Cour fédérale  Federal Court

Date: 20110324

Docket: IMM-3693-10

Citation: 2011 FC 355

Ottawa, Ontario, March 24, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

SUWALEE IAMKHONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. THE FACTS

[1] The Applicant is a woman of Thai origin who seeks judicial review of a decision of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board. With this decision, the IAD confirmed that the Applicant was to be removed to Thailand, as serious criminality made her inadmissible to Canada under section 36(1) of the *Immigration and Refugee Protection Act*, SC

2001, c 27 (“IRPA”). The admissibility hearing was held on December 16, 2008, after which the Board Member found the Applicant to be inadmissible in light of her criminal convictions, which were later confirmed by the IAD’s decision. Leave was granted on December 2, 2010. Madam Justice Marie-Josée Bédard denied the interim motion for a stay of removal pending the determination of the application for judicial review. Also, Madam Prothonotary Martha Milczinski denied intervener status in these proceedings to the Canadian HIV/AIDS Legal Network and to the Committee for Access to AIDS Treatment.

[2] The Applicant’s criminal conviction results from the Applicant’s non-disclosure of her HIV-positive status to her husband at the time. The Applicant left her native Thailand to find work as an exotic dancer in Hong Kong. During the course of this employment, the Applicant resorted to prostitution and contracted HIV. She learned of her HIV-positive status while in Hong Kong. She travelled to Canada on a work visa, for which she underwent medical evaluation. After periodic renewals of her work visas, the Applicant was accepted as a sponsored permanent resident, her husband being the sponsor. Because Canadian authorities did not bring her HIV-positive status to her attention, she mistakenly thought her positive testing for HIV was a mistake. On the basis on this assumption, she had unprotected sexual relations with her husband at the time, who contracted the disease.

[3] The Applicant was found guilty of criminal negligence causing bodily harm, contrary to section 221 of the *Criminal Code of Canada*, RSC 1985, c C-46. The Trial Judge sentenced her to three (3) years in prison, twelve (12) months of which were to be credited for pre-trial custody. On this basis, an inadmissibility report was prepared pursuant to section 44 of the IRPA. The Applicant

sought judicial review of the findings of this report. However, Justice Russel Zinn of this Court determined that the report was reasonable (*Iamkhong v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1349). After the admissibility hearing, the Board Member applied section 36(1)(a) of the IRPA, as the Applicant was found guilty of an offence under an Act of Parliament for which a term of imprisonment of more than six (6) months had been imposed.

[4] Upon appeal of the convictions and the sentence, the Ontario Court of Appeal later confirmed the convictions, but reversed the sentence. The Ontario Court of Appeal sentenced the Applicant to two (2) years less one day, which had the practical effect of granting the Applicant a Right of Appeal under subsection 63(3) of the IRPA, as subsection 64(2) no longer applied. For clarity, these provisions read as follows:

63. (…) *Right to appeal — removal order* (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	63. (…) *Droit d'appel : mesure de renvoi* (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.
No appeal for inadmissibility 64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	*Restriction du droit d'appel* 64. (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.

Serious criminality (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.	*Grande criminalité* (2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

[5] It is in this context that the Applicant appealed the Board Member's findings of inadmissibility before the IAD. The IAD applied several factors outlined by case law, dismissed the appeal and made a removal order under section 69 of the IRPA. It is this decision that the Court is asked to review.

II. THE IAD'S DECISION

[6] In a detailed, 24-page decision, the IAD declined to stay the removal order. The provisions of IRPA guiding this determination read as follows:

66. After considering the appeal of a decision, the Immigration Appeal Division shall (a) allow the appeal in accordance with section 67; (b) stay the removal order in accordance with section 68; or (c) dismiss the appeal in accordance with section 69.	66. Il est statué sur l'appel comme il suit : a) il y fait droit conformément à l'article 67; b) il est sursis à la mesure de renvoi conformément à l'article 68; c) il est rejeté conformément à l'article 69.
Appeal allowed 67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of, (a) the decision appealed is wrong in law or fact or mixed law and fact; (b) a principle of natural justice	*Fondement de l'appel* 67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé : a) la décision attaquée est erronée en droit, en fait ou en droit et en fait; b) il y a eu manquement à un principe de justice naturelle; c) sauf dans le cas de l'appel du

has not been observed; or
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Effect
(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

Effet
(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

Removal order stayed
68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Sursis
68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Effect
(2) Where the Immigration Appeal Division stays the removal order
(a) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

Effet
(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non

(b) all conditions imposed by the Immigration Division are cancelled;
(c) it may vary or cancel any non-prescribed condition imposed under paragraph (a); and
(d) it may cancel the stay, on application or on its own initiative.

réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

Reconsideration
(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

Suivi
(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.

Termination and cancellation
(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

Classement et annulation
(4) Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

Dismissal
69. (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.

Rejet de l'appel
69. (1) L'appel est rejeté s'il n'y est pas fait droit ou si le sursis n'est pas prononcé.

