Federal Court  Cour fédérale

Date: 20220204

Docket: IMM-6722-19

Citation: 2020 FC 927

Ottawa, Ontario, February 4, 2022

PRESENT: Mr. Justice Annis

BETWEEN:

TIAN REN ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED FINAL JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or *IRPA*] for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (IAD or Board), dated October 24, 2019 (the Decision). The Board dismissed the Applicant's appeal and request for a stay of a

removal order on the basis that there were not sufficient humanitarian and compassionate (H&C) considerations to warrant special relief in light of all the circumstances of the case.

[2] Despite almost twenty years after coming into force, this is the first decision to interpret sections 67(1)(c) and 68(1) of the *IRPA* in accordance with Driedger's "modern principal" described in *Driedger, Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87. The Supreme Court of Canada adopted the modern principle of interpretation in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [*Rizzo Shoes*].

[3] The results of a holistic interpretation of the provisions are dramatic. It turns out that they describe a very different scheme in Parliament's intention of providing special relief for inadmissible appellants. The scheme largely displaces strict adherence to the factors and the methodology of their application laid out in 1985 in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4, [1985] IADD No 4 [*Ribic*], which is discussed at length below.

[4] The following remarks, however, are specific to the granting of special relief to inadmissible appellants on grounds of serious criminality. The Board described the factors in *Ribic* (the *Ribic* factors) with a view to providing equitable relief relating to serious criminality. The comments below, to the extent that they may apply in other areas of special relief granted to inadmissible appellants, must be interpreted with respect to the specific factual circumstances they describe, e.g., misstatements.

II. **Facts**

[5] The Applicant, born on February 23, 1999, is a citizen of China. On July 28, 2011, he landed as a permanent resident of Canada, becoming a permanent resident when he was 12 years old. He returned to China in 2011 before returning to Canada in 2014, completing his high school education in Canada.

[6] On 9 March 2017 after turning 18, the Applicant and three of his schoolmates committed an offence (the Offence) against another schoolmate (the victim). The Applicant was convicted on August 22, 2018 of forcible confinement pursuant to s. 266 of the Criminal Code of Canada. He received a Conditional Sentence Order (CSO) – a form of incarceration – of 23 months. The conditions included that he remain for 12 months under house arrest 24 hours a day, 7 days a week, except when: attending school, accompanied by his parents, sister or brother-in-law, or with special written permission from his CSO Supervisor.

[7] On May 14, 2019, the Immigration Division (ID) held an admissibility hearing, issuing a deportation order on the same date. The Applicant appealed to the IAD. He did not appeal the legality of the deportation order, but sought special relief pursuant to sections 67(1)(c) and 68(1) of the *IRPA* on H&C grounds. In closing submissions, Applicant's counsel, after requesting that the appeal be allowed, requested a stay of the removal so that the Applicant had more time to demonstrate that he was rehabilitated and established.

[8] The Minister's counsel indicated that she did not oppose the stay of removal in order to allow the Applicant “to show us that he is on that road firmly, in terms of rehabilitation.”

III. **The IAD decision**

[9] The IAD stated that the test to be applied in the exercise of its jurisdiction is that it must be satisfied that at the time of the appeal, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[10] The Board described the considerations in granting special relief stated in *Ribic* and endorsed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 [*Chieu*], noting that they vary with each individual, but can include:

> a) the seriousness of the offence or offences leading to the removal order;
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> b) the possibility of rehabilitation;
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> c) the length of time and degree of the Appellant's establishment in Canada;
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> d) the impact of removal on the Appellant's family members in Canada;
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> e) the support available for the Appellant in the family and community;
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> f) the degree of hardship that would be caused to the Appellant by the removal from Canada, including the conditions in the likely country of removal; and
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> g) the best interests of a child directly affected by the decision, although not applicable in this matter.

