Federal Court Cour fédérale

Date: 20140709

Docket: IMM-6485-13

Citation: 2014 FC 671

Ottawa, Ontario, July 9, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SILVIA OLVERA ROMERO

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

# JUDGMENT AND REASONS

[1] This is an application for leave and judicial review of the decision of a hearings officer of the Canada Border Services Agency (CBSA), dated September 19, 2013, to make an application for cessation of refugee protection (cessation application) to the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), pursuant to s. 108 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The Applicant also alleges that the Minister's interpretation of the legislative scheme violates s. 7 of the *Canadian Charter of Rights and*

*Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (Charter).

**Factual Background**

[2] The Applicant is a citizen of Mexico. She and her husband entered Canada in 1997. In May 1999 the RPD determined that they were Convention refugees because they had a well-founded fear of persecution, pursuant to s. 96 of the IRPA, by individuals associated with the then ruling political party in Mexico. Their daughter was born in Canada in 1999. The Applicant subsequently separated from her husband and, in July 2010, she became a permanent resident of Canada.

[3] On August 6, 2013, the Applicant was returning from Mexico, accompanied by her daughter, when she was questioned by a CBSA officer (CBSA Officer) at Vancouver International Airport concerning that and her prior trips to Mexico. On September 19, 2013, Ms. Susan Barr, the CBSA hearings officer and Minister's delegate (Hearings Officer or Minister's Delegate), made a cessation application pursuant to s. 108 of the IRPA. The basis of the application included that the Applicant had informed the CBSA Officer that she had obtained a Mexican passport some time after her landing on July 5, 2010, it had been renewed on April 8, 2013 and was valid until April 8, 2019. Further, that since 2004 she had made four trips to Mexico. The first was from June 2004 until 2007 following her separation from her husband. During that time, she lived with her brother and her daughter attended school in Mexico. Her second trip was in July 2011, her third was in May 2013, and her fourth was in July 2013. When

asked why she no longer feared returning to Mexico she stated that the Mexican government had changed and she now felt that it was safe to visit her mother.

[4] The cessation application asked that the RPD determine, pursuant to s. 108(2) of the IRPA, that the Applicant's refugee protection has ceased for the reasons listed in s. 108(1).

**Legislative Background**

[5] Section 108 of the IRPA states as follows:

| ***Cessation of Refugee Protection*** | ***Perte de l'asile*** |
| --- | --- |
| **Rejection** | **Rejet** |
| 108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: | 108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants : |
| (a) the person has voluntarily reavailed themself of the protection of their country of nationality; | a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité; |
| (b) the person has voluntarily reacquired their nationality; | b) il recouvre volontairement sa nationalité; |
| (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality; | c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité; |
| (d) the person has voluntarily become re-established in the country that the person left | d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est |

or remained outside of and in respect of which the person claimed refugee protection in Canada; or

demeuré et en raison duquel il a demandé l'asile au Canada;

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

**Cessation of refugee protection**

**Perte de l'asile**

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

**Effect of decision**

**Effet de la décision**

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(3) Le constat est assimilé au rejet de la demande d'asile.

**Exception**

**Exception**

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[6] The effect of a successful cessation application on permanent residents was altered by the passage of the *Balanced Refugee Reform Act*, SC 2010, c 8 (BRRA) and the *Protecting Canada's Immigration System Act*, SC 2012, c 17 (PCISA), the relevant provisions of which came into force on December 15, 2012 by order in council (PC 2012-1588). Specifically, pursuant to s. 46(1)(c.1) of the IRPA, permanent residence is now lost upon a positive cessation decision being made by the RPD:

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| 46. (1) A person loses permanent resident status | 46. (1) Emportent perte du statut de résident permanent les faits suivants : |
| […] | […] |
| (c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d); or | c.1) la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile; |
| […] | […] |

[7] Further, s. 40.1(2) of the IRPA was amended such that, upon a positive determination of cessation of refugee protection, the person under consideration is rendered inadmissible:

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| 40.1 (1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased. | 40.1 (1) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire. |
| (2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons | (2) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas |

| | |
|---|---|
| described in paragraphs 108(1)(a) to (d). | 108(1)a) à d), la perte de l'asile d'un résident permanent emporte son interdiction de territoire. |

[8] Section 25 of the IRPA requires the Minister to consider, as an exception to the requirement that application be made from outside Canada, a request for permanent residence by a foreign national who is within Canada in certain circumstances, including on the basis of humanitarian and compassionate (H&C) considerations. However, this is subject to the s.25(1.2) exceptions, which include a twelve month waiting period from the time the claim was last rejected pursuant to s. 25(1.2)(c). This, in turn, is subject to the s. 25(1.21) exceptions including that pursuant to s.25(1.21)(b) the twelve month delay does not apply in respect of a foreign national whose removal would have an adverse effect on the best interests of a child directly affected.

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| **Humanitarian and compassionate considerations — request of foreign national** | **Séjour pour motif d'ordre humanitaire à la demande de l'étranger** |
| 25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the | 25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, |

foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

**Exceptions**

(1.2) The Minister may not examine the request if

[…]

(c) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.

**Exceptions**

(1.2) Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants :

[…]

c) sous réserve du paragraphe (1.21), moins de douze mois se sont écoulés depuis le dernier rejet de la demande d'asile, le dernier prononcé de son retrait après que des éléments de preuve testimoniale de fond aient été entendus ou le dernier prononcé de son désistement par la Section de la protection des réfugiés ou la Section d'appel des réfugiés.

**Exception to paragraph (1.2)(c)**

(1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national

[…]

(b) whose removal would have an adverse effect on the best

**Exception à l'alinéa (1.2)c)**

(1.21) L'alinéa (1.2)c) ne s'applique pas à l'étranger si l'une ou l'autre des conditions suivantes est remplie :

[…]

b) le renvoi de l'étranger porterait atteinte à l'intérêt

| | |
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| interests of a child directly affected. | supérieur d'un enfant directement touché. |

## Issues

[9] The Applicant submits that the issues are as follows:

i. Does an officer breach a duty of fairness in failing to give notice and provide an opportunity to make submissions before initiating an application for cessation?

ii. Does an officer have discretion to consider H&C factors before deciding to apply for cessation with respect to a permanent resident?

[10] Subsequent to the judicial review of this matter being set down for hearing, the Applicant also filed a Notice of Constitutional Question stating that she questioned the constitutional validity, applicability and effect of ss.108(2), 46(1)(c.1) and 40.1 of the IRPA. Specifically:

> iii. If the Minister's interpretation of the legislation and lack of discretion is correct, then the legislation is unconstitutional as there is no mechanism to consider the breaches of s. 7 inherent in the application of the IRPA on two levels:
>
> (a) The devastating psychological impact of the loss of permanent residence in the circumstance, in particular when the provisions are applied retrospectively; and
>
> (b) The purported inability to give any consideration whatsoever to the impact on a child directly affected.

[11] The Respondent submits that the issue is whether the Applicant has established that she has been denied procedural fairness. The Respondent also submits that the Notice of Constitutional Question is deficient and should be struck. Further, that the questions are not proper nor justiciable because they are premature.

[12] In my view, the issues can be framed as follows:

i. Was the Applicant denied procedural fairness?

ii. Does the Hearings Officer have discretion to consider H&C factors prior to submitting a cessation application?

iii. Should the Notice of Constitutional Question be set aside?

iv. If there is no ability for the Hearings Officer to consider H&C factors on a cessation application, does this violate s. 7 of the Charter?

**Standard of Review**

[13] The parties make no submissions on the standard of review.

[14] A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 57 [*Dunsmuir*]; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18).

[15] Issues of procedural fairness attract the standard of review of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]).

[16] There is clear authority that deference will usually result when a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (*Dunsmuir*, above]; *Alberta (Information and Privacy Commissioner) v Alberta*

*Teachers' Association*, 2011 SCC 61). This presumption has been applied to decisions of ministers (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 50; *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85 at paras 40-41, 86) and minister's delegates (*Kinsel v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 126 at para 26). In my view, the presumption has not been rebutted in this case given the discretionary nature of the decision. Thus, the application and interpretation of the relevant provisions of the IRPA will attract the reasonableness standard in these circumstances.

[17] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above, at paras 45, 47-48; *Khosa*, above, at paras 59, 62).

[18] For the constitutional issue, the applicable standard of review depends on whether the constitutionality of a law is at issue or an administrative decision is said to violate Charter rights (*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at para 36 [*Doré*]). The former situation would attract the correctness standard (*Dunsmuir*, above, at para 58; *Doré*, above, at para 36), while the latter would be reviewed on a reasonableness standard because it is fact specific (*Doré*, above, at paras 35-36, 52-58). Here, the Applicant challenges the Minister's interpretation of the legislation and therefore, in my view, this necessarily involves the constitutionality of a law attracting the correctness standard.