Minister's Appeal
(2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration

Appel du ministre
(2) L'appel du ministre contre un résident permanent ou une personne protégée non visée par le paragraphe 64(1) peut être rejeté ou la mesure de renvoi applicable, assortie d'un sursis,

Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).	peut être prise, même si les motifs visés aux alinéas 67(1)a) ou b) sont établis, sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
Removal order (3) If the Immigration Appeal Division dismisses an appeal made under subsection 63(4) and the permanent resident is in Canada, it shall make a removal order.	*Mesure de renvoi* (3) Si elle rejette l'appel formé au titre du paragraphe 63(4), la section prend une mesure de renvoi contre le résident permanent en cause qui se trouve au Canada.

[7] The IAD was guided by the relevant factors highlighted by the Supreme Court in *Chieu v Canada (Citizenship and Immigration)*, 2002 SCC 3 and in *Al Sagban v Canada (Citizenship and Immigration)*, 2002 SCC 2, which affirmed the factors stated in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL). These factors are: the seriousness of the criminal convictions, the possibility of rehabilitation, the length of time of presence in Canada, the degree of establishment in Canada, the impact of the removal on members of the family, the family and community support available to the person and the hardship that the person could face if removed. Best interests of the child are also to be considered, when applicable.

[8] In this light, the IAD determined that, while the Applicant was not a hardened criminal, the convictions satisfied the test under section 36(1)(a) of the IRPA, as they were upheld by the Ontario

Court of Appeal. The IAD was not the proper forum to relitigate the convictions. The seriousness of her criminal actions is “such as to establish an extremely high bar to her remaining in Canada”.

[9] The IAD assessed the Applicant’s remorse and determined that no expression of remorse was sufficient to overcome the magnitude of her offence. The IAD did not consider the Applicant’s remorse to be an important factor. In fact, the IAD’s decision alludes to the fact that this remorse is self-serving.

[10] Rehabilitation was assessed in light of the *possibility* of rehabilitation, rather than the proof thereof, in light of the case law. In this perspective, the IAD noted that the Applicant is unlikely to re-offend and that there were no further convictions. This was viewed as a neutral consideration. Rehabilitation was further commented in terms of examining “to what degree an appellant has gone to removing the conditions of their situation that predisposed them to criminality”. In this case, the Applicant, after fifteen (15) years in Canada, cannot fluently speak either official language, which was seen as a negative factor. Furthermore, the Applicant only “belatedly” enrolled in an English class in December 2009. As such, the IAD noted “nothing of significance” had been done to improve her knowledge. Also, the Applicant is unemployed and requires the state’s assistance, which is seen as a negative factor.

[11] The Applicant took steps while incarcerated and since her release in “making something of her life”, which the IAD recognized as positive factors for rehabilitation. That said, the IAD noted that the accomplishments in this respect were scant in light of the Applicant’s long presence in Canada. Overall, the possibility of rehabilitation was actualized in a small way, and only recently.

The possibility of rehabilitation in this case was not sufficient to overcome the bar to admissibility in Canada.

[12] Establishment was then considered as a stand-alone factor. The IAD noted that the Applicant is “unemployed, totally reliant on the state for support, owns no real property and has no assets save and perhaps some personal property”. This lack of establishment was a negative factor. The fact that the Applicant has a sister in Canada was also considered. In terms of family ties, the Applicant retained personal ties with her family in Thailand, as she sends money to support her mother and son and talks with them every week.

[13] Hardship was a contentious question in the IAD’s assessment. As the Applicant has developed AIDS, access to medication is essential to preserve her life expectancy. The Applicant brought evidence to support her claim that treatment is not available in Thailand, or at the very least, is very expensive. Letters from the Thai National AIDS Foundation and the Canadian Aids Society supported this contention. The IAD determined that one letter had informed the other to a great degree, and so these letters were given less authority. More evidence was adduced in terms of AIDS treatment in Thailand. The IAD relied on the Minister’s evidence: a statement from Dr. G. Giovinazzo, a medical attaché with Foreign Affairs. In this declaration, Dr. Giovinazzo indicated that he had visited a treating hospital in Thailand, and that treatment was available in Thailand, although some second-line medication were available in only a smaller number of hospitals than the first-line treatments.

[14] The IAD assigned more weight to the evidence brought forward by Dr. Giovinazzo, as it was only contradicted by un-sworn statements from the Applicant's physician and the Thai National AIDS Foundation, despite the possibility that Dr. Giovinazzo could have been cross-examined. Relying on *Bichari v Canada (Citizenship and Immigration)*, 2010 FC 127, it was deemed reasonable by the IAAD to rely on a medical officer's opinion. As such, the other documents were given less weight, as they were either speculative or not clear.

[15] Parallel to this assessment, the IAD noted that the Applicant's treating physician did not establish that the two medications indicated were the only ones that could be taken by the Applicant. At the very least, it was established that these were available in Thailand. Concluding on this matter, the IAD noted the following:

> The best case scenario is that the appellant would return to Thailand and have free access at publicly funded hospitals, to medication and treatment. The worse case scenario is that she would return to Thailand, have free access to one of the two medications she is currently taking and that she would either have to purchase the other, the cost of which is unknown, or alternatively take other medication from those freely available in Thailand. This does not create the life and death scenario set out by the appellant.

