2) merely authorizes the Minister to permit one to apply for landing from within Canada or, at best, give an applicant “approval-in-principle”. This means that landing is still subject to him or her meeting all other requirements under the Act. Support for this view can be found in *Dass v. Canada (Minister of Employment and Immigration)*, where the Federal Court of Appeal held that an exemption from subsection 9 (1) of the Act does not entitle one to become landed, merely to submit the application from within the country.

In spite of the decisions to the contrary, it is submitted that subsection 114 (2) does authorize the Minister to grant landing, even to persons who would otherwise be inadmissible to Canada. Under subsection 114 (2), the Minister is authorized to “facilitate” the person’s “admission”. “Admission” is defined in the Act as “entry or landing,” and “landing” is defined as “lawful permission to establish permanent residence in Canada”. The term “facilitate” suggests a wide discretion given to the Minister to authorize landings, where she is satisfied that sufficient compassionate or

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17. *Supra* note 4, s.2(1).
humanitarian considerations exist to warrant such action. Moreover, subsection 114(2) of the Act specifically refers to the Minister facilitating the admission of "any person". That term, "any person", is broad enough to include even those people whose admission would otherwise be prohibited.

In Jiminez-Perez v. Canada (Minister of Employment and Immigration), the Federal Court of Appeal interpreted the phrase "facilitate the admission of any person" in subsection 114 (2) as sufficient to relieve an immigrant of the obligation to apply for status from abroad, as required by subsection 9 (1) of the Act. It is submitted that it would be illogical to interpret this decision to mean that subsection 9 (1) is the only provision of the Immigration Act from which one can be exempted on humanitarian grounds. The Act prohibits the entry of persons for a variety of reasons, only one of which is coming to Canada without first having obtained an immigrant visa. Why can one requirement of the legislation be circumvented on the basis of humanitarian and compassionate considerations, but not others?

Finally, it is submitted that the very raison d'être of subsection 114 (2) is to provide a mechanism by which persons who would otherwise be inadmissible to Canada or who have violated the provisions of the Act in some way can still be allowed to remain in Canada, where sufficient humanitarian or compassionate grounds are found to exist. As Joyal J. notes in Cabalfin v. Canada (Minister of Employment and Immigration), ... The whole purpose of the programs under s. 114 of the Act is to accord humanitarian and compassionate considerations to applicants whose continuing presence in Canada is itself a perpetuation or continuation of illegal activity and who may be said to have repeatedly breached the various bona fide requirements of the Immigration Act.

In cases where humanitarian factors are found to exist, but the applicant is nevertheless inadmissible to Canada, it is Citizenship and Immigration's practice to issue the person concerned a Minister's Permit. Minister's Permits allow those who are otherwise in violation of the Immigration Act to remain in Canada.

Often, however, the issuance of a Minister's Permit is an inadequate solution in circumstances that call for a more humane response. Medical cases are a prime example. At the very core of these applications is the person's need for ongoing medical services, which are unavailable in the home country. In Ontario, however, people on Minister's Permits are ineligible for provincial health coverage. So, for those

20. Ibid. at 170.
21. Persons seeking entry to Canada on a permanent basis who are not in possession of an immigrant visa are in violation of s.19(2)(d) of the Act.
22. (1990), 40 F.T.R. 147, 12 Imm. L.R. (2d) 287, 49 Admin. L.R. 100 [hereinafter cited to Imm. L.R.].
23. Ibid. at 304.
24. The Minister's authority to issue permits is derived from s.37(1) of the Act. Minister's Permits provide the recipient with a temporary status, which can be cancelled at any time by the Minister.
individuals, being allowed to remain in Canada by means of a Minister’s Permit is a rather hollow and inappropriate “victory”.

A similar problem is faced by persons who are allowed to remain in Canada for humanitarian reasons but are refused landing because of a reliance on social assistance.\(^\text{25}\) Often, the very factor that warranted the granting of humanitarian relief — their age, for example, or the fact that they have been abused — is what prevents such people from ever being self-sufficient. It makes little sense in these cases to exercise a humanitarian discretion only part way, allowing the applicants to stay in Canada by way of a Minister’s Permit, but forever denying them permanent status.