***Amendment of Style of Cause – Preliminary Matter***

[19] As a preliminary matter, the Respondent asks that the style of cause be amended to remove the Minister of Public Safety as the Respondent and replace him with the Minister of Citizenship and Immigration (CIC). The latter is responsible for the administration of s. 108 of the IRPA and the former was incorrectly named on the cessation application.

[20] The Applicant takes the position that while she does not oppose adding the Minister of CIC, she does oppose the removal of the Minister of Public Safety because it was CBSA that made the decision to make the cessation application.

[21] Paragraph (b) of the *Order Setting Out the Respective Responsibilities of the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness Under the Act*, SI/2005-120 confirms that the Minister of CIC is the Minister responsible for applying for cessation under s. 108(2). Furthermore, in CIC's Instrument of Designation and Delegation, described in further detail below, the Minister of CIC delegates to CBSA hearings officers the authority to make an application to the RPD for a determination of cessation of refugee protection pursuant to s. 108(2) of the IRPA. Accordingly, while the decision was made by a CBSA officer, it was under the Minister of CIC's delegated authority. Given this, the style of cause should properly name the Minister of CIC and remove the Minister of Public Safety and is hereby amended accordingly.

***Issue 1: Was the Applicant denied procedural fairness?***

*Applicant's Position*

[22] The Applicant submits that the effect of ss. 108(2), 46(1)(c.1), 40.1(2), and 21(3) of the IRPA is, if the cessation application is successful, that she would immediately lose her permanent residence status and become inadmissible. Because the cessation decision is not made in the context of an admissibility hearing or an examination, there is no appeal available pursuant to s. 63(3) of the IRPA and s. 110(2)(c) precludes appeal to the RPD and a potential of a stay under s. 23(1). Further, pursuant to s. 108(3), the Applicant's claim is deemed to be rejected with the result that all of the consequences that follow the rejection of a refugee claim also follow a positive cessation finding. This includes being unable to apply for permanent residence on H&C grounds for twelve months (s. 25(1.2)(c)) unless one of the s. 25(1.21) exceptions apply. Even in that event, there is no statutory stay of removal while an H&C application is made and no impediment to immediate removal pursuant to s. 48(2).

[23] The loss of permanent residence also results in the loss of the right to work in Canada without authorization. Even if there is a pending H&C application and she can apply for a work permit, this could take several months to be issued. Thus, a well established former permanent resident such as the Applicant would have to leave their employment in the interim. The Applicant would also be precluded from applying for a temporary resident permit pursuant to s.24(4) of the IRPA, and would not be eligible for a Pre-Removal Risk Assessment (PRRA) pursuant to s. 112(2)(c), both for a period of twelve months.

[24] Given the seriousness of these consequences, the Applicant submits that the level of procedural fairness owed by a hearings officer, as the Minister's delegate, to an individual before making a cessation application should be governed by the two-step analysis taken by this Court in *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 FCR 3 [*Hernandez*]. This would also determine the scope of the hearings officer's discretion pursuant to the statutory framework. The Applicant submits that the hearings officer is not compelled by s. 108(2) to make the cessation application and has broad discretion in that regard as demonstrated by past practice.

[25] The Applicant also submits that when the subject amendments to the IRPA were being effected, the Minister made repeated representations to Parliament that cessation applications would only be initiated in situations where individuals had re-established themselves in their country of nationality immediately upon obtaining permanent residence. This implies Parliament's intent that there be an element of fraud in connection with the original application and, therefore, a much broader discretion on the part of the Minister's delegate than the Respondent has advanced in this proceeding. In the result, CBSA should not be seeking to determine if there is merely a technical basis for a cessation application, but whether, in the context of each specific case, the reavailment provides a compelling basis for believing that the original claim was fraudulent.

[26] Further, the Immigration Manual: Enforcement (ENF) – Chapter ENF 24 Ministerial Interventions (ENF-24) establishes CIC's policy and demonstrates that an application for cessation pursuant to s. 108(2) should only be made after balancing considerations that are

beyond the scope of s. 108(1). It does not support the Respondent's position that the Hearings Officer has no discretion other than to assess whether a *prima facie* case for a cessation application exists.

[27] The scope of the duty of fairness owed is to be assessed in accordance with the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28 [*Baker*]. An analysis of those factors leads to the conclusion that the duty includes being afforded the opportunity to make submissions prior to a hearings officer's decision to make a cessation application.

*Respondent's Position*

[28] The Respondent submits that the Applicant misconstrues the distinction between the role of the Hearings Officer with that of the role of the RPD in a cessation proceeding. The IRPA explicitly states that it is the RPD, and not the Hearings Officer, who makes a decision as to whether refugee protection has ceased. The Applicant's assertion that she is entitled to notice and an opportunity to make submissions is, therefore, premature and misplaced. The *Refugee Protection Division Rules*, SOR/2012-256 (RPD Rules) provide for a hearing, right to counsel, comprehensive disclosure, and the right to call witnesses and to lead evidence, all before the RPD makes its decision. Accordingly, the Applicant will be afforded procedural protections before a decision is made that may result in a loss of her refugee status.

[29] Further, the Hearings Officer does not have H&C jurisdiction under the IRPA. The IRPA and the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can

TS No 6 [Refugee Convention] indicate that H&C factors are not relevant to a determination of whether refugee protection has ceased on the basis that it is no longer warranted.

[30] The Hearings Officer's role is limited to completing an "Application for Cessation of Refugee Protection" form based on *prima facie* evidence and facts that criteria for cessation of refugee protection are met, and, representing the Minister before the RPD. It is the RPD, and not the Hearings Officer, who will assess the evidence and determine if the Applicant's refugee status has ceased. The Hearing Officer's act of filing the cessation application was, at most, a preliminary decision which did not give rise to a duty of fairness (*Guay v Lafleur*, [1965] SCR 12 [*Guay*]; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at para 26 [*Knight*]; *Baker*, above). Even where applicable, the common law duty of procedural fairness does not require notice or an opportunity to make submissions before a tribunal proceeding is initiated, provided that there are procedural protections at the tribunal processing stage (*Hyundai Motor Co v Canada (Attorney General)*, [1987] FCJ No 724 (TD), 14 FTR 316 [*Hyundai*]; *Kindler v Canada (Minister of Citizenship and Immigration)*, [1987] FCJ No 507 (CA), 41 DLR (4th) 78 [*Kindler*]; *Mohammed v Canada (Minister of Employment and Immigration),* [1988] FCJ No 1141 (CA), 55 DLR (4th) 321 [*Mohammed*]). Further, the *Baker* factors weigh against imposing a requirement of notice and submissions for pre-cessation applications.

[31] The heart of the Applicant's position is that fairness requires that she have an opportunity to convince the Hearings Officer not to file the cessation application, notwithstanding the evidence of a *prima facie* case, on the basis of countervailing H&C considerations including the

best interests of her daughter. However, this would undermine the IRPA regime with respect to H&C applications and relies on a misreading of ENF-24.

[32] A non-citizen does not have any right to H&C assessments in connection with every immigration process that may adversely affect their status. Such assessments are generally properly the subject of H&C applications pursuant to s. 25 of the IRPA. H&C considerations play no role in determining whether refugee protection has ceased pursuant to s. 108 (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 13 [*Varga*]; *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539 at para 47 [*Medovarski*]). Nor does ENF-24 support a view that the Hearings Officer has H&C jurisdiction. The factors listed therein pertain to the criteria for cessation of refugee protection, set out in s.108(1), incorporating Article 1C of the Refugee Convention and the guidance of the United Nations High Commission for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook) with respect to the application of those criteria. This is not indicative of broad discretion to consider factors unrelated to the grounds for cessation of refugee protection, such as H&C considerations.

[33] The Respondent submits that *Hernandez*, above, is distinguishable and has been superseded by more recent authority (*Nagalingam v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1411 at paras 34-35 [*Nagalingam*]; *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at paras 13, 21-23, [2007] 1 FCR 409 [*Cha*]; *Faci v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 693 [*Faci*]). Even in

the s. 44 context, procedural fairness does not mandate a right to notice or to make submissions before an officer prepares a s. 44 report and in those circumstances, officers do not consider H&C factors.

*Analysis*

[34] The Applicant's argument is, essentially, that s. 108(2) affords the RPD little, if any discretion. Once the cessation application is before it, if one of the s. 108(1) criteria is met, then it must determine that refugee protection has ceased with the inevitable consequence of a loss of permanent residence. Therefore, procedural fairness requires that before that stage is reached, and when the Hearings Officer is determining whether there is a basis for making a cessation application, there must be notice and an opportunity to make submissions. Further, that the Hearings Officer has broad discretion to decide, based on the information so gathered and submitted, whether or not the application should actually be made.