[16] While noting that this was speculative, the IAD determined that the Applicant's son in Thailand would be willing to help and support her. Also, the Applicant has further family support in Thailand in her two (2) brothers.

[17] As for stigma, the IAD noted that it was possible the Applicant could feel some stigma associated with her condition. Considering the documentary evidence provided on this matter, the

IAD concluded that it was not satisfied that stigma was such that it would approach the level of unusual, undeserved or disproportionate hardship.

[18] Further, no unusual, undeserved or disproportionate hardship was found; as she would be returned to a culture and language she speaks, to a land where she still has a continuing connection.

[19] The best interests of the child were somewhat irrelevant here, as the IAD noted that the Applicant's son was no longer a child, being in his twenties.

[20] In conclusion, the IAD noted that this was not "a simple black and white matter". Citing the legislative intent recognized in *Medovarski v Canada (Citizenship and Immigration)*, 2005 SCC 51, security concerns of the IRPA have indeed been prioritized. The personal circumstances of the Applicant's case, while sad, did not absolve her of criminal responsibility. Noting that receiving better treatment in Canada is not grounds for a stay, the IAD determined that the Applicant will have access to medication and treatment in Thailand.

[21] As such, the positive elements of her establishment were belated and not sufficient to overcome the bar to her admissibility to Canada. No special relief in the form of a stay of the removal order was warranted.

III. THE POSITION OF THE PARTIES

[22] The Applicant submits that the IAD erred in deciding the issue. It is argued that the IAD erred in failing to adequately consider community and familial support in the analysis of the *Ribic*

factors, and it was a fatal error for the IAD to not consider one of the factors set out. It is also argued that the IAD fettered its discretion in importing the wrong test for analyzing humanitarian and compassionate considerations. Furthermore, the IAD's findings in regards to availability of treatment in Thailand are argued to be unreasonable.

[23] The IAD's analysis of the rehabilitation factors is also said to be unreasonable, as it failed to properly assess the Applicant's remorse and activism. In this perspective, the unlikelihood of recidivism should have been viewed positively, and not neutrally, as the IAD did. More generally, it is argued that the IAD conflated two (2) factors in *Ribic*, choosing to use factors of establishment in the likelihood of re-offence factor. The Applicant also submits that the IAD used an erroneous test in determining that a stay is not warranted as "it would accomplish nothing of meaning". The Applicant contends that through the sermonic tone of the IAD's reasons, it is clear that a punitive motive was underlying the decision, as there was no risk of re-offending.

[24] The Respondent submits that the Applicant's argument to the effect that the IAD did not consider the documentary evidence is not accurate. As such, the IAD's reasons do not need to be analyzed in a formal and structured manner, as the list in *Ribic* is illustrative. The Applicant's arguments in this respect ask the Court to re-weigh the evidence, which is not permitted. Also, the Respondent submits that the IAD did consider the appropriate test for the evaluation of hardship, and that the discretion under sections 25 and 67(1)(c) is the same. In any event, the Respondent notes that the "undue, undeserved or disproportionate" test was not actually used as a legal test by the IAD. Furthermore, the IAD's conclusions in regards to AIDS treatment in Thailand are reasonable, as is its analysis of the rehabilitation factors.

IV. THE STANDARD OF REVIEW

[25] The Parties did not make written submissions in regards to the applicable standard of review. However, the questions at issue are fairly straightforward and a reading of *Dunsmuir v New Brunswick*, 2008 SCC 9, allows for a clear determination of the applicable standard of review.

[26] The Applicant submits questions of law, namely in regards to the applicable test for the evaluation of hardship, as well as for the correct application of the assessment of the nature of the *Ribic* factors. These are to be reviewed on the standard of correctness.

[27] The remainder of the arguments brought forth by the Applicant go to the IAD's evaluation of the evidence before it. These are mixed questions of fact and law to be reviewed on the standard of reasonableness, for which deference is owed to the IAD (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Abdallah v Canada (Citizenship and Immigration)*, 2010 FC 6; *Canada (Public Safety and Emergency Preparedness) v Mendoza Reyes*, 2009 FC 1097).

V. ANALYSIS

A. *General Considerations*

[28] Some perspective is required in order to fully grasp the legislative context in which this decision arises.

[29] At the heart of this matter is the question of admissibility to Canada of non-citizens. As was clearly stated by the Supreme Court in *Canada (Minister of Employment and Immigration) v*

Chiarelli, [1992] 1 SCR 711, there is no absolute right for non-citizens to remain in Canada. While it was decided before important statutory reforms were made, the Supreme Court in *Chiarelli*, above, was clear:

> *Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada*. It has done so in the Immigration Act. Section 5 of the Act provides that no person other than a citizen, permanent resident, Convention refugee or Indian registered under the Indian Act has a right to come to or remain in Canada. The qualified nature of the rights of non-citizens to enter and remain in Canada is made clear by s. 4 of the Act. Section 4(2) provides that permanent residents have a right to remain in Canada except where they fall within one of the classes in s. 27(1). *One of the conditions Parliament has imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non citizen to remain in the country. The requirement that the offence be subject to a term of imprisonment of five years indicates Parliament's intention to limit this condition to more serious types of offences*. (emphasis added)

[30] Considerable reforms were undertaken to overhaul Canada's immigration regime, which resulted in the adoption of the *Immigration and Refugee Protection Act*. Under the regime as it was when *Chiarelli* was decided, a serious criminal conviction was one where imprisonment of five (5) years could be given or where six (6) months of imprisonment had occurred. These were the alternative conditions required to establish a bar to admissibility. Under the IRPA as it now stands, subsection 36(1) establishes that inadmissibility for serious criminality occurs when a prison term of at least six (6) months is served or when the maximum term of imprisonment provided by an Act of Parliament is at least 10 years.