[11] The Board also stated that "[t]he exercise of discretion must be consistent with the objectives of the IRPA. These include the need to protect the health and safety of Canadians and maintain the security of Canadian society." This refers specifically to section 3(1)(h) of the *IRPA*.

[12] The IAD described the "very serious" nature of the Offence and lack of credibility concerning the Applicant's conduct as best detailed by paragraphs 10 to 12 of the decision:

> [10] The Appellant was convicted of forcible confinement against a school colleague he suspected was pursuing his then girlfriend. The Appellant spoke to the victim on two occasions and asked him to stop. Afterwards, as the Appellant suspected that the victim was continuing to pursue his girlfriend, the Appellant arranged to meet him at a tea shop and, unknown to the victim, brought three friends. The victim tried to enter his car and flee when he saw the Appellant did not arrive alone, though was stopped from doing so by the Appellant. The Appellant forced the victim into the tea shop where at points the Appellant or his friends confined him, restrained the neck of the victim to prevent him from rising or leaving his chair, yelled at him and hit him. They also took turns going through the victim's cell phone.
>
> [11] The Appellant and his friends then took the victim into a nearby alley where the victim was struck some more. The Appellant and his friends then forced the victim into the vehicle he was using and drove him to a nearby vacant area. They continued their assault during the drive and at their destination. The Appellant and his friends demanded money from the victim and as he had none, one of the Appellant's friends began to impersonate the victim on the victim's chat applications. They were able to convince one of the victim's friends to give them money and then drove the victim to his friend's home to collect it. They took the money from the victim when he re-entered the vehicle. The victim was released after a second friend suspected that something was amiss after he received the demand for money through the victim's chat applications. The second friend agreed to give the victim money as a front to meet the victim and his assailants and convince them to release the victim.

> [12] There is little doubt that this is a serious offence. I note that the maximum sentence for imprisonment for the offence of forcible confinement is 10 years and that it is considered "serious criminality" according to the IRPA under section 36(l). This was a premeditated act which involved violence. There were a number of alternate ways to confront the victim and resolve the situation without resulting to unlawful acts. The Appellant testified at his criminal trial that he was too influenced by his friends who came with him to meet the victim. He also testified to the fact that his friends told him that he is not a fighter and could not stand up for himself; and therefore they asked to be present when he met the victim. The Appellant provided no credible explanation as to what he intended his friends to do during the meeting with the victim, or why he had not considered the possibility that there could be violence considering their statements. Further, during testimony the Appellant indicated that the whole incident lasted approximately two hours and that during this time he became aware that what was occurring was wrong. While he testified before the IAD that he did try to stop his friends, the Appellant could provide little evidence of how or precisely when he tried to stop his friends. I accept that the Appellant was influenced, to an extent, by his friends. However, I also find that the Appellant failed to consider possible violence when he permitted his friends to meet the victim, and I note the Appellant's lack of concrete efforts to stop the incident when he became aware that what was occurring was wrong. Due to this I give little weight to the Appellant's testimony that the events which transpired were a result of him being too influenced by his friends who came with him to meet [t]he victim. Considering all of the circumstances, I find that this is a very serious offence. [Footnotes omitted.]

[13] The IAD noted the positive elements of the Applicant's potential for rehabilitation and level of remorse. He had no further convictions since the Offence, and was meeting all the conditions of his sentence. A psychological report provided in the Applicant's sentencing hearing concluded that his behaviour was situational rather than characteristic and that he is not someone who represents a risk of violence in the community. Although expelled from high school, he found alternate avenues to successfully complete his secondary schooling, demonstrating high academic success. He eventually accepted to study at Western University in

Ontario, which included a scholarship. At the time of the hearing he was preparing to enter his second year of the program.

[14] However, the IAD called into question the Applicant's expression of remorse due to conflicting and equivocal evidence concerning his responsibility for the incident. He testified that his friends were somewhat responsible, though not blaming them, but then further stated that he was too influenced by his friends who encouraged him. The Board concluded as a finding of fact "that the level of remorse detracts from the weight that I can attribute to the Appellant's efforts at rehabilitation."