[35] In order for that position to succeed, there must first be a duty of fairness, the content of which requires giving notice and providing an opportunity to make submissions. And, if so, a further duty or the discretion of the Hearings Officer to consider factors, including H&C grounds, at the pre-cessation application stage when deciding whether to proceed with that application.

[36] As a starting point, it should be noted that s. 108 of the IRPA, which addresses cessation, was not amended by the BRRA or the PCISA. Section 108(2) states that on application by the

Minister, the RPD may determine that refugee protection referred to in s. 95(1) has ceased for any of the reasons set out in s. 108(1). Thus, the cessation process was, and remains, a two-step process.

[37] It is also important to view the Applicant's assertion of a lack of procedural fairness within the larger context of refugee protection law. The Refugee Convention defines a refugee and sets out a series of obligations owed to them by contracting states (*Németh v Canada (Minister of Justice)*, 2010 SCC 56, [2010] 3 SCR 281 at para 17). The UNHCR Handbook addresses Article 1C, the "cessation clauses," stating that they are based on the consideration that international protection should not be granted when it is no longer necessary or justified.

[38] Article 1C sets out the circumstances where that protection will no longer apply:

> This Convention shall cease to apply to any person falling under the terms of section A if:
>
> (1) He has voluntarily re-availed himself of the protection of his country of nationality; or
>
> (2) Having lost his nationality, he has voluntarily re-acquired it; or
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
>
> (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous

persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because of circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former residence.

[39] The UNHCR Handbook notes that the first four clauses reflect a change of the situation that has been brought about by the refugee. Conversely, the last two clauses are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared because the reasons for a person becoming a refugee have ceased to exist. The cessation clauses are negative in character and are exhaustively enumerated. They should be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.

[40] The UNHCR Handbook also offers an interpretation of certain of these clauses. As to Article 1C (1), it states that this applies to a refugee who possesses a nationality and remains outside their country of nationality. A refugee who has voluntarily re-availed of national protection is no longer in need of international protection. He has demonstrated that he is no longer "unable or unwilling to avail himself of the protection of the country of his nationality" (i.e. s. 96 of the IRPA). This clause implies three requirements: voluntariness; intention (the refugee must intend by his action to re-avail himself of the protection of the country of his nationally); and, re-availment (the refugee must actually obtain such protection).

[41] In determining whether refugee status is lost in these circumstances, the UNHCR Handbook states that a distinction should be drawn between actual re-availment of protection and occasional or incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality: "… obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status."

[42] Similar considerations apply with regard to Article 1C (2). While Article 1C (1) concerns a person having a nationality, but who ceases to be a refugee if he re-avails himself of the protection attaching to such nationality, Article 1C (2) concerns the loss of refugee status by re-acquiring the nationality previously lost.

[43] Article 1C (4), voluntary re-establishment, applies to both refugees who have a nationality and to stateless refugees. It relates to refugees who, having returned to their country of origin or previous residence, have not previously ceased to be refugees under Article 1C (1) or (2) while still in their country of refuge. It is to be understood as return with a view to permanently residing there: "A temporary visit by a refugee to his former home country, not with a national passport but, for example, with a travel document issued by his country of residence, does not constitute "re-establishment" and will not invoke loss of refugee status…."

[44] The cessation criteria under Article 1C are reflected in s. 108(1) of the IRPA. The procedural mechanism whereby the RPD assesses information provided by CBSA for the

purpose of determining whether refugee protection has ceased pursuant to s. 108(1) is the cessation application made by a hearings officer pursuant to s. 108(2). Hearings officers have the delegated authority to make s. 108(2) cessation applications on behalf of the Minister pursuant to a CIC Instrument of Designation and Delegation.

[45] Rule 64 of the RPD Rules states that an application to cease refugee protection made by the Minister (or his delegate) must be made in writing and in accordance with that Rule. It specifies the content of the application including the decision that the Minister (or his delegate) wants the RPD to make and the reasons why the RPD should make that decision. In this case, the written cessation application was completed and, pursuant to Rule 50(4), listed the documentary evidence that the Hearings Officer, as the Minister's delegate, sought the RPD to consider. This included the solemn declaration of the CBSA Officer who interviewed the Applicant at the airport.

[46] The Affidavit of Aaron Smith, Senior Policy Advisor, Refugee Affairs Branch, CIC (Smith Affidavit), states that a hearings officer may gather additional information with respect to the facts that are relevant to the grounds for cessation under s. 108(1) including interviewing the person concerned in some circumstances. The hearings officer then reviews the information for the purpose of assessing whether there is *prima facie* evidence or facts to establish that any of the s. 108(1) criteria are met (Smith Affidavit, para 19(a)).

[47] It is within the above context that the procedural fairness issue must be considered.

*a) Does a duty of fairness exist?*

[48] The Respondent submits that the Hearings Officer is, at best, making only a preliminary decision, being the decision to make the cessation application. Because the final decision and attendant procedural fairness rights lie with the RPD, there is no duty to act fairly at the cessation application stage (*Guay*, above; *Knight*, above, at para 26).

[49] A review of *Knight*, above, relied upon by the Respondent, indicates that it dealt with a termination of employment pursuant to a contract and the *Education Act*. The Supreme Court of Canada found that the existence of a duty of fairness depends on the nature of the decision to be made, the relationship between the parties and the effect of the decision on the individuals' rights. The Court stated that the finality of the decision is also a factor to be considered and that, "A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect."

[50] However, as stated by Justice Le Dain in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14:

> …This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual…

[51] In J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Toronto: Canvasback, 1998), Brown & Evans state that "contemporary administrative law takes a very broad view of the range of rights, privileges and interest that will

attract a right of procedural fairness" (p. 7-47). Privileges "refer to benefits, the grant or revocation of which are to a greater or lesser extent within the discretion of the relevant agency," and would include the ability of a non-citizen to enter Canada (p. 7-51). For example, in a circumstance which involved denial of a security certificate, which in turn would lead to a denial of citizenship and liability to deportation, a duty of fairness is owed (*Al Yamani v Canada (Solicitor General)*, [1995] FCJ No 1453 (TD), 129 DLR (4th) 226 (FCTD). Further, interests may include benefits to which there is no legal entitlement, but which are none the less important (p. 7-52).

[52] As to when an interest is affected, Brown & Evans state:

> At one time, implied rights to participate in decision-making by public bodies appeared to be limited to the exercise of powers that finally *decided* the *rights* of individuals. However, the "fairness revolution" that has transformed administrative law in Canada since the early 1980's has expanded not only to the range of interests protected by the duty of fairness, but also the types of administrative action, to include more than final determinations of legal rights. For example, suspensions, the refusal of discretionary benefits, investigations, public inquiries, referrals to a hearing, and recommendations, may now attract the duty of fairness.
>
> [Emphasis in original]

[53] Brown & Evans also state that although the Supreme Court in *Knight*, above, stated that a decision of a preliminary nature will not generally trigger the duty to act fairly, there are many instances where the duty does apply to non-final decision-making:

> Of course, public administration should not be encumbered by a requirement to notify affected individuals and to consider their representation before each step of a decision-making process. On the other hand, the practical seriousness of non-final processes such as investigations, public inquiries, recommendations, and

> references to more formal proceedings may warrant procedural safeguards.
>
> In some instances the benefit of avoiding the harm that an erroneous preliminary decision may potentially inflict will be outweighed by the administrative burden that the duty of fairness is likely to impose…
>
> Conversely, there are circumstances in which the duty of fairness is likely to apply. More specifically, any administrative action that could either significantly influence the ultimate decision or expose the individual to some other harm may be subject to the duty of fairness. Of course, in those circumstances, the content of the duty will always vary, depending upon the context in which it arises.

[54] In my view, and contrary to the Respondent's submission, the Hearings Officer is not just filling out a form. She is considering the facts presented to her by the CBSA Officer. And, according to Mr. Smith, she has the discretion to gather further information and conduct an interview of the person concerned for the purpose of determining if a *prima facie* case for cessation exists. If she determines that it does, then she makes a recommendation for cessation, as she did in this case. My interpretation of *Knight*, above, is that it does not definitely preclude a duty of procedural fairness being owed in preliminary decisions.

[55] Thus, while it is true that the Hearings Officer's decision to file the cessation application is preliminary in the sense that it is the RPD that will make the final determination, in my view, in these circumstances, it is nevertheless an administrative decision that affects the Applicant's interests. It is a decision that may have a significant potential impact on the Applicant as it commences the cessation application process. Accordingly, it attracts a duty of fairness (*Smith v Canada (Attorney General)*, 2009 FC 228, [2010] 1 FCR 3 at para 44).