[31] One of the concerns which were emphasized by the immigration reforms are the safety and security concerns, as well as the health of the Canadian population. In all clarity, the Supreme Court stated in *Medovarski v Canada (Minister of Citizenship and Immigration),* 2005 SCC 51, at para 10 that:

> *The objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada*. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(i) of the IRPA versus s. 3(j) of the former Act; s. 3(1)(e) of the IRPA versus s. 3(d) of the former Act; s. 3(1)(h) of the IRPA versus s. 3(i) of the former Act. *Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.* (emphasis added)

[32] Further, the Supreme Court noted that to further reinforce this security objective, Parliament had deprived individuals falling under the serious criminality provisions of the right of appeal before the IAD.

[33] In this case, the Applicant did not benefit of a right of appeal to the IAD before the Ontario Court of Appeal overturned her sentence in order for her to benefit of this appeal right. In any event, it is clear that immigration proceedings such as this one are not the forum to relitigate criminal convictions. The Court must accept the work of learned colleagues of the criminal courts and not introduce uncertainty by diminishing the impact of their rulings and going against legislative intent. Also, the inadmissibility report against the Applicant has been reviewed and found reasonable my colleague Justice Zinn in *Iamkhong,* above.

[34] The reason removal procedures have been engaged is that serious criminality is present, and that Parliament deems this important enough to warrant removal. The question is thus whether the exercise of the IAD's discretion in relieving the Applicant of the consequences of her conviction under humanitarian and compassionate considerations was reasonable, and whether this was done on sound legal reasoning.

B. *Was the proper legal test used by the IAD in regards to H&C considerations?*

[35] The Applicant argues that the IAD failed in its assessment of the proper legal test in the evaluation of H&C considerations. Rather than considering if hardship should be analyzed as "undue, undeserved or disproportionate", it is suggested that the IAD should have relied upon a other legal test, that of *Chirwa v Canada (Citizenship and Immigration)*, [1970] IABD No 1, whereby H&C applications must be considered with regard for the interest of mankind, as a reasonable person would understand them in our civilized community.

[36] With respect, this is a well settled issue of law. The legal test set out in *Chirwa* has been seen to be subsumed into the "undue, undeserved or disproportionate" examination of hardship (*Lim v Canada (Citizenship and Immigration)*, 2002 FCT 956, at para 17; *Rizvi v Canada (Citizenship and Immigration)*, 2009 FC 463). Furthermore, as the Respondent has aptly stated, the Applicant does not have an absolute right to the application of a particular legal test (*Paz v Canada (Citizenship and Immigration)*, 2009 FC 412). Thus, the reviewing Court should satisfy itself within the context of the exercise of the IAD's discretion, which has been qualified as follows by the Supreme Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para 57:

> In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(c) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(c) requires the IAD to be "satisfied that, at the time that the appeal is disposed of . . . sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(c) calls for a fact-dependent and policy-driven assessment by the IAD itself.

[37] Furthermore, there is no basis in the Applicant's argument to the effect that the IAD fettered its discretion by relying on the "undue, undeserved or disproportionate" components of hardship derived from subsection 25(1) of the IRPA in the H&C context of paragraph 67(1)(c) of the IRPA. As indicated by Madam Justice Heneghan in *Delos Santos v Canada (Citizenship and Immigration)*, 2010 FC 614, at para 16:

> The nature of the discretion at issue in dealing with H&C considerations is the same, whether that discretion is invoked pursuant to paragraph 67(1)(c), that is relative to an appeal before the IAD, or "independently", that is pursuant to a stand-alone application pursuant to subsection 25(1). The H&C discretion is a means by which strict compliance with the Act and the Immigration and Refugee Protection Regulations, SOR/2002-227 ("the Regulations") is waived.

[38] Not only is this supported by case law, but it is also a question of the internal coherence of statutes. Surely, when Parliament uses "humanitarian and compassionate grounds" in sections of the very same act, the Court can presume Parliament's intent and purpose is to give these expressions the same meaning, as Parliament's coherence is presumed (*Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 919; *2747-3174 Québec Inc. v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919). As noted by Professor Sullivan, this presumption "is also expressed as a presumption against internal conflict. (…) The presumption of coherence is strong and virtually impossible to

rebut" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., Lexis Nexis, 2008, at pages 223-225). Furthermore, the purposes of subsection 25(1) and paragraph 67(1)(c) are similar: they aim to relieve an applicant of a legal requirement of the Act or the Regulations. It is only logical that the "humanitarian and compassionate" grounds by which this relief is granted be interpreted coherently.