It is understandable that Citizenship and Immigration Canada bifurcates the process of assessing humanitarian applications, first granting a visa exemption and then considering issues of inadmissibility. In fact, there are many examples of individuals who ought to be allowed to apply for permanent residence from within Canada but not landed, particularly where crimes are committed following the issuance of “approval-in-principle”. However, a refusal to grant landing to those who are inadmissible should not be the rule in every case. In many instances, where strong humanitarian grounds justify a person’s continued presence in Canada, there is no reason to deny him or her permanent status. As indicated above, the wording of subsection 114 (2) does give the Minister the authority to “facilitate” such landings. All that is lacking is the political will to do so.

**THE SHAH DECISION**

Even if the Minister of Citizenship and Immigration was willing to fully exercise her discretion under subsection 114 (2) of the Act and grant landing to those worthy of humanitarian consideration, this would be of little solace to those who do not convince the local Immigration officer that sufficient humanitarian and compassionate grounds exist in their case. The seemingly arbitrary decision-making of some officers in humanitarian applications and the very limited review of their decisions by the Federal Court have placed significant obstacles in the path of subsection 114 (2) applicants.

In making decisions, officers are bound by a duty to act fairly. The extent of that duty as it relates to humanitarian applications was articulated by the Federal Court of Appeal in the case of Shah.\(^\text{26}\) Shah involved an application made under subsection 114 (2) to allow the spouse of a Canadian citizen to apply for landing from within Canada. The Immigration officer questioned the bona fides of the marriage and refused the application. In Shah Hugessen J. writing for the Court of Appeal, described the content of the duty of fairness to be applied by the officer in that case as “minimal”. He states:

> In a case such as this one, the applicant does not have a “case to meet” of which he must be given notice; rather it is for him to persuade the decision-maker that he should be given exceptional treatment and exempted from the general requirements

\(^{25}\) Such persons are inadmissible under s.19(1)(b) of the Act.

\(^{26}\) Supra note 3.
of the law. No hearing need be held and no reasons need be given. The officer is not required to put before the applicant any tentative conclusions she may be drawing from the material before her, not even as to apparent contradictions that concern her.27

For practitioners and their clients, reading the Shah decision was like standing in a cold shower. In plain English, it meant that Immigration officers considering humanitarian applications have a very wide discretion, with which the Courts are extremely reluctant to interfere. As Hugessen J.A. explains:

To succeed in his attack ... the applicant must show that the decision-maker erred in law, proceeded on some wrong or improper principle or acted in bad faith. It is a heavy burden and the applicant [in Shah] has not met it.28

But how “minimal” is the duty of fairness where the basis for the application is “compassionate or humanitarian considerations”? The decision in Shah opens with the words, “It is commonplace that the content of the duty of fairness varies according to the circumstances.”29 Shah was a case involving a married couple who did not wish to be separated during the processing of the husband’s application for landing. Given that the duty of fairness does vary “according to the circumstances”, can one argue that a higher duty ought to apply in cases involving more substantial hardship than that experienced by separated spouses?

In Roy-Kamtapersaud v. Canada (Minister of Citizenship and Immigration),30 the Court justified the minimal duty of fairness in a case involving spouses by explaining that in these situations, “... The rights of an individual are not in jeopardy; [the applicants] may still apply for landing from outside Canada as normally required by the legislation.”31 In other words, where spouses are involved, a negative decision in a subsection 114 (2) application is not irrevocable. On the other hand, if the basis for the humanitarian application is, for example, that the applicant would die of starvation due to famine if returned home, can one so easily say that the rights of the individual would not be put in jeopardy if the application were refused?

The argument that something more than a “minimal” duty of fairness is warranted in subsection 114 (2) applications not involving married spouses has been accepted only once, in the case of Garcia v. Canada (Minister of Employment and Immigration).32 In Garcia, Gibson J. distinguished the situation of a married couple in Shah from that of Mr. Garcia, whose humanitarian application was based on his “fear of returning to Nicaragua, his fragile psychiatric condition and the degree of his attachment to Canada since his arrival more than seven years ago.”33 ... The factual bases for the applica-

27. Ibid. at 83.
28. Ibid. at 84.
29. Ibid. at 83.
31. Ibid. at 148.
tions [in Garcia and Shah],” writes Gibson J., “are very different.”34 For that reason, he concluded that Mr. Garcia’s case “... Is not a case such as the one that was before the Federal Court of Appeal in Shah.”35