*b) What is the content of the duty of fairness in this case?*

[56] However, as stated in *Baker*, above, the content of the duty of fairness is variable and its content is to be decided in the specific context of each case (*Baker*, above, at p. 837; see also *Knight*, above, at pp. 682-683).

[57] The Applicant submits that the two-step analysis in *Hernandez*, above, as applied to ss.44(1) and (2) should similarly be applied to s. 108(1) and (2) of the IRPA to determine the scope of discretion and the duty of fairness owed.

[58] The Respondent submits even if the duty of procedural fairness arises, it does not require notice or an opportunity to make submissions before a tribunal proceeding is initiated, so long as there are procedural protections at the tribunal processing stage (*Hyundai*, above). I would note that *Hyundai* pre-dates *Baker*. Nevertheless, there it was held that the decision of whether or not to launch an investigation was a threshold decision of the Deputy Minister and an administrative act in respect of which he could fix his own procedure subject to any requirements of the Act. Therefore, no rights or interests of the applicants were being determined.

[59] Here, a decision has already been made to make inquiries and, based on those inquiries, to make a cessation application. Accordingly, in my view and as noted above, the Applicant's interests are affected albeit not determined. It is therefore still a threshold analysis.

[60] In his affidavit, Mr. Smith stated that s. 108(2) applications are handled through the usual tribunal process with its accompanying procedural protections set out in the IRPA and the RPD Rules:

> […]
>
> d. In accordance with the Refugee Protection Division Rules, the person concerned is notified that there is an application in the RPD under section 108(2) of the IRPA.
>
> e. The person concerned is notified of the evidence and facts that have been provided to the RPD in the application and may submit to the RPD evidence and facts in response.
>
> f. As explained above, a CBSA Hearings Officer represents the Minister in the section 108(2) application. The person concerned has a right to be represented by counsel.
>
> g. The RPD holds a hearing in the section 108(2) application. The Hearing is held in accordance with the *Refugee Protection Division Rules*.
>
> h. The parties have an opportunity to make submission regarding the evidence and facts that have been submitted to the RPD, specifically, whether on that evidence and facts, the criteria for cessation of refugee protection under section 108(1) of the IRPA has been met.
>
> (Smith Affidavit, para 19)
>
> […]
>
> …Under the IRPA, RPD members have the same powers and authorities as commissioners who are appointed under the *Inquiries Act*, and may do any other thing they consider necessary to provide a full and proper hearing in an application under s. 108(2). Further, at the hearing the person concerned has the right to be heard and to present evidence and arguments to an impartial decision-maker.
>
> (Smith Affidavit, para 24)

[61] The Respondent submits that this process has been followed in this case and that it provides the Applicant "with extensive procedural protections, including comprehensive disclosure, an oral hearing before an independent tribunal and an opportunity to file evidence and make submissions on response before any decision is made affecting her rights on status in Canada."

[62] The Respondent also refers to *Kindler* and *Mohammed*, both above, in support of its position that the decision in this case was preliminary and that the content of procedural fairness conforms to the proceeding. In *Kindler*, with respect to the decision of the Deputy Minister under s. 27(3) of the *Immigration Act*, *1976* to issue a direction for an inquiry to a senior immigration officer, the Court held that the Deputy Minister has only to decide that an inquiry is warranted, which he would do on the existence of a *prima facie* case. *Mohammed* followed *Kindler* and concluded, given the clear wording of the statute, that an immigration officer was not required, before issuing a s. 27(1) report, to give the person concerned an opportunity to answer the allegations contained in that report as it was only the first step in the inquiry process.

[63] I agree with the Respondent that a similar approach was taken in *Baker* regarding the content of procedural fairness.

[64] In *Baker*, the Applicant sought an exemption, based on s. 114(2) H&C grounds, from the requirement that an application for permanent residence be made from outside of Canada. The procedure at issue consisted of the submission of a written application with supporting documentation, this was summarized by a junior immigration officer who made a

recommendation. That information was considered by a senior officer who made the H&C decision.

[65] The Supreme Court set out the following five factors to be considered when determining the type of participatory rights that the duty of fairness requires: the nature of the decision; the statutory scheme; the importance of the decision to the applicant; the legitimate expectations of the person challenging the decision; and, the administrative decision-maker's choice of procedure. The list is not exhaustive.

[66] The Supreme Court concluded that the flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. Further, that an oral hearing was not a general requirement for an H&C decision nor was an interview essential in order for relevant information to be put before an immigration officer. In that case, the applicant had placed the relevant information before the decision-maker through counsel. The Court held that the opportunity to produce full and complete written documentation satisfied the requirements of participatory rights required by the duty of fairness. The lack of an oral hearing or notice of such a hearing also did not violate the requirements of procedural fairness to which the applicant was entitled in those circumstances.

[67] The Supreme Court emphasized that:

> …underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their

> views and evidence fully and have them considered by the decision-maker. (p. 837)

[68] The starting point in applying the *Baker* factors to the circumstances of this matter is a consideration of the nature of the decision. The closer the administration process is to the judicial process then the more likely that procedural protection will similarly be elevated. Here, the Applicant acknowledges that the decision to make a cessation application does not constitute the final decision to cease refugee status or to remove the Applicant as this will be made by the RPD at a subsequent hearing. However, she argues that because the RPD has no discretion to consider mitigating factors and because the consequences will be devastating, the Hearings Officer's decision should be considered as a final decision and support a higher duty of procedural fairness.

[69] I do not agree with this position. The Hearings Officer's decision is not a quasi-judicial decision. It is a preliminary decision based on a reasonable belief that the factual circumstances indicate that one or more of the s. 108(1) criteria have been met. This is not determinative of the Applicant's refugee status. And, as set out above and as will be discussed further below, the statutory context within which the RPD's final decision will be made clearly contemplates the relevant factors to be considered and the consequences of cessation. While in many cases the final outcome, being loss of permanent residence status and removal, may follow I do not agree with the Applicant that this is inevitable. The RPD must consider whether re-availment was voluntary, intentional and actual when making its decision (*Nsende v Canada (Minister of Citizenship and Immigration*), 2008 FC 531 at paras 13-19; *Cabrera Cadena v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 67 at paras 19-20). Further, in

circumstances where the decision may adversely affect the best interests of a child and where this factor must be accounted for (s. 25(1.21)(b)), that H&C consideration may prevail.

[70] As to the nature of the statutory scheme, *Baker* describes this factor together with the terms of the statute pursuant to which the administrative body operates:

> …The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted…(p. 838)

[71] As noted above, a full hearing before the RPD is available as is judicial review of the RPD's decision. In this context, the level of procedural fairness required with respect to the Hearings Officer's decision is on the lower end of the spectrum. The Applicant submits that the Hearings Officer's decision to apply for cessation is most often determinative of the issue of whether the individual is to be issued a removal order. While that may be, the decision to make a cessation application remains only that. The RPD may or may not determine that refugee protection has ceased and, ultimately, a removal order may be issued. But these are separate steps or decisions in the process.

[72] As to the third *Baker* factor, being that the more important the decision is to the lives of those affected and the greater it impact on that person(s) the more stringent the procedural protections that will be mandated, while the decision to make the cessation application is important as it is the first step in a procedural process that could significantly affect the

Applicant, it is not a decision stripping her of her permanent residence status or rendering her inadmissible. Accordingly, it does not warrant a higher level of procedural fairness.

[73] The fourth *Baker* factor is that if a legitimate expectation is found to exist, this will effect the content of the duty of fairness owed to the individuals affected by the decision. That is, if the claimant has a legitimate expectation that a certain procedure will be followed, then it will be required by the duty of fairness:

> … Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights. (para 26)

[74] The Applicant submits that the procedures set out in ENF-24 are relevant to this factor. In *Hernandez*, above, the manual referred to by the Court specifically provided that individuals should be given the opportunity to provide information in writing or in an interview with counsel. Thus, the Applicant submits, it is a "logical imperative" that she also be afforded the opportunity to make submissions. However, the Applicant acknowledges that ENF-24 does not contain a similar provision pertaining to the making of submissions nor does it provide for notice of the intention to bring on a cessation application. Given this, and in the absence of any evidence suggesting that in this case there has been a deviation from the normal practice, or, of any representations being made that could serve to form a legitimate expectation that notice and an opportunity to make submissions would be provided, in my view this factor also points to the lower end of procedural fairness.

[75] As to the final *Baker* factor, choices of procedure, this requires that the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances, be taken into account.