[15] The IAD expressed concerns about the Applicant's efforts to lower his risk of reoffending. Concerning his rehabilitation, he had not adequately addressed a number of potential areas, particularly in reference to the psychological assessment opinion that stated he would benefit from counselling in specific areas. The Board noted that the Applicant had not sought therapy and had no immediate plans to do so. The evidence and testimony showed that the Applicant had done little beyond satisfying the conditions of his sentence or fulfilling his academic ambitions that would ensure that he would react differently in a similar situation. The Board further concurred with the statement by Applicant's counsel during submissions that he had yet to put in place meaningful strategies for rehabilitation.

[16] In addressing the psychological report concerning the possibility of rehabilitation, the IAD noted the different mandates for criminal sentencing and rehabilitation under the *IRPA*. It also noted the points raised in the criminal proceedings that all the information was provided by

the Applicant and no corroborative clinical testing was carried out despite four different interviews. The Board stated that it must reach its own conclusions regarding whether the prospects of rehabilitation are such that, alone or in combination with other factors, they warrant special relief from a valid removal order (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa* SCC]).

[17] The IAD found that, when testifying, the Applicant provided little evidence to show that he had the skills and insight to respond differently should he encounter another stressful situation. His statement that in the future he would use the law to protect himself versus violence was vague. The Applicant was unable to speak to any strategies to resolve conflict without resorting to legal means. This raised concerns in the Board's mind about his ability to deal with situations where he would need to confront others about behaviors without legal assistance. The Applicant also testified that one of the reasons he had not pursued counselling to explore his emotions was that he was ashamed to talk about the incident. The Board found that this augments the concerns over the Applicant's lack of counselling and level of rehabilitation, as he appears to have not developed the skills to seek help and talk about stressful situations. Considering the limitations of the psychological report and these considerations, the Board concurred with the general conclusion of the psychological report that the Applicant did not represent a risk of violence in the community. Nevertheless, it was not convinced that he would not reoffend non-violently or with less violence if similar situations presented themselves. The IAD concluded that the degree of remorse and rehabilitation of the Applicant was a "minimally negative factor in the appeal."

[18] Thereafter, the IAD considered the traditional H&C factors. The Applicant's father, sister, sister's family, grandparents and many extended family members live in China, that balanced with the members of family in Canada, representing a neutral factor. He visited China frequently and there was little evidence that he would not be supported by his family should he return there. The limited degree of establishment was taken into consideration, noting his young age, and determined to be a somewhat positive factor, as were some of his close and supportive relationships in Canada. His concerns about the possible loss of university credits were not substantiated. The IAD's overall conclusion was that the Applicant would not face any undue hardship should he be returned to China.

[19] The IAD responded to the request for a stay of the removal order, stating as follows:

> [23] The panel has taken into consideration the option of a stay of the removal order, which was a position suggested by the Respondent. In the particular circumstances of this case, a stay would do little to serve the objectives of the IPRA. Actions such as those by the Appellant undermine public confidence in the IRPA and they undermine public support for Canada's generous immigration and refugee system. They cast a cloud of suspicion over the many honest and hardworking immigrants trying to make a better life for themselves in Canada. The public would be offended if the Appellant was allowed to remain in Canada, even with conditions. A stay of the deportation order is not appropriate.

IV. **Parties' submissions**

[20] The Applicant argued that the IAD breached the Applicant's procedural fairness because the Board did not request any input, nor raise any concerns, with respect to the joint recommendation, but rather indicated his intention to reserve judgment. The Board thereafter rendered a negative decision, dismissing the stay request without any real consideration of the merits, as well as relying on an impermissible "general deterrence" line of reasoning. The

Applicant's second submission was that the Board's assessment of the H&C factors was unreasonable.