[39] In this light, the IAD clearly did not fetter its discretion by considering whether the hardship suffered by the Applicant if removed would be "undue, undeserved or disproportionate". Indeed, this particular wording is drawn for the IP-5 Manual, which guides an Officer's decision in the context of section 25(1). Yet it is clear in this case that the IAD exercised its discretion and did not apply the wrong legal test.

[40] Furthermore, as the Respondent noted, the opposite argument is more frequently seen, i.e. an applicant argues that hardship was *not* properly considered as "undue, undeserved or disproportionate" (see, *inter alia*, *Barnash v Canada (Citizenship and Immigration)*, 2009 FC 842).

[41] In its decision, the IAD separated its reasons by headers, derived from the factors drawn out in *Ribic*, above, that it was required to analyze. However, the IAD did not present a separate section for the "Family and Community Support" criterion. The Applicant argues that this is a fatal flaw in the decision, and is indicative of the IAD's omission to fully appreciate the humanitarian and compassionate grounds of the case.

[42] Firstly, it must be noted in this respect that the *Ribic* factors are considered to be "illustrative, and not exhaustive" and that "the weight to be accorded to any particular factor will vary according to the particular circumstances of a case" (*Chieu*, above, at para 40). In this light, it is clear that the exercise of the IAD's discretion is to be guided by these factors, but that they are not the full extent of the analysis to be undertaken. Evidently, if there is evidence on a particular factor, it must be addressed by the IAD, namely, when this relates to the potential hardship (*Ivanov v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 315; *Canada (Minister of Citizenship and Immigration) v Stephenson*, 2008 FC 82; *Vijayasingham v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 395).

[43] However, the IAD's obligation to address the relevant evidence and the *Ribic* factors does not mean that the IAD is required to draft a point-by-point analysis of all the *Ribic* factors. Indeed, the Court will later preoccupy itself with the exercise of the IAD's discretion in terms of analyzing the evidence and *Ribic* factors. But this analysis cannot, as per the principles of administrative law, require undue formalism on the part of the IAD in terms of how it drafts its reasons. On this matter, Justice Pinard's comments in *Canada (Public Safety and Emergency Preparedness) v. Mendoza Reyes*, 2009 FC 1097, at para 20, are eloquent:

> "In this proceeding, it is not necessary to decide whether the panel must absolutely reiterate the *Ribic* factors in its decision. It is, at the very least, arguable whether requiring it would not demonstrate unjustified formalism with respect to an administrative tribunal. The important thing is that the panel actually take these factors into account in its decision.

[44] Indeed, it appears clear that the IAD's findings are findings of fact that are to be reviewed on the standard of reasonableness (*Khosa*, above). Also, the Court will later analyze whether the

IAD discharged itself of its duties to meaningfully address the evidence before it. However, the mere fact that “Family and Community Support” does not appear as a separate header is not the relevant issue. The real question is whether the IAD turned its mind to the evidence before it on this matter, if any. At face value, it appears that family and community support was indeed considered. Whether this analysis was reasonable will be seen later in these reasons. Suffice to say that it would be incoherent for a reviewing Court to proceed to such a formalistic analysis of the *Ribic* factors without actually analyzing the IAD’s reasons.

[45] The Court must also dismiss the Applicant’s argument to the effect that the IAD applied the wrong legal test in stating that granting the application would accomplish “nothing of meaning”. It is clear from the IAD’s reasons that whether the application would “accomplish something of meaning” was not at all at the heart of its decision. The Court sees this comment as relating to the Applicant’s request to stay her removal for two to three years, so as to prove rehabilitation. It is clear that the IAD’s reasons go to whether there are sufficient humanitarian and compassionate grounds to warrant special relief in light of all the circumstances of the case, as is required by paragraph 67(1)(c) of the IRPA. While deciding on a distinct question of the applicable standard of proof, Justice Harrington warned against a strictly literal analysis of the IAD’s decisions in *Brace v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 582, at para 14:

> *Words have to be considered in context, and so may take on different flavours. However there is nothing in the reasons, read as a whole,* to suggest that the IAD was assessing the situation on a standard more stringent than on a balance of probabilities. (emphasis added)

[46] In this case, as in any other, words have to be considered in context, and there is nothing in the reasons, read as a whole, to suggest that the IAD was applying anything but the legal test

prescribed by the Supreme Court in *Chieu*, above, and *Al Sagban*, above. Hence, the IAD's decision in this respect is correct, and there are no questions of law that warrant the Court's intervention. The Court will now proceed to analyze whether the *Ribic* factors were reasonably considered by the IAD in light of the evidence before it.

C. *Analysis of the Ribic factors*

[47] As stated in *Khosa*, above, at para 57, the IAD's power to grant relief under paragraph 67(1)(c) is to be exercised while considering the circumstances of the case, including hardship. This relief is seen to be "exceptional" by the Supreme Court (*Khosa*, above, para 57). Starting from this assertion, the evaluation of whether H&C grounds and the circumstances of the case warrant special relief is to be considered in light of the *Ribic* factors, as discussed in *Chieu*, above, *Al Sagban*, above, as well as the other relevant cases from this and other Courts. As noted above, the applicable standard of review for this portion of the application is reasonableness. It is trite to state that the Court's role is not to re-weigh the evidence, but rather to address whether the decision falls within the acceptable outcomes defensible in fact and law (*Dunsmuir*, above, at para 47).