[76] Here the same circumstances as discussed with respect to the fourth *Baker* factor and ENF-24 also come into play. The Applicant submits that the procedures set out in ENF-24 did not foresee the possibility of cessation applications being brought against permanent residents. This may be true as ENF-24 has not been updated since the recent IRPA amendments and it contemplates that, if the individual is a permanent resident, that a cessation application need not be pursued. However, even if this is the case, it is just one factor and is not, in and of itself, determinative.

[77] In sum, in the present case, the only decision that has been made is to make the cessation application. Most of the *Baker* factors favour a more relaxed requirement of procedural fairness. Given that in *Baker* the content of the duty of fairness was owed in the context of an H&C decision, which involved a final determination and not just a recommendation, but that in that case neither notice nor an interview were required, I cannot conclude that those procedural safeguards would be required in these circumstances. This is particularly so because a full hearing and the opportunity to make submissions will be afforded at the RPD hearing, the outcome of which is not inevitable.

[78] That said, it seems to me that it would be prudent for CBSA officers to advise individuals that the purpose of their questions is to inform a potential cessation application. This would permit the individual to contemporaneously provide a verbal response with any relevant information. This information could, potentially, have the effect of causing the hearings officer to determine that there was no factual basis for believing that any of the s.108 (1) criteria had been met and exercising his or her discretion not to proceed with the cessation application. This would both preserve resources and avoid unnecessary concern to the individual.

[79] Thus, while a duty of fairness is owed by the Hearings Officer, the content of that duty did not require that notice and an opportunity to make submissions be given prior to the decision to make the cessation application being made. There was no breach of procedural fairness in this regard.

***Issue 2: Does the Hearings Officer have discretion to consider H&C factors prior to submitting a cessation application?***

[80] ENF-24, Table 5, lists factors to consider with respect to refugee protection (s. 108) and refers to a two stage analysis in that regard:

> - Is the person a permanent resident?
> - Is there a cause of ineligibility that would make it possible to obtain a removal order?
>
> If the answer to the first question is "yes", there is no need to pursue the application for cessation of refugee protection. If the answer if "no", evaluate the additional factors listed below.
>
> If the answer to the second question is "yes", it is probably appropriate to pursue the application for cessation. The following factors must be evaluated:

- the period of time elapsed since the claimant's arrival in Canada, and since refugee protection was granted
- the presence of a spouse or children who benefit from status in Canada
- the frequency and duration of trips to the country of nationality
- evidence of settlement in the country of nationality (eg. work, school, properties, family)
- the existence of mitigating factors (eg. illness of a family member)
- the nature and frequency of contacts with the authorities of the country of nationality.

[…]

[81] The Applicant submits that because she is a permanent resident, pursuant to ENF-24, CBSA or the Hearings Officer did not need to progress past the first question and had the discretion not to do so.

[82] It must be recalled that ENF-24 was last revised prior to the amendments to ss. 40 and 46(1) of the IRPA by the BRRA and PCISA. The affidavit of Aaron Smith deposes that it is not the role of CBSA generally, or the Hearings Officer in particular, to decline to submit a cessation application to the RPD notwithstanding that there is *prima facie* evidence and facts that the criteria under s. 108(1) of the IRPA are met "based on alleged countervailing considerations that are unrelated to the criteria under s. 108(1), such as, for example, general "humanitarian and compassionate" considerations."

[83] When cross examined on his Affidavit, Mr. Smith confirmed that ENF-24 is still a valid direction and is still found on CBSA's website. Further, that prior to the IRPA amendments, a permanent resident whose refugee protection ceased would not become inadmissible and, therefore, could not be removed. In my view, it can reasonably be inferred that this was the reason why, if a person was a permanent resident, ENF-24 instructed that there was no need to pursue the cessation application. As to discretion, Mr. Smith suggested that the Hearings Officer has no discretion once a *prima facie* case is established.

[84] ENF-24 states that if there is a cause of ineligibility that would make it possible to obtain a removal order then it is probably appropriate to pursue the cessation application. In that event, the listed factors must be evaluated. This does involve the exercise of discretion, however, in my view, it is limited to the evaluation of the listed factors to establish if the facts give rise to a reasonable belief that any of the s. 108(1) criteria have been met. The discretion contained in ENF-24 does not go further.

[85] As to the listed factors, Mr. Smith's evidence was that the period of the elapsed time since a claimant's arrival in Canada and since refugee protection was granted is relevant to deciding whether to proceed with the cessation application. If for example, an individual was recently granted protected person status and shortly thereafter returned to their country of nationality, this would be relevant as it may demonstrate that Canada's protection may no longer be required. Conversely, where an individual has been in Canada for many years and is still benefiting from protection and then returns, the length of time spent in Canada could also be a relevant factor in deciding whether to bring the cessation application.

[86] As to the presence of a spouse or children who benefit from status in Canada, Mr. Smith's evidence was that this was relevant in deciding whether there was a *prima facie* case for cessation. If, for example, a family or part of it had returned to their country of origin for a prolonged period, this would be considered. Similarly, if there were a spouse or family member with status and remaining in Canada, this may inform whether or not the individual in question had re-established in their home state.

[87] In short, Mr. Smith's interpretation of the IRPA provisions and ENF-24 is that should CBSA become aware of information which suggests that refugee protection may no longer be needed, then it is under an obligation to assess that information, make any further inquiries that it deems necessary and appropriate at that stage and to assess this against the factors set out in ENF-24 to determine if a *prima facie* case that a s. 108(1) ground for cessation exists. If it does, then the Hearings Officer is obligated to make a cessation application. Discretion only exists to the extent of determining the information that must be gathered at that stage to make an assessment, and, assessing that information based on the factors set out in ENF-24. This is not an unreasonable interpretation and is in keeping with the fact finding role described in *Cha*, below.

[88] Presumably this would mean, for example, that if a permanent resident has been established in Canada for many years and, during that time, country conditions had changed such that they were no longer at risk in their country of origin and they then returned for the purpose of a three week holiday to visit family, the assessment of that information and the ENF-24

factors could result in a discretionary decision that a cessation application was not warranted. This would be because of an absence of a reasonable belief that a s. 108(1) criteria had been met.

[89] The Applicant relies on *Hernandez*, above, to argue that the Hearings Officer's discretion should be more broadly interpreted.

[90] In *Hernandez*, above, the claimant was a permanent resident who had been convicted of trafficking cocaine. While in prison, he was interviewed by an immigration officer who issued a report under s. 44(1) of the IRPA indicating that he was inadmissible based on serious criminality. The Minister referred the report to the Immigration Division of the IRB for an admissibility hearing and a deportation order was subsequently issued. On judicial review, the report, referral and deportation order were quashed. Justice Snider found that the scope of the immigration officer's discretion under s. 44(1) to determine whether or not to issue a report, and the Minister's discretion under s. 44(2) as to whether or not to refer the report for an admissibility hearing, were broad enough to consider factors other than the criminal conviction.

[91] Justice Snider noted that s. 36 offered no discretion as inadmissibility on grounds of serious criminality followed upon conviction. However, s. 44(1) allowed a residual discretion to the immigration officer who "may prepare a report setting out the relevant facts." Justice Snider concluded that CIC had always been of the view that ss. 44(1) and (2) permitted the officer and the Minister's delegate to exercise their discretion in a very broad manner and beyond consideration of the fact of the conviction.

[92] In my view, *Hernandez* can be distinguished from the present case for a number of reasons. First, it dealt with s. 44 and not s. 108 of the IRPA. Here, s. 108(1) clearly sets out the circumstances which give rise to cessation of refugee protection. These are reflective of the Article 1C of the Refugee Convention and do not incorporate discretionary or H&C considerations. Secondly, the language of s. 44 indicated that discretion was available as it stated that an officer "may" prepare the report and the Minster "may" refer to it for an admissibility hearing. Similar discretionary wording is not found in s. 108 or ENF-24 (*Nagalingam*, above, at para 28). Further, in *Hernandez* there was clear evidence that CIC was always, even after amendment of that legislation, of the view that ss. 44(1) and (2) permitted the broad exercise of discretion and to consider factors beyond the fact of the conviction. There is no equivalent evidence in this case as regard to s. 108.

[93] In my view, once the Hearings Officer was satisfied that a *prima facie* case that a s. 108(1)(a) to (d) criteria had been met on the basis of the information before her, she had no discretion not to make the cessation application. Further, the factors listed in ENF-24 all pertain to information that would permit that assessment. They do not contain unrelated factors nor is there any evidence that CBSA's past practice was to consider factors beyond those listed in ENF-24, such as H&C factors.