[21] The Respondent's submissions, including those in reply to a Direction of the Court, were threefold. First, the Applicant simply disagrees with the IAD's weighing of the evidence with respect to the assessment of the H&C factors. Second, there was no breach of procedural fairness by the IAD not accepting a joint submission supporting a stay of removal, noting Federal Court jurisprudence that the IAD is not bound by joint submissions. Third, with respect to the rejection of the stay of removal, the IAD's statements relating to "general deterrence" considerations did not go to the core of the Decision. The essence of the refusal was the crimes were too serious to merit a stay, while the *Ribic* factors had already been deemed unmet by the Board, such that the superfluous statements of general deterrence to reject the stay did not alter the outcome.

[22] In response to the Respondent's third argument, the Applicant submitted that the tests applied under sections 67(1)(c) and 68(1) of the Act must reflect a sliding scale of the level of meeting the *Ribic* factors, in order to ensure their distinct application. To conclude otherwise would render untenable a body of cases in which relief is denied under s. 67, but granted under s.68.

V. **Standard of review**

[23] In accordance with the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 16 [*Vavilov*], the new framework to determine the standard of review is based on the presumption that an

impugned decision is reasonable. This presumption has not been rebutted for any of the issues raised in this case.

[24] The focus of reasonableness review must be on the decision actually made by the decision maker concerning both the reasoning process and the outcome. The reviewing courts must determine whether the decision "is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker" (*Ibid* at para 85, 99ff). A reasonable decision is justified in light of the particular legal and factual constraints that bear on the decision -- "it is not enough for the outcome of a decision to be *justifiable* ... the decision must also be *justified*" (*Ibid* at para 86). The reviewing court must determine whether the decision "bears the hallmarks of reasonableness – justification, transparency and intelligibility" (*Ibid* at para 99). Finally, the onus is on the party who contests the decision to demonstrate that it is not reasonable (*Ibid* at para 100).

[25] With respect to factual findings, which extend to inferences of fact, parties must demonstrate that exceptional circumstances apply which would permit the reviewing court to interfere with factual findings, and that they are not requesting the court to re-weigh and reassess the evidence considered by the decision-maker (*Ibid* at paras 125–26).

VI. **Relevant statutory materials**

[26] The relevant statutory materials are as follows:

Disposition

66. After considering the appeal of a decision, the Immigration Appeal Division shall
(a) allow the appeal in accordance with section 67;
(b) stay the removal order in accordance with section 68; or
(c) dismiss the appeal in accordance with section 69.

Décision

66. Il est statué sur l'appel comme il suit :
a) il y fait droit conformément à l'article 67;
b) il est sursis à la mesure de renvoi conformément à l'article 68;
c) il est rejeté conformément à l'article 69.

Appeal allowed

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

…

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

…

Fondement de l'appel

67 (1) Il est droit à l'appel sur preuve qu'au moment où il en est disposé :

[…]

c) sauf dans le cas de l'appel du ministre, il y a – compte tenu de l'intérêt supérieur de l'enfant directement touché – des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[…]

Removal order stayed

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

…

Sursis

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

[…]

Dismissal	**Rejet de l'appel**
69 (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any. [Emphasis added.]	69 (1) L'appel est rejeté s'il n'y est pas fait droit ou si le sursis n'est pas prononcé. [Je souligne.]

VII. **Issues**

1) Was the joint submission for a stay of removal fairly regarded?
2) Can the same considerations to reject an appeal under section 67(1)(c) apply equally under section 68(1) to reject a request to stay a removal, and if so upon what reasoning can they be differentiated in application?
3) Did the IAD err in law in the exercise of its discretion under s. 67(1)(c) of the Act?
4) Did the IAD err in law in referring to "general deterrence" reasoning to reject the stay of removal request under s. 68(1) of the Act?

VIII. **Analysis**

A. *Fair consideration of the joint submission*

[27] The Applicant's challenge to the Board's fair treatment of the joint submission made with the Attorney General is without merit. It is acknowledged that the Board is not required to accept a joint submission (*Saroya v Canada (Citizenship and Immigration)*, 2015 FC 428 at para 20; *Doe v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 518 at para 44).