With the exception of Garcia, no attempt has been made by a reviewing court to distinguish the facts in Shah from other humanitarian applications, where a negative decision may indeed result in circumstances which are irrevocable. On the contrary, the judicial trend has been to apply the reasoning in Shah to every type of humanitarian application. In Carson v. Canada (Minister of Citizenship and Immigration),36 for example, a case dealing with both marriage and the applicant’s fear of being arrested upon his return to Northern Ireland, Wetston J. stated that, “No consideration of a humanitarian and compassionate determination can be made without regard to the Federal Court of Appeal’s decision in Shah...”37 Numerous other Federal Court decisions have also applied the reasoning in Shah to non-marriage situations.38 In fact, Shah has become the standard of fairness which has been applied to other discretionary decisions under the Immigration Act, in addition to humanitarian applications. Most particularly, it has been held to apply to determinations that one is a “danger to the public” under subsection 70 (5) of the Act39 as well as to discretionary decisions taken by visa officers.40

For applicants, the negative impact of making the officer’s decision in humanitarian cases “wholly discretionary” with “no right to any particular outcome”41 is compounded by the fact that “no reasons need be given”. Typically, the letters of refusal that Citizenship and Immigration issues to subsection 114 (2) applicants do not disclose any basis for the negative decision.42 Solace for counsel seeking to judicially

33. Ibid. at 271.
34. Ibid.
35. Ibid.
37. Ibid. at 139.
39. See, for example, Williams v. Canada (1997), 212 N.R. 63, [1997] 2 F.C. 646, 147 D.L.R. (4th) 93 at 115 (C.A.) [hereinafter Williams], where the Court relied on Shah to hold that reasons were not required to explain “danger to the public” opinions made by the Minister.
42. Such letters typically begin with the words, “After a thorough and sympathetic review of all the cir-
review such decisions, however, was typically found in the officer’s file notes, which often revealed the reasons for the officer’s decision. Increasingly, though, officers’ notes reveal very little of their thought-processes. At the conclusion of a questionnaire used in interviews with humanitarian applicants is a section entitled “Officer’s Recommendation/Rationale for Decision”. It is now common to see in this section the words: “In my opinion no H & C exists that warrants processing from within”. Period. No explanation is provided for how this decision was arrived at or why insufficient humanitarian and compassionate grounds exist, even in the officer’s own file.

In a 1994 decision, Chan v. Canada (Minister of Employment and Immigration) Reed J. of the Federal Court Trial Division, drew a distinction in subsection 114(2) cases between “formal” reasons and informal reasons contained in the officer’s notes. Her decision highlighted the importance of the latter. She writes:

As is well known, there is no obligation to provide formal reasons for negative subsection 114 (2) decisions. An indication of the process of the decision-making however can be obtained from the notes of the immigration officer who initially reviews the application. I agree with counsel for the respondent, that these notes should not be elevated to the status of formal reasons. At the same time, they are relevant in assessing whether there has been a serious misconstruction or an ignoring of highly relevant evidence.

The immigration officer’s notes then contain a section entitled “Officer’s Recommendation”. This must be read as giving an indication of the salient factors on which the officer relied in coming to his recommendation. It is significant that an immigration officer’s recommendation is reviewed by a more senior official before being approved and communicated to the applicant. Thus the notes serve to explain to that more senior officer why the particular recommendation is being made. This, in my view, gives credence to the conclusion that the factors set out in the recommendation are significant.

In a subsequent decision, however, Hunter-Freeth v. Canada (Minister of Citizenship and Immigration), Nadon J. held that if no reasons need be provided formally in subsection 114 (2) applications, then logically, none were required to be found in the officer’s internal notes. As Heald J. observed in Olaniyon v. Canada (Minister of Citizenship and Immigration), “although one might have the view that the preferred

procedure in such circumstances would be to provide reasons to better satisfy an applicant that justice has been done, the *Shah* case establishes that such a procedure is not mandatory and failure to provide reasons in these circumstances does not constitute, per se, reviewable error*.49

In the immigration context, with applicants from every part of the world seeking discretionary relief, there is always the possibility that matters of race or nationality may influence decisions. It is submitted that where reasons need not be provided in an officer’s file, the likelihood of bias in decision-making increases.