(a) Seriousness of the Applicant's criminality

[48] While remaining a distinct factor of the *Ribic* analysis, little to no discretion is conferred to the IAD on this matter, as the starting point of the analysis is the fact that the Applicant has been convicted of a crime which makes her inadmissible to Canada.

[49] In this respect, the IAD relied upon the seriousness of the crime, the callous nature of the act itself, as well as the serious sentence served by the Applicant. Indeed, the sentence was reduced by

the Ontario Court of Appeal. Yet this was done in a manner that suggests that it was reduced so that the Applicant could benefit of the appeal before the IAD. In any event, the IAD considered that a two-year less a day sentence is extremely serious, as well as the seriousness of the criminality was such that it establishes an "extremely high bar to her remaining in Canada". This determination is reasonable, as it falls within the acceptable outcomes defensible in fact and law.

(b) The findings on the existence of undue, undeserved or disproportionate hardship

[50] An important component of the alleged hardship argued by the Applicant is the hardship that results from her medical condition, and more particularly, its exacerbation caused by removal to Thailand, where treatment is argued to be insufficient. Availability of medicine in Thailand was a core finding of the IAD in this respect, as it is on this basis that the IAD found the Applicant to not suffer undue, undeserved or disproportionate hardship if removed.

[51] The IAD based its findings on a report from a medical officer in Hong Kong and Singapore, who, having visited Thailand and reviewed the relevant documentation, concluded that first-line medication was freely available, and that second-line medication was also available, albeit in a more limited way and at an uncertain cost not apportioned between the two medications taken by the Applicant. In order to conclude on this matter, the IAD considered the evidence brought forth by the Applicant and clearly discussed why it was not relied upon. Basically, it found Dr. Giovinazzo's opinion to be given more weight.

[52] The IAD's conclusion in this respect is entirely reasonable. Firstly, as the IAD noted, it was within its powers to prefer the evidence of Dr. Giovinazzo to the Applicant's, as was decided in

Bichari v Canada (Citizenship and Immigration), 2010 FC 127, at para 28. Also, it was reasonable for the IAD to prefer this evidence, as Dr. Giovinazzo provided an informed opinion, which was supported by scientific literature on the treatment of AIDS sufferers in Thailand. This finding was detailed, addressed the contrary evidence on the file and provided a clear rationale.

[53] More precisely, it was reasonable for the IAD to conclude that the Applicant's evidence lacked specificity and was not conclusive on the matter of availability and cost of the drugs required for the Applicant's survival. Also, there was no conclusive evidence on the other medication the Applicant could take. Finally, the IAD's findings on the availability of medication in Thailand was supported by important elements of the documentation, not least of which a report from *Médecins Sans Frontières*. The Court agrees with the IAD that Justice Martineau's reasons in *Bichari*, above are highly instructive, albeit taken in another context: "the standard on a humanitarian and compassionate application cannot be whether the applicants will get better or more affordable treatment in Canada, because if this were the case, virtually all medically inadmissible persons would be entitled to stay". Again, this case involves inadmissibility for serious criminality, but surely when the quality of healthcare in Thailand is a central issue, it is reasonable for the IAD and this Court to rely on *Bichari*.

[54] The IAD's conclusions that the Applicant's family in Thailand would support her if removed has not been contested by the Applicant, and so this must also be accepted as reasonable.

[55] The Court cannot substitute its own conclusions to that of the IAD on this matter: the IAD provided clear, detailed reasons to support its conclusion on the topic. It is, in fact and in law, a

determination that falls within the range of acceptable outcomes defensible in fact and law, as defined in *Dunsmuir*, above.

[56] Furthermore, prior to the Applicant's removal, a Pre-Removal Risk Assessment was conducted, as required by the IRPA. Evidently, the jurisdiction for a PRRA is more limited in scope than that of the IAD under paragraph 67(1)(c). As the IAD validly noted at paragraph 43 of its reasons, the framework of paragraph 67(1)(c) of the IRPA is much broader: "all the circumstances of the case" have to be considered. This is indicative of a serious and mindful exercise of the IAD's equitable jurisdiction, namely in regards to hardship.

[57] Again on hardship, the IAD commented on the stigma that the Applicant could suffer in Thailand if she was to be removed. The Court notes that these were not contested by the Applicant. In any event, and in the interests of justice and transparency, the Court finds that the findings related to stigma were also reasonable: the IAD recognized the stigma that the Applicant could suffer, but ruled that it did not amount to undue, undeserved or disproportionate hardship.

[58] Furthermore, the IAD supported its hardship findings with the fact that the Applicant has maintained a continuing connection with her homeland, through her family. The IAD found that she knew the Thai language and culture, and that removal to Thailand could not constitute *prima facie* hardship because of these elements. Again, the Court finds that these findings are reasonable.

[59] Thus, the IAD's assessment of hardship as one of the *Ribic* factors is reasonable.