[28] There can be no issue of fairness in terms of responding to submissions when the Board affords the parties an opportunity to make submissions, which it subsequently rejects, even if for unexpected reasons. In this case, the issue refers to the alleged unfairness in not being able to address aspects of general deterrence in the Board's reasons based on the evidence before it. This raises issues as to the correctness of the Board's legal reasoning that the Court addresses below. Courts may apply the correct law to the factual matrix, even if the parties do not address the legal principle relied upon by the court. The exception arises in fairness, if the reviewing court modifies the underlying evidentiary matrix, or a well-established legal standard that may require new evidence and new submissions to be considered.

[29] It is always open to the decision-maker to seek further submissions on a legal issue the parties have not addressed, but should have, based on the factual matrix, as a self-imposed means to ensure the correctness of its legal assessments. However, it is not required to do so. The legal issue is one that relates to the proper law, regardless of submissions, and may be the subject of a certified question on appeal. This issue of procedural fairness should not be confused with a form of unfairness in failing to address significant evidence or the parties' submissions in the course of fact-finding or decision-making.

[30] Conversely, the Court is more concerned with a procedural breach by the Applicant and the Attorney General who did not ensure that the IAD was able to conduct a proper hearing. They failed to disclose their stay of removal agreement until the completion of the hearing. In the meantime, the Attorney General conducted an examination in chief of the Applicant, on occasion leading, posing normally impermissible redundant questions, or those that the Applicant could

have covered, that were intended to demonstrate his rehabilitation and remorse. More importantly, the failure to indicate an intention to request a stay of removal at the opening of proceedings may have compromised the questions the Board might have posed to assist in obtaining evidence allowing it, for instance, to distinguish the circumstances that should apply under section 67(1)(c) from those under section 68.

[31] Besides the requirement that the Attorney General indicate at the opening of proceedings its intention to support a joint agreement for stay of removal, his counsel should normally limit its participation to submissions, unless there is relevant evidence in the Attorney General's possession that is pertinent to the issues at hand. In addition, in circumstances involving a stay of removal of someone convicted of serious criminality where issues of personal safety and security are pertinent, the Attorney General should relate any concerns in this regard that might be relevant to the determination of the stay request not raised in the course of the hearing.

[32] Furthermore, because a joint submission places the Board at a disadvantage in not having the benefit of an adversarial challenge to the request for a stay, the Attorney General is required to provide the Board with a balanced analysis describing why it supports the reasoning relied on by the Applicant to grant the stay. In effect, it should indicate that it has made its best efforts to obtain all the relevant evidence supporting and opposing granting the stay, i.e., aspects of the equitable case, and particularly those relevant to the safety and security of the appellant remaining in Canada. Supporting a stay of removal should not be a *pro forma* exercise on the part of the Attorney General.

B. *The interpretation and differentiation of sections 67(1)(c) and 68(1) of the IRPA*

(1) Introduction

[33] As detailed in the reasons above, the Board undertook a thorough and well-reasoned analysis of the *Ribic* factors in support of its conclusion dismissing the appeal under section 67(1)(c). The Court agrees with the Respondent that in essence the Applicant is requesting it to reweigh the evidence, which it cannot do.

[34] The remaining significant issue is whether the Board erred in its reasons for refusing to accept the agreement to stay the Applicant's removal based on wrong legal principles under section 68(1). In confronting this issue, the problem encountered is that the principles governing the application of section 68(1) cannot be confidently assumed without knowing how they are to be distinguished from those governing sections 67(1)(c). It appears that neither the Federal Court, nor the IAD, has previously attempted to provide a differential interpretive analysis of the two provisions.

[35] As the parties did not address the differential application of these provisions, the Court requested further submissions from the parties. They provided little in the form of policies, case law or interpretive extrinsic evidence to distinguish the application of the two provision. Counsel instead used the opportunity to describe some of the Board jurisprudence regarding the application of section 68(1). The previous jurisprudence is nonetheless useful and worthy of consideration.