In the recently decided case of *Antillon v. Canada (Minister of Citizenship and Immigration)*,50 Simpson J. accepted that an officer was “abrupt and impatient, and indeed may have been rude”, but as there was no evidence of “any sarcasm, or racist or sexist remarks which might disclose bias”, the officer’s behaviour was not subject to review.51 Some Immigration officers may indeed, on occasion, be rude and impolite, but rarely are they so stupid as to make any overtly racist or sexist remark in the presence of the applicant, let alone record such comments in their files. Racial intolerance or sexism (or other less discriminatory but equally irrelevant factors) may contribute to the decision-making process, but since the law relieves officers of the necessity of explaining or recording any other rationale for their decisions in humanitarian cases, it is hard to challenge them. Again, this is not to suggest that officers would admit in their files to having been influenced by discriminatory factors. But a requirement to record some rationale for the decision, at least, would satisfy an appellate court that relevant factors were the basis for the decision.

Of course, the challenge of successfully reviewing a decision where no rationale is revealed is formidable. As noted in *Williams*,52 “... Such subjective decisions cannot be judicially reviewed except on grounds such as that the decision-maker acted in bad faith, or erred in law, or acted upon the basis of irrelevant considerations.” But how does one show that “irrelevant considerations” influenced the officer’s decision, when he or she has not explained what considerations were taken into account? Moreover, according to the Federal Court of Appeal in *Williams*, unless there is evidence to the contrary, the reviewing court “... Must assume that the decision-maker acted in good faith in having regard to that material.”53 To satisfy that test, the officer need only say nothing and it will be assumed that he or she had regard to all the material before him or her.

In *Portilla v. Canada (Minister of Citizenship and Immigration)*, Simpson J. held that, “In the absence of a concrete indication in the [officer’s] Notes that relevant matters

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49. *Ibid* at para. 7.
52. *Supra* note 39 at 104.
53. *Ibid*.,
were overlooked or intentionally ignored, I am not prepared to find that the officer
failed to undertake an exhaustive H & C review merely because the Notes are silent
on the issue of undue hardship."\(^5\) One might ask, how likely is it that an Immigration
officer will intentionally record in his or her file that a relevant matter was intentionally
overlooked or ignored? The answer is "not very".

In certain circumstances, it is possible for a court to overturn an officer’s decision on
judicial review, even where no reasons for the decision are apparent on the file. This
will occur where such a decision is on its face perverse, or clearly unreasonable. As
Strayer J.A. explains in Williams:

> What has been recognized is that where a discretionary tribunal decision is either,
on its face, perverse, or where there is evidence of facts before the tribunal which
manifestly required a different result or which were irrelevant yet apparently deter-
minative of the result, then a court may be obliged to conclude that, in the absence
of reasons which might have explained how the result is indeed rational or how cer-
tain factors were taken into account but rejected, a court may have to set aside the
decision for one of the established grounds for judicial review such as error of law,
bad faith, consideration of irrelevant factors, failure to consider relevant factors, etc.
In such cases the tribunal decision is set aside not because of a lack of reasons, per
se, but because in the absence of reasons it is not possible to overcome the inference
of perversity or error derived from the result or the surrounding circumstances of
the decision.\(^5\)

This reasoning was followed in Thillaiampalam v. Canada (Minister of Citizenship
and Immigration).\(^6\) In that case, the Immigration officer found insufficient grounds
to accept a father’s humanitarian application. The applicant’s young son had pre-
viously been accepted as a Convention refugee from Sri Lanka.

The Federal Court noted that the officer had acknowledged the presence of the son in
Canada and the son’s Convention refugee status. He, however, had overlooked the
significance of these factors: namely, because the son had a well-founded fear of
persecution in Sri Lanka, he would not be able to return there to be with his father.
Citing Williams, Gibson J. found that “the officer’s decision is either, on its face,
perverse, or there were facts before the officer which manifestly required a different
result.”\(^5\)

In general, however, it is difficult to demonstrate that an officer’s decision was
“perverse”, given the deference shown to discretionary decision-makers. For some
time it was thought that Immigration officers might be held more accountable for their
decisions in humanitarian cases if clearer guidelines were issued to them. In March
1999, after a long period of development, updated guidelines for officers reviewing
subsection 114 (2) applications were finally released.