(c) Possibility of Rehabilitation and Remorse

[60] This aspect of the *Ribic* factors was also reasonably considered by the IAD. Contrary to what the Applicant notes, it does indeed appear that the IAD considered the possibility of rehabilitation as a positive factor for the application. The same cannot be said of the IAD's appreciation of the Applicant's remorse. Indeed, the IAD did have harsh words for this remorse, noting that it was self-serving and pointless after the Applicant's offence. While the Court warns against the IAD taking too negative a view of remorse, which may well be genuine, it cannot be said that remorse is determinative in this case. It seems as though the IAD focused on the breach of trust underlying the Applicant's criminal convictions and took a moral stance against it. This may not be the most tactful manner to address the issue of remorse; but the IAD's conclusion on remorse is not unreasonable, as it results from the IAD's appreciation of the Applicant's testimony as it arose before it.

[61] As for the possibility of rehabilitation, this was first commented as a "neutral consideration" by the IAD (paragraph 25 of the reasons). The IAD aptly noted that it was to analyze the possibility of rehabilitation, and not the evidence thereof (*Kanagaratnam v Canada (Citizenship and Immigration)*, 2009 FC 295; *Martinez-Soto v Canada (Citizenship and Immigration)*, 2008 FC 883). The IAD noted that the Applicant was not a hardened criminal, and was unlikely to re-offend as the evidence indicated that the Applicant "now appreciates she represents a threat to anyone she has intimate relations with". The Applicant also was deemed to be likely to be compliant. Although these arguably relate to establishment or even community support, the IAD noted that the Applicant had taken steps with various AIDS-related organizations through her involvement, which go to rehabilitation.

[62] Contrary to the Applicant's representations, these were seen as *positive*, and not neutral, factors (see paragraph 73 of the reasons). As such, the Applicant cannot take issue with the finding in regards to the finding on the possibility of rehabilitation. Rather, it seems as though the Applicant takes issue with how this factor came into play in the overall appreciation of the *Ribic* factors, as will be considered later in these reasons.

[63] Hence, as the rehabilitation finding is based on the proper legal test, takes into account the evidence and ultimately, is favourable to the Applicant, it is clear that the Court's intervention in regards to this factor is not required.

(d) Family and Community Support

[64] As stated above, the Court rejects the Applicant's contention that the IAD did not turn its mind to the presence of family and community support in the Applicant's life. For example, paragraph 28 of the reasons address the rehabilitation programs in which the Applicant participated. Paragraph 31 addressed the Applicant's ties to her sister in Canada. More importantly, some of her community work and support was clearly considered at paragraph 63:

> Certainly Ms Sutdhibhasilp's testimony would speak to what the appellant has done since 2004 as would the letters of support from the Elizabeth Fry Society, Voices of Positive Women and her Buddhist Temple *as evidence that she is now attempting to make something of herself within a supportive community network all of which are positive factors.* (emphasis added, references omitted)

[65] Hence, not only did the IAD consider the evidence before it in this respect, it weighed it as being favourable to the Applicant. What is asked of the Court is thus to re-weigh the evidence,

which is not something that is open for the Court to do, barring errors of fact and law or similar questions requiring the Court's intervention.

(e) Establishment

[66] Is it manifest that this was the *Ribic* factor which was most unfavourable to the Applicant. The IAD decided that, despite the Applicant's best, yet belated efforts, there was not enough evidence for the establishment criterion to be considered favourably. In this respect, the IAD deplored that, despite her long presence in Canada, 15 years, the Applicant did not master any of Canada's official languages. Furthermore, the Applicant was noted to be entirely dependant on the state for support, and owns no real property. The Applicant only belatedly tried to remedy her lack of formal education, and testified to wanting to become a chef. While these elements were considered under the rehabilitation factors, they can also be seen as being part of the Applicant's establishment in Canada. The IAD also noted that the Applicant had a sister in Canada, whom would miss her should the Applicant be removed.

[67] The IAD itself resumed its findings as follows: "These efforts are better late than never (…) But after fifteen years not much of an accomplishment in respect of the objectives of immigration". Further, the IAD noted that "surely the fact that [she] has done little to establish [herself] here must be viewed as an overall negative factor".

[68] What transpires from the IAD's reasons and the facts of the case is that the Applicant's positive establishment factors were belated and probably not extraneous to the removal procedures

being engaged. The IAD seemed convinced that the Applicant's positive factors of establishment did not outweigh the negative ones. Was it reasonable for the IAD to decide in such a manner?

[69] The Court finds that the IAD's decision in regards to establishment is reasonable. It addresses all the relevant evidence, both positive and negative. In the end, the Applicant's total reliance on the state, her lack of education and her poor mastery of Canada's official languages proved to be determinative. The relevant IRPA objectives are set out in section 3:

Objectives — immigration 3. (1) The objectives of this Act with respect to immigration are (a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration; (b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada; (b.1) to support and assist the development of minority official languages communities in Canada; (…) (e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society; (…) (h) to protect the health and safety of Canadians and to maintain the security of Canadian society; (i) to promote international	*Objet en matière d'immigration* 3. (1) En matière d'immigration, la présente loi a pour objet : a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques; b) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel; b.1) de favoriser le développement des collectivités de langues officielles minoritaires au Canada; (…) e) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne; (…) h) de protéger la santé des Canadiens et de garantir leur sécurité; i) de promouvoir, à l'échelle internationale, la justice et la

justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; (…)	sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité; (…)

[70] The Court notes the clear concerns of integration, both cultural and economic, the importance of Canada's official languages, as well as the consideration of the health and safety of Canadians. These considerations are reflected in the IAD's appreciation of the Applicant's establishment in Canada. As she herself admitted, the Applicant did not undertake steps to meaningfully establish herself in Canada as she thought she would live with her former husband forever.