[94] In *Nagalingam*, above, Justice Boivin also considered s. 44 of the IRPA. There, the issue was whether the officer erred in law and breached the duty of procedural fairness by failing to take into account H&C considerations or by failing to give the applicant an opportunity to make submissions prior to issuing the report and directing the applicant to an inquiry.

[95] Justice Boivin acknowledged *Hernandez*, above, but found that the remainder of the jurisprudence which he had examined supported the view that very little discretion is afforded to officers or Minister's delegates to consider factors other than the factual basis of the inadmissibility finding. He relied on *Cha*, above, where Justice Décary of the Federal Court of Appeal stated:

> [37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(a) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act…

[96] Justice Boivin concluded that the jurisprudence favored a more restrictive approach to the discretion that an officer or a Minister's delegate has in considering mitigating and H&C factors at the s. 44 level. Further, that the duty of fairness did not require the officer to allow for submissions prior to issuing the s. 44 report or that the officer should, or was permitted to, consider H&C grounds. Accordingly, there had been no breach of procedural fairness.

[97] It should be noted that in *Cha*, above, the Federal Court of Appeal was careful to point out that the case before it concerned foreign nationals, not permanent residents. It also noted that the word "may" in s. 44(2) granted the Minister's delegate the discretion to exercise or not to exercise his authority to issue a removal order under that section. Further, that immigration is a privilege and not a right and that non-citizens do not have an unqualified right to enter or remain

in the country. Parliament has the right to enact legislation prescribing the conditions upon when non-citizens will be permitted to enter and remain in Canada. As a result, the IRPA and its regulations treat citizens differently than permanent residents, who are treated differently than convention refugees who in turn are treated differently than other foreign nationals. Foreign nationals who are temporary residents receive little substantive and procedural protection though the IRPA.

[98] In my opinion, little turns on the distinction between permanent residents and other categories of non-citizens in this case. While the Applicant is a permanent resident, applying the *Baker* analysis, above, results in the level of procedural fairness owed to her in this circumstance being at the lower end of the spectrum. Further, the jurisprudence generally, including cases involving permanent residents, tends to conclude that the discretion is narrower than contemplated in *Hernandez*, above (see also *AMM v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 809 at paras 25-31, [2010] 2 FCR 291 at paras 25-31).

[99] Further, and more significantly, the Federal Court of Appeal in *Cha*, above, stated that:

> [35] I conclude that the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.

[100] As to the use of the word "may," in that circumstance it did not attract discretion.

[101] While the IRPA does not stipulate any requirements for bringing an application under s.108(2), viewed in the context of ENF-24, s. 108(1)(a) to (d) and the Refugee Convention cessation provisions and the interpretation thereof, it is reasonable to infer that Parliament intended that discretion ought to be exercised reasonably and in that context. The factors that the Applicant submits must be considered, including H&C factors, extend well beyond this and are an attempt to incorporate matters unrelated to the issue of whether refugee protection should cease for the reasons described in s. 108(1). In my view, if Parliament had intended to impose a duty to consider such factors, it would have explicitly done so. Further, if this were the case, it would mean that Canada would continue protecting people as refugees for reasons unrelated to whether they still are, in fact, refugees.

[102] On a final point, I have reviewed the portions of the parliamentary debates submitted by the Applicant in support of her submissions but do not find them to be compelling. They addressed the then proposed amendments to the IRPA (Bill C-31). One was an answer given on March 6, 2012 when the Minister was advised that he had 30 seconds to respond and addressed a specific question and circumstance where a refugee obtained permanent residence status and then immediately returned to their country of origin. The Minister that answered under Bill C-31 a cessation application could be joined with an application seeking revocation of permanent residency in circumstances where a refugee obtained permanent resident status and then immediately returned to their country of origin. He went on to say that if an individual fraudulently obtained protected person status there was now a streamlined process to revoke both

protected status and permanent residency. In my view, this does not mean, however, that fraud was the only circumstance in which the amendments will apply.

[103] In the May 17, 2012, extract the Minister explained that clause 19 of Bill C-31 (now section 46(1)(c.1)) provided for the automatic loss of permanent residence if an individual loses protected person status as a result of cessation. This was amended so that cessation for reasons such as a change of country conditions would not result in automatic loss of permanent residency. Permanent resident status is lost automatically only where the cessation decision of the IRB is the result of the individual's own actions such as voluntarily returning to live in their country of origin shortly after receiving protection person status.

[104] I do not think that these two extracts support the Applicant's view that the clear intention of Parliament was that cessation applications would only be pursued in one circumstance and that hearings officers are, therefore, not to look to whether there was a technical basis for making a cessation application but rather, whether the re-availment provides a compelling basis to believe that the original complaint was fraudulent.

[105] Moreover, while use of legislative history as a tool for determining the intention of the legislature in an appropriate exercise (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 31), the first and cardinal principle of statutory interpretation is to look at the plain words of the provision. Only where ambiguity arises will it be necessary to resort to external factors to resolve the ambiguity (*R v DAI*, 2012 SCC 5, [2012] SCR 149 at para 26).

[106] To conclude, the Hearings Officer's discretion was limited to a consideration of whether the factors listed in ENF-24 and the information gathered, led to a reasonable, fact-based belief that any of the s. 108(1)(a)-(d) cessation criteria had been met. If so, the Hearings Officer was obliged to make the cessation application. She had no discretion to consider factors beyond those related to s. 108(1)(a)-(d) including H&C factors which are specifically addressed by s. 25, specifically s. 25(1.21) in this case. Therefore, she did not breach the duty of fairness by failing to consider H&C factors.

***Issue 3: Should the Notice of Constitutional Question be set aside?***

[107] The Notice of Constitutional Question, filed on April 16, 2014, states that the Applicant intends to question the constitutional validity, applicability and effect of ss. 108(1), 46(1)(c.1) and 40.1 of the IRPA. The Applicant submits that the Respondent has, in this proceeding, taken the position that the Minister, the Hearings Officer and the RPD have no discretion to consider the destabilizing psychological impact that the loss of permanent residence will have on the Applicant or other permanent residents facing cessation, and, the devastating effect this would have on the Applicant's daughter or any children directly affected. If the Respondent's interpretation of the legislation and lack of discretion is correct, then it is unconstitutional for both of these reasons.

[108] The Respondent submits that the Notice of Constitutional Question should be struck. The RPD has not yet held a hearing and there has been no loss of permanent residence status. The Respondent submits that the Notice of Constitutional Question is deficient because it does not

clearly set out why the impugned legislation provisions are inapplicable or inoperative nor does it seek specific relief. Rather, the Applicant's constitutional arguments raise arguments about the interpretation of the provisions, not their constitutionality (*Doug Kimoto v Canada (Attorney General),* 2011 FCA 291 at para 20 [*Kimoto*]). Additionally, the arguments were not raised at the outset. The Applicant waited until after leave had been granted, affidavits filed and cross examinations conducted and the Respondent had filed its further Memorandum. This was improper, and results in the Applicant, essentially, having commenced an entirely new application.

[109] In my view, the Respondent's position cannot succeed. In *Kimoto*, above, the notices were set aside because they did not identify any provisions alleged to be inapplicable or inoperative, any grounds for that finding and what relief was sought. Here, the notice plainly identifies ss. 108(1), 46(1)(c.1) and 40.1. It also sets out the material facts giving rise to the legal basis for the constitutional question. While it does not explicitly identify the remedy sought, Rule 69 of the *Federal Court Rules*, SOR /98-106 (Rules) only requires that the notice be in Form 69, which does not include a section identifying a remedy. And, in any event, the Applicant asserted that the identified breaches of s. 7 of the Charter applied to her and her daughter. Accordingly, it can reasonably be inferred that she seeks either a constitutional exemption from the operation of those provisions or a declaration of invalidity. In this case, the lack of specificity as to remedy is not fatal to the notice.

[110] It is also of note that s. 57(2) of the *Federal Courts Act*, RSC 1985, c F-7 only requires that the notice be served at least ten days before the day on which the constitutional question is to

be argued unless otherwise ordered. In many instances, such as this one, this will be subsequent to the completion of pre-hearing matters. This is not an extraordinary circumstance. No adjournment was sought by the Respondent, nor has a formal motion been brought pursuant to Rule 58(1) attacking any irregularity or non-compliance.

***Issue 4: If there is no ability for the Hearings Officer to consider H&C factors on a cessation application, does this violate s. 7 of the Charter?***

*Applicant's Position*

[111] In support of its constitutional argument, the Applicant states that the legislation is clear that the loss of permanent residence is an inevitable consequence of a finding by the RPD under s.108 (1)(a)-(d). The devastating psychological impact of the loss of permanent residence and resulting psychological instability, particularly when the provisions are applied retrospectively to individuals long established in Canada and when accompanied by state imposed loss of employment, termination of studies and threat of imminent removal from Canada, is a breach of s. 7 (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 55-57 [*Blencoe*]).