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55. Supra note 39 at 111.
57. Ibid. at 266.
Although the new guidelines are in some respects more comprehensive than their predecessors, they do not make the process completely transparent. As before, “humanitarian or compassionate grounds” are said to exist where the applicant would suffer “unusual, undeserved or disproportionate hardship” should he or she have to leave Canada to apply for status from abroad.\(^{58}\) In the old Immigration Manual,\(^{59}\) some very specific examples were given of when humanitarian and compassionate grounds exist. These included situations of family dependency or circumstances where the applicant would face severe sanctions in the country of origin.\(^{60}\) In the new manual, “unusual, undeserved or disproportionate hardship” is defined in a much more general way. For example, “unusual” is described as “a hardship not anticipated by the Act or Regulations”.\(^{61}\) “Undeserved” according to the Manual, means that the hardship, in most cases, is “the result of circumstances beyond the person’s control”.\(^{62}\) In my view, these explanations are too vague to provide much guidance to prospective humanitarian applicants and it is doubtful that they will lead to more transparency in decision-making. Officers are informed that the new Manual definitions for “humanitarian and compassionate grounds” are not meant to be taken as “hard and fast rules”. In other words, decisions are still subject to their unfettered discretion.

One positive aspect of the new guidelines is that officers are encouraged to keep good, detailed notes of their interviews with subsection 114 (2) applicants. In a section entitled, “Recording the reasoning behind your H & C decision”, officers are advised to “Explain your thought process” and to “record all the factors you considered in making your decision, both positive and negative”.\(^{63}\) At this time, it is too early to know what effect this will have on officers, and on applicants seeking to judicially review negative decisions.

Although guidelines cannot bind officers, courts have acknowledged that “... General standards are necessary for the effective exercise of discretion ... in order to ensure a certain level of consistency from one decision to another, and to avoid a patchwork of arbitrary and haphazard decisions being made across the country.”\(^{64}\) Ideally, guidelines are sufficiently comprehensive to assist potential applicants in deciding whether to pursue this route. With respect to subsection 114 (2) applications, this would mean clear examples of the types of situations which would warrant positive consideration. Knowing more clearly in advance the likelihood of success would discourage frivolous applications and, at the same time, save many potential applicants the expense of filing.\(^{65}\)


\(^{59}\) Ibid. at Chapter IE-9.

\(^{60}\) Ibid. at Chapter IE-9, s.9.07.

\(^{61}\) Ibid. at Chapter IP-5, s.6.1.

\(^{62}\) Ibid.

\(^{63}\) Ibid. at Chapter IP-5, s.1.10.


\(^{65}\) Currently, the non-refundable processing fee is $500 for each adult applicant, and $100 for each dependent.
The Baker case

The recent case of *Baker v. Canada* has given the Supreme Court of Canada a rare opportunity to comment on the application of subsection 114 (2) of the Act. *Baker* involves a woman seeking relief under subsection 114 (2) on the grounds that her removal from Canada would either separate her from her four Canadian-born children or require those children to leave Canada for a country they have never known.

Potentially, the Supreme Court’s decision in *Baker* will have far-reaching consequences for humanitarian applicants, many of whom have Canadian-born children. The case raises the issue of whether, in considering the humanitarian applications of such persons, the best interests of the children ought to be given “primary consideration”. This notion is derived from Article 3 (1) of the International *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 interests of the child shall be a primary consideration.

In the Federal Court of Appeal’s decision in *Baker*, a distinction was drawn between actions “concerning” children and those “affecting” children. The Court of Appeal held that the removal of a parent, while “affecting” the child, did not “concern” the child. Consequently, the requirement of Article 3 (1) to make the best interests of the child a “primary consideration”, was held to not apply to a parent’s subsection 114 (2) application. The Court of Appeal also found that the *Convention* did contemplate that children would be separated from their parents in cases involving deportation, because under Article 9 (4) of the *Convention*, a State’s responsibility in such situations was merely to provide the child with “essential information concerning the whereabouts of the absent member(s) of the family”.

Whether the Supreme Court in *Baker* will hold that the best interests of the child have to assume paramount importance in subsection 114 (2) applications is, of course, impossible to predict. In any event, it is unlikely that the Supreme Court would diminish the existing obligation on the part of officers, where Canadian children are involved in humanitarian applications. The Federal Court of Appeal in *Baker* accepted as non-controversial that “…The welfare of the Canadian children of a deportee must be a factor, where raised by the deportee, in any determination as to the existence of adequate humanitarian grounds of exempting him or her from deportation.” In such cases, it is incumbent on applicants to submit evidence to support the claim that a parent’s removal from Canada would have a serious, negative impact on the child.