(2) Parties' submissions regarding the differential interpretation of sections 67(1)(c) and 68(1)

[36] The Applicant submitted that a stay of removal should be granted if the Board is convinced that appellants are on their way to rehabilitation and they do not pose unacceptable risks of reoffending. The Court would not heavily rely on the distinction between an appellant being on their way to rehabilitation and not posing an unacceptable risk of reoffending – rehabilitation being for the purpose of ensuring that reoffending not occur, as they both share the same result. While the Court generally agrees with the statement that not posing an unacceptable risk of reoffending is an essential element of obtaining a stay of removal, the standard is insufficiently strict. The appropriate standard is demonstrating that it is unlikely the appellant will reoffend. More importantly, the timing of the application of the standard is not when granting the stay, but when completing it. Without this distinction, this submission does not assist the Court in its search for a differential interpretation of sections 67(1)(c) and 68(1).

[37] The Applicant supported his submission with a number of cases in which the IAD granted the stay of removal. The Applicant referred to the case of *Barrinetos v Canada (Public Safety and Emergency Preparedness)*, 2008 CanLII 66587 at paras 8–9 where the Board accepted a joint recommendation from the parties on a stay request, acknowledging the appellant's credible expression of remorse at his hearing. The Board noted that the criminal acts that led to issuance of the removal order were serious, but also acknowledged "that the Appellant has changed his life around in such a way as to warrant special relief in this case." A lengthy stay was granted with the purpose of allowing the appellant to "establish by his conduct" that he can be "a law abiding resident of Canada." The Court agrees for the most part that where all factors are properly considered, the purpose of a stay of removal is to provide an opportunity to

demonstrate that the appellant will likely, as opposed to "can", be a law-abiding resident of Canada.

[38] In *Malhi v Canada (Public Safety and Emergency Preparedness)*, 2008 CanLII 87002 at paras 5, 15–18, 21–23, 29 the appellant argued for a stay of removal that would allow him to "show that he can be rehabilitated." The Board held at paragraph 29 that "[t]he onus is on the appellant to show that there is acceptable risk that he will not re-offend", concluding "that, on a balance of probabilities, there is a good possibility of rehabilitation." The statement "a balance of probabilities, there is a good possibility" describes two different standards of proof, being those of a probability and a possibility. The Court agrees that the risk of not reoffending is the appropriate test, but disagrees that the standard is an "acceptable risk" or "a good possibility", both being insufficiently strict. The standard must be one that sufficiently assures the safety and security of Canadian society. The applicant must establish that continued efforts of rehabilitation during a stay period, and other risk-evaluating circumstances, will demonstrate the likelihood of his successful rehabilitation, and therefore demonstrate that he is likely not to reoffend upon completion of the stay.

[39] In *Oneil v Canada (Public Safety and Emergency Preparedness)*, 2009 CanLII 94197, the Board had lingering concerns about whether the appellant had truly turned his life around, but was nevertheless of the opinion that he was on the right track. The Board further stated at paragraph 35 that "[i]t is up to the appellant to demonstrate that he deserves to remain both within the family unit and in Canada and, as such, the panel is of the view that [a] three-year stay is minimally required. A stay of this length will provide the appellant with the opportunity to

demonstrate significant rehabilitation but also it will provide him with the opportunity to fail should he deviate from the straight and narrow." The Court disagrees that this reasoning reflects the requirements of granting a stay of removal under section 68(1), particularly in relation to the concept of providing "an opportunity to fail".

[40] The Respondent's position in response to the Court's direction was simply that the language of the two sections tracks identically and therefore, the *Ribic* factors apply equally to both questions. Although this rings true, the Court finds this unhelpful because they must be applied in some different manner to achieve different outcomes.