[71] As such, the IAD did not consider the Applicant's establishment to be sufficient. It was reasonable for the IAD to conclude in this manner on this *Ribic* factor: all the relevant evidence was duly considered and weighed. It was reasonable for the IAD to consider the Applicant's efforts to establish herself to be insufficient and belated.

(f) Overall Balance of the Ribic Factors

[72] In its conclusions, the IAD adequately framed the exercise that was to be undertaken: the IAD was to consider whether, upon consideration of all the circumstances of the case, whether there were humanitarian and compassionate considerations by which special relief would be granted. As discussed above, the IAD's reasons are detailed and provide for a reasonable assessment of the evidence that was before the IAD.

[73] Again, the Court emphasizes the nature of the application for judicial review: it is not a *de novo* appeal. As such, it is not open for the Court to re-weigh the evidence or otherwise substitute itself to the decision-maker. While the Court does recognize some strong tones in the IAD's reasons, these did not blind the IAD of its duties to fairly and meaningfully address the case before it. Surely, this is an emotionally charged case. Navigating through the evidence and humanitarian considerations is not an easy task, especially not in this case. However, there is nothing to indicate that the Applicant did not get a full, legally sound analysis of her case.

[74] The IAD noted all the relevant *Ribic* factors and seriously turned its mind to the case. It noted some positive factors. Ultimately, the negative factors overruled whatever positive aspects of this application. It was reasonable for the IAD to conclude in such a manner, as there was no breach of fairness and nothing wanting in the IAD's reasons. The IAD's conclusion that all the circumstances of the case did not warrant humanitarian and compassionate relief was reasonable.

VI. PROPOSED QUESTION FOR CERTIFICATION

[75] The Applicant suggests the following question for certification:

> In considering hardship as a humanitarian and compassionate consideration under s.67(1) of IRPA, is the IAD limited to considering only hardship that it finds amounts to the level of "undue, undeserved or disproportionate" or should it consider all hardship as per the test set out in *Chirwa*?

[76] The Applicant's position is based on the fact that this question is both determinative of the appeal and of general importance. Also, in submissions made in regards to certification of questions, counsel for the Applicant has attempted to reframe and nuance the arguments presented at the hearing and in the materials placed before the Court. Counsel for the Applicant has argued that

appellate guidance on this question would further clarify the duties of the Officer when assessing humanitarian and compassionate grounds.

[77] The Respondent opposes the certification of this question, as the matter is argued to have been resolved by the Supreme Court, and that this question is not determinative of the appeal.

[78] The test for certification is that a proposed question must be of general importance and must be determinative of the appeal (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89).

[79] Furthermore, as discussed above at paragraph 38, the presumption of coherence within statutes is such that the Applicant's proposed question for certification would go against the interpretation of "humanitarian and compassionate grounds" as recognized within sections 25 and 67 of the IRPA. Legislative intent and coherence must be recognized: when humanitarian and compassionate considerations are at play, surely the same expression within IRPA cannot be interpreted differently on the sole basis that two different sections of the same act are at play. As legislative coherence is essential to the predictability of the applications of Canada's laws, the proposed question for certification would go against coherence, as well as clear guidance from the Supreme Court.

[80] In this matter, it appears clear that there is appropriate guidance from the Supreme Court in regards to the proper test for the evaluation of humanitarian and compassionate considerations under s 67(1) of IRPA. Firstly, *Chirwa* is a case that is dated, which constitutes indicia that the appellate

courts were aware and sensitive to its breadth and scope. The Supreme Court clarified the application of *Ribic* to the IAD's duty under subsection 67(1) of the IRPA in *Chieu*, above, and *Al Sagban*, above. Clearly, as was decided in cases from this Court, one can assume the general considerations raised in *Chirwa* are an element of the IAD's evaluation and cannot constitute a stand-alone legal test for the evaluation of hardship.

[81] It should also be noted that the Supreme Court described at great lengths in *Khosa*, above, the framework in which the IAD exercises its discretion under subsection 67(1) of the IRPA.

[82] Lastly, the Court is not satisfied that this question would be determinative of the appeal: the IAD properly analyzed all the evidence before it and weighed it. Surely, the general musings offered in *Chirwa* cannot be said to be determinative of the appeal: one can presume the IAD considered the case "with regard for the interest of mankind, as a reasonable person would understand them in our civilized community". The Court fails to see how this could even constitute a valid, stand-alone legal test that could prove to be determinative of the appeal.

[83] Hence, as there is ample appellate guidance and as this question is not determinative of the appeal, this question will not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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