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66. Hereinafter *Baker*. Argument before the Supreme Court of Canada in *Baker* was heard on November 4, 1998. The Court has reserved its decision.


Even if the Supreme Court of Canada were to go so far as to accept that the *Convention on the Rights of the Child* applies to humanitarian applications, it will still be necessary to give meaning to the words "primary consideration". In argument before the Supreme Court, neither the applicant nor any of the intervenors who supported her position were prepared to argue that the parents of Canadian-born children should be allowed to remain in Canada in every situation. Where, then, does one draw the line? In which cases should parents not be removed and in which would it be consistent with the best interests of the children to have them removed? Unless clear guidelines are drafted to address these difficult questions, the answer will be left wholly to the discretion of the officer and effectively we will be back at square one.

**FUTURE DIRECTIONS**

In January 1999, the Minister of Citizenship and Immigration introduced a discussion paper entitled *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*.70 The paper outlines broad directions that the Minister intends to follow in future years. It also contemplates major revisions to the *Immigration Act*71 and *Immigration Regulations, 1978*.72

Some of the recommendations concern humanitarian and compassionate applications. It appears that the government intends to reform this area beyond what is contained in the recently revised guidelines for officers discussed above. In general, the "proposed directions" concerning humanitarian applications appear to be sound. There will still be discretion on the part of the officer to decide such cases, but an effort will be made to make the system more transparent:

> In a field as fundamentally human as immigration, discretion enables the infinite diversity of situations that arise to be resolved humanely. Discretion takes the rough edges off the legislation. However, the current system is too complex, lacks transparency and leads to inconsistent decisions. The government proposes to regularize to the extent practicable the situations that are currently dealt with through discretionary powers, and to introduce a range of measures to manage the residual cases more consistently and with greater transparency.73

One change suggested in the discussion paper which causes concern, however, is the proposal to limit access to the humanitarian and compassionate decision-making process by persons whose refugee claims have been refused. Under the proposed regime, such persons will be permitted to make humanitarian applications only in the period immediately following a negative decision by the Immigration and Refugee

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71. *Supra* note 5.


73. *Supra* note 70 at 55.
Board. Moreover, "... The humanitarian or compassionate process will not include a review of the protection issues already decided by the Board." 74

The rationale behind these proposals is to prevent unsuccessful refugee claimants from "unduly delay[ing] their departure" by filing humanitarian applications well after the date of their hearing. The fundamental flaw with this reasoning is that filing a humanitarian application does not stay an applicant's removal from the country, unless so ordered by the court. Routinely the courts have refused to grant a stay unless the circumstances are extremely grave. One part of the test for granting a stay is a requirement that the potential deportee demonstrate that irreparable harm would be caused to him or her by the removal. 75 Since filing a humanitarian application does not provide the applicant with a statutory stay of removal, it is difficult to understand how allowing failed refugee claimants to make humanitarian application could somehow "unduly delay" their removal from Canada.

A second obvious shortcoming of the Government's proposal is that humanitarian factors are not limited to a specific time. Circumstances which ought to warrant special consideration (a marriage or serious illness, for example) can arise at any time. Certainly, they are not restricted to the period immediately following a negative decision of the Refugee Board.

Finally, with respect to raising protection issues which were already decided by the Board, it is hoped that one would still be able to submit new evidence which was not before the Refugee Board. It is inconceivable that evidence having a direct bearing on the applicant's safety, which was not considered in the refugee hearing, would somehow be "inadmissible" in a humanitarian application.

CONCLUSION
Although the Ottawa conference on immigration law was considered a success, an address by Immigration officials on "What constitutes humanitarian and compassionate grounds?" would have been welcome. Even with the release of new guidelines on humanitarian applications the answer to that question remains unclear.

In Building on a Strong Foundation, the government states that, "Where decisions are made respecting governance, Canadians expect a rules-based system that is accountable and transparent. Where rules create inflexibility, Canadians look to the exercise of discretion to resolve problems humanely." 76 With respect to humanitarian applications, I believe that what is needed is a system which demonstrates accountability, transparency and humanity. There is room to improve the present system in all of these areas.

74. Ibid. at 57.
76. Supra note 70 at 10.