[112] The Applicant also submits that the loss of status, livelihood and psychological stability of a single mother would impact her dependant child. Further, that a breach of s. 7 is inherent to the purported inability to give any consideration to the best interests of the child which is fundamental to the *United Nations Convention on the Rights of the Child (Rights of the Child Convention)* 20 November 1989, Can TS 1992 No 3, Articles 3(1), 9(3) and 20(1). This is

reflected in Canadian jurisprudence which has held that separating a parent from her child could implicate the parent's security of the person (*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 69-72 [*G(J)*]). Here, the Hearings Officer does have the discretion to consider the impact of cessation on the best interests of the child and, accordingly, the matter could be resolved on the basis of the administration law principles set out in *Baker*, above.

[113] The Applicant refers to *Medovarski*, above and *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 [*Chiarelli*] which concern loss of permanent residence due to criminality. She states that not only has she not committed a crime, but that the conduct for which the permanent residence status would be lost occurred prior to the coming into force of PCISA which imposed that consequence. Here, the application of the provisions in question is retrospective and the Applicant did not deliberately violate a condition of her permanent residence. This is unlike any previous mechanisms by which permanent residence was at risk of being lost and is not in accordance with fundamental justice.

*Respondent's Position*

[114] The Respondent submits that the Applicant mistakes its position as to discretion as the Respondent does not assert that s. 108(2) should be interpreted as conferring no discretion whatsoever and, effectively, requiring that an application for cessation be filed in every case. Rather, the Respondent's position is that the Hearings Officer does not have discretion to weigh H&C submissions in assessing whether a cessation application is to be filed.

[115] In addition, the Respondent argues that s. 7 of the Charter is not engaged. Considering whether the Applicant is described under s. 108(1)(a)-(d) of the IRPA does not in and of itself result in a removal order even if, at some time in the future, a removal order based on the loss of permanent residence status pursuant to s. 46(1)(c.1) were to be issued.

[116] Although a determination that the Applicant is an individual described in s. 108(1)(a)(b)(c) or (d) may result in a consequential determination that she is inadmissible to Canada, this also, in and of itself, does not engage s. 7. For example, the mere holding of an inadmissibility hearing does not engage Charter rights (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 63 [*Poshteh*]; *Nguyen v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 47 (CA), 18 Imm LR (2d) 165; *Barrera v Canada (Minister of Employment and Immigration),* [1992] FCJ No 1127 (CA), 99 DLR (4th) 264 [*Barrera*]; *Martin v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 83 at para 44 (TD) [*Martin*]). A finding of inadmissibility under the IRPA is not a "determinative" step in the deportation process that engages s. 7 (*Poshteh*, above).

[117] Further, if the Applicant did face imminent deportation, s. 7 of the Charter is not engaged by the deportation of a non-citizen without more (*Medovarski*, above, at para 46). *Medovarski* explicitly rejected the argument that s. 7 would be engaged because the applicant was a long-term permanent resident and, therefore, would suffer state imposed psychological stress if removed (*Medovarski*, above, at paras 45-47). The Federal Court of Appeal has followed and applied *Medovarski* and *Chiarelli* in cases where the persons concerned had no criminality (*De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436).

[118] The Respondent further submits that even if s. 7 is engaged, the Applicant has failed to establish any violation of the principles of fundamental justice. Despite the importance of the best interests of the child, it is not a principle of fundamental justice (*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 at paras 7-12). Further, neither the Charter nor the Rights of the Child Convention require the interests of affected Canadian born children to be considered under every provision of the IRPA (*Varga*, above, at para 13). Such assessments are properly the subject matter of s. 25 H&C applications. Here, should the RPD grant the cessation application, the Applicant can apply for H&C consideration and the best interests of the child will be considered at that time. It is also well settled law that the loss of permanent residence is not contrary to the principles of fundamental justice nor is there any s. 7 Charter right to an H&C assessment before any proceeding takes place that might result in a loss of permanent residence status (*Medovarski*, above, at paras 45-47).

[119] Finally, even in the context of the s. 44 removal process relied on by the Applicant in her submissions, there is no statutory right to an H&C assessment before loss of permanent residence. And, even in cases where the Courts have suggested that a Minister's delegate may have discretion to consider H&C factors in making a decision under s. 44(2), they have no obligation to do so (*Faci*, above, at para 63).

*Analysis*

[120] In my view, s. 7 of the Charter is not engaged at this stage of the Applicant's proceeding.

[121] The burden is on the Applicant to established that i) s. 7 is engaged meaning that there is a deprivation of her life, liberty and security of person; and, ii) that the deprivation is contrary to the principles of fundamental justice (*Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para 127 [*Bedford*]). In order to demonstrate that s. 7 of the Charter is engaged, there must be "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" (*Blencoe*, above; *Bedford*, above, at para 75).

[122] In *Poshteh*, above, the Federal Court of Appeal found that an initial determination of inadmissibility did not engage s. 7 of the Charter because there were a number of subsequent procedural stages prior to any deportation:

> [62] The principles of fundamental justice in section 7 of the Charter are not independent self-standing notions. They are to be considered only when it is first demonstrated that an individual is being deprived of the right to life, liberty or security of the person. It is the deprivation that must be in accordance with the principles of fundamental justice. (See, for example, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraph 47.)
>
> [63] Here, all that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights. (See, for example, *Barrera v. Canada (MCI)* (1992), 99 D.L.R. (4th) 264 (F.C.A.).) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, fundamental justice in section 7 of the Charter is not of application in the determination to be made under paragraph 34(1)(f) of the Act.

[123] Also, see *Barrera*, *Nguyen*, and *Martin*, above and *Soe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 671 at paras 15-18, in which Justice Shore similarly concluded with respect to the eligibility determination stage of the immigration process.

[124] In my view, similar considerations apply in the present case. The Hearings Officer's decision is simply whether sufficient information exists to form a reasonable belief that one or more of the s. 108(1)(a)-(d) criteria may have been met. She did not decide if protection has ceased as that is the purview of the RPD after a hearing where the Applicant may make representations. Even if the RPD decides that her refugee protection has ceased, and she is found to be inadmissible, she may apply for an H&C application pursuant to s. 25 and the s. 25(1.21)(b) exception which, given her circumstances, may very well succeed.

[125] In *Medovarski*, above, the question before the Supreme Court was whether a transitional provision of the IRPA removed the right to appeal an order for removal to the Immigration Appeal Division in the case of persons deemed inadmissible for serious criminality, unless a party had, under the former Act, been granted a stay. The Court held that the applicable principles of statutory interpretation led to the conclusion that the right of appeal was lost in the absence of an actually granted stay. The appellants, who were permanent residents, argued that this was unfair but the Court held that this did not disprove its conclusion. The section, properly interpreted, established that Parliament intended to deny a right of appeal to an individual in the appellants' position. Based on the IRPA provisions and the Minister's comments in introducing the new provisions, the Court concluded that the purpose of the subject provisions was to efficiently remove criminals sentenced to prison terms exceeding six months in duration.

[126] The Supreme Court rejected the Charter arguments and, relevant to the present case, are the following comments:

> [45] Finally both appellants raise *Charter* arguments. Medovarski claims that s. 196 violates her s. 7 rights to liberty and security of the person. She claims that deportation removes her liberty to make fundamental decisions that affect her personal life, [page556] including her choice to remain with her partner. Medovarski argues her security of the person is infringed by the state-imposed psychological stress of being deported. Medovarski further alleges that the process by which her appeal was extinguished was unfair, contrary to the principles of fundamental justice.
>
> [46] The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.
>
> [47] Even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice. The humanitarian and compassionate grounds raised by Medovarski are considered under s. 25(1) of the IRPA in determining whether a non-citizen should be admitted to Canada. The *Charter* ensures that this decision is fair: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Moreover, *Chiarelli* held that the s. 7 principles of fundamental justice do not mandate the provision of a compassionate appeal from a decision to deport a permanent resident for serious criminality. There can be no expectation that the law will not change from time to time, nor did the Minister mislead *Medovarski* into thinking that her right of appeal would survive any change in the law. Thus for these reasons, and those discussed earlier, any unfairness wrought by the transition to new legislation does not reach the level of a *Charter* violation.
>
> [48] Esteban asserts that *Charter* values should inform the interpretation of s. 196. *Charter* values only inform statutory interpretation where "genuine ambiguity arises between two or more plausible readings, each equally in accordance with the [page557] intentions of the statute": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14. Both readings are not equally in accordance with the intention of

> the IRPA. Thus it is not necessary to consider *Charter* values in this case.

[127] Thus, *Medovarski* confirms that in circumstances involving a change of legislation and transitional provisions, s. 7 is not engaged and, even if it were, the alleged unfairness does not constitute a breach of the principles of fundamental justice. Further, the deportation of a non-citizen in and of itself cannot implicate the liberty and security interests protected by the s. 7 of the Charter.

[128] The Applicant also submits that s. 46(1)(c.1) should not be retrospectively applied as it came into force on December 15, 2012 while much of the factual basis underlying the cessation application occurred prior to this. In particular, that her three year return to Mexico was from 2004 to 2007 and that she had been back in Canada for five years before the subject IRPA amendments took effect. She submits that the retrospective application of the legislation and the resulting consequences breach s. 7 of the Charter.

[129] Generally, statutes should not be construed as having prejudicial retrospective operation unless such a construction is “expressly or by necessary implication required by the language of the Act” (*Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301 at 318). However, in my view, the application of s. 46(1)(c.1) is not retrospective and does not attract the presumption.

[130] Here, while s. 46(1)(c.1) came into force on December 15, 2012, the plain language of that provision states that permanent residency will be lost on final determination by the RPD of

the s. 108(2) cessation application, which decision has not yet been made. By necessary implication, s. 46(1)(c.1)will only apply when the RPD makes its decision. The fact that the Applicant was granted refugee protection and permanent residency status at a time when the disputed provisions were not in effect does not mean that new legislation would not apply to her. Further, while the facts that may underlie the RPD's determination occurred before the subject amendments came into force, this would not, in my view, change their effect. In any event, there are some facts underlying the basis of the cessation application which arose after the amendments as the Applicant had also traveled to Mexico in May 2013 and in July 2013.

[131] In *Rudolph v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 400 (CA), the Federal Court of Appeal held that "…it is not retrospective legislation to adopt today a rule which henceforward excludes persons from Canada on the basis of their conduct in the past." And, in *Valle Lopes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 403 (*Valle Lopes*), the applicant therein argued that the RPD erred in applying the s. 35(1) admissibility provision retroactively. Justice O'Keefe rejected this argument and found that the application of that section was not retrospective and thus, did not attract the presumption in the first place. He stated:

> [95] Furthering the notion that paragraph 35(1)(a) does not have a retrospective application is the fact that its application does not change one's past legal status. It does not interfere with a vested right, since permanent residents cannot be said to have a "vested" right to remain in Canada (*Chiarelli* above, at 733 and 734). The application of paragraph 35(1)(a) does not change the fact that the applicant has lived in Canada as a permanent resident since 1986. It does not reach into the past and alter the rights and privileges that he enjoyed as a permanent resident. The allegation is only that the applicant is removable today because of his participation in crimes against humanity. Paragraph 35(1)(a) is applied to the

> applicant's present situation to determine if he can continue to be a permanent resident in the future.

[132] While *Valle Lopes*, above, was made within the context of participation in a crime, similar considerations apply here given the language of s. 46(1)(c.1).

[133] The Applicant relies on an earlier decision of the Supreme Court in *Blencoe*, above in support of her argument on retrospective application of the legislation and the resulting consequences breaching s. 7 of the Charter. There, the Court acknowledged that, in the criminal context, it has been held that state interference with bodily integrity and serious state imposed psychological stress can constitute a breach of an individual's security of the person. The Supreme Court stated:

> [55] ….These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion.

[134] This is not such a situation. Nor is it a situation such as *G(J),* above, as referenced by the Court in *Blencoe*, above. There, state removal of a child from parental custody was held to constitute direct state interference with the psychological integrity of the parent in which event s.7 granted parents the right to a fair hearing, yet still acknowledged that there are boundaries for cases where one's psychological integrity is infringed upon. Not every state action which interferes with a parent-child relationship will restrict a parent's right to security of the person.

[135] Where, as here, the security right in s. 7 is being invoked on the basis of an impact on the individual's psychological security, there must be "serious state-imposed psychological stress" (*R v Morgentaler*, [1988] 1 SCR 30 at para 56). In *Blencoe*, at para 57, Justice Bastarache, for the majority of the Supreme Court, stated the two factors which must be evaluated. The psychological harm must be state imposed, meaning that the harm must result from the actions of the state, and, the psychological prejudice must be serious. In my view, in the circumstances of the matter before me the Applicant has not demonstrated that she is a victim, at the present stage, of such an impact.

[136] Again, the application to cease refugee protection, which is the subject matter of this judicial review, does not involve the removal of permanent residence status, a finding of inadmissibility, a removal order or separation of parent and child. While the Hearings Officer's decision to make the cessation application is, no doubt, very stressful for the Applicant, in my view, it does not fall within the category of cases described by *Blencoe*, above.

[137] For the same reasons, the Applicant's argument that s. 7 is breached because the Hearings Officer is unable to give any consideration to the impact of the cessation application on the best interests of the child cannot succeed. The Hearings Officer's decision to make the cessation application has no impact on the child. It is only if the RPD decides that any of the s. 108(1)(a)-(d) criteria are met does this possibility arise. Further, as started in *Varga*, above:

> [13] Neither the Charter nor the *Convention on the Rights of the Child* [November 20, 1989, [1992] Can. T.S. No. 3] requires that the interests of affected children be considered under every provision of IRPA: *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 (CanLII), [2006] 3 F.C.R. 655 (F.C.A.), at paragraph 105. If a statutory scheme provides an

> effective opportunity for considering the interests of any affected children, including those born Canada, such as is provided by subsection 25(1), they do not also have to be considered before the making of every decision which may adversely affect them. Hence, it was an error for the applications Judge to read into the statutory provisions defining the scope of the PRRA officer's task a duty also to consider the interests of the adult respondents' Canadian-born children.

[138] For these reasons, it is my view that the absence of any ability of the Hearings Officer to consider H&C grounds does not engage or breach s.7 of the Charter.

**Certified Question**

[139] The Applicant submits the following question for certification:

> Does the Minister in deciding whether to initiate an application under s. 108 of the IRPA, have discretion to consider factors other than those set out in s. 108?

[140] The Respondent proposes the following question:

> Does procedural fairness require that a protected person be notified and have an opportunity to make submissions to CBSA hearing officers on alleged H&C considerations regarding best interests of the child and/or the person concerned's permanent residence status prior to filing of an application for cessation under s. 108(2) of the IRPA?

[141] The Federal Court of Appeal recently reiterated the test for certified questions in *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9:

> It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad

> significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (Canada (Minister of Citizenship and Immigration) v. Liyanagamage, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; Zazai v. Canada (Minister of Citizenship and Immigration), 2004 FCA 89 (CanLII), 2004 FCA 89 (CanLII), 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; Varela v. Canada (Minister of Citizenship and Immigration), 2009 FCA 145 (CanLII), 2009 FCA 145 (CanLII), 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

[142] The following question of general importance is hereby certified:

> In connection with s. 108(2) of the IRPA and in light of the amendments to s. 46(1) and 40.1(2):
>
> (a) is a CBSA officer who intends to interview a permanent resident and protected person obliged to inform that person of the purpose of the interview, being a potential cessation application;
>
> (b) is the CBSA officer or a hearings officer, the CIC Minister’s delegate, obliged to provide that person with an opportunity to make submissions prior to the making of a cessation application;
>
> (c) does the CBSA hearings officer, or the hearings officer as the Minister’s delegate, have the discretion to consider factors other than those set out in s. 108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to s. 108(2)?

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The style of cause is amended to name the Minister of Citizenship and Immigration and to remove the Minister of Public Safety, as the Respondent;

2. The application for judicial review is denied;

3. The following question of general importance is certified pursuant to s. 74(d) of the IRPA:

> In connection with s. 108(2) of the IRPA and in light of the amendments to s. 46(1) and 40.1(2):
>
> (a) is a CBSA officer who intends to interview a permanent resident and protected person obliged to inform that person of the purpose of the interview, being a potential cessation application;
>
> (b) is the CBSA officer or a hearings officer, the CIC Minister's delegate, obliged to provide that person with an opportunity to make submissions prior to the making of a cessation application;
>
> (c) does the CBSA hearings officer, or the hearings officer as the Minister's delegate, have the discretion to consider factors other than those set out in s. 108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to s. 108(2)?

"Cecily Y. Strickland"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6485-13 |
| **STYLE OF CAUSE:** | SILVIA OLVERA ROMERO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | APRIL 28, 2014 |
| **JUDGMENT AND REASONS:** | STRICKLAND J. |
| **DATED:** | JULY 9, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Peter Edelmann | FOR THE APPLICANT |
| Banafsheh Sokhansanj and Mary E. Murray | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

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