[41] The Attorney General further cited *Singh v Canada (Citizenship and Immigration)*, 2020 FC 328 at paragraph 38 for the proposition that "[i]n order for the IAD to stay a removal order there must be sufficient humanitarian and compassionate grounds to warrant special relief." This is consistent with Supreme Court and Federal Courts jurisprudence that describes all *Ribic* factors, including seriousness of the offence and possibility of reoffending, as H&C factors. It is the Court's respectful view that these factors do not concern equitable hardship, but are countervailing factors relating to public safety and security. Describing them as equitable hardship factors is not in accordance with the modern interpretation of sections 67(1)(c) and 68(1). They fall within the wording "in light of all the circumstances" that must warrant equitable relief, or the French equivalent "vu les autres circonstances de l'affaire, la prise de mesures spéciales."

[42] The Court also noted the decision of *Sananikone v Canada (Minister of Citizenship and Immigration)*, [2001] IADD No 1950, the conclusionary portion of which is found at paragraphs 15 and 16, as follows:

> 15 In all the circumstances of this case, the panel is satisfied, on a balance of probabilities, that the risk of the appellant re-offending is sufficiently low that it does not conflict with our duty to administer the laws of Canada in such a matter as to maintain the health, safety and good order of Canadian society. The panel is prepared to grant a stay for the appellant to continue with his rehabilitation process. The stay will be for a duration of three years.
>
> 16 The appellant needs to know that any further criminal conviction or any transgressions of the terms and conditions of his stay may lead to his removal from Canada. It is up to him to behave responsibly. The appellant has been given an important opportunity to follow the more positive path his life has taken recently. It is to be hoped that the appellant will recognize that as a very serious opportunity to rehabilitate himself. The present stay will provide structure to allow him to continue efforts to rehabilitate. [Emphasis added.]

[43] The Court agrees that the risk of reoffending must be sufficiently low as a danger to the safety and good order of Canadian society in order for the granting the stay of removal. This reflects the essence of the second paragraph, namely that the result will be a rehabilitated law-abiding citizen. Nevertheless, the test is not stated applying appropriate legal terminology, without any description of the ultimate purpose of the stay. The stay is granted on the basis of demonstrating sufficient rehabilitation, such that at the termination of the stay period, the Board may conclude that it is likely the appellant will not reoffend in the future, if granted permanent resident status.

(3) *Rajagopal v Canada*

[44] Another case, this time at the Federal Court level, not referred to by the parties, but of some interest to these issues is that of *Rajagopal v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 523 at paragraphs 30 to 34 [*Rajagopal*]. The pertinent reasons are set out with the Court's emphasis on statements that require discussion:

> 2. Assessment of Whether to Grant a Stay
>
> [30] According to the applicant, if the applicant requests a stay as is the case here, the IAD must consider the request and give "good" reasons as to why it has refused it. As noted at paragraph 14 of *Lewis v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. 1227 (T.D.)(QL): "if a stay is requested and if the facts suggest that there is reason to consider a conditional stay, then, if reasons are given pursuant to section 69.4(5) of the Act, the applicant is entitled to know why a stay was denied".
>
> [31] The applicant asserts that in the present case the IAD has failed to provide any meaningful analysis or reasons for its refusal to grant a stay, the extent of its attention being limited to a sweeping conclusion. As was noted in *Archibald v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 747 (T.D.)(QL) at paragraph 11: "a significant factor in assessing whether or not to stay the deportation order is an evaluation of the risk which exists that the applicant will re-offend". In the present case, the applicant asserts that the IAD's sole finding in this regard was based on its further finding that the applicant was not remorseful, which was in turn was based on the misconstrued nature of the police report. Therefore the IAD failed to consider all of the evidence which indicated that the applicant would likely not re-offend.
>
> [32] The respondent asserts that the IAD did not err in refusing to grant a stay, and that it gave clear reasons for the refusal. The respondent asserts that the case law indicates that the applicant is entitled to know why the IAD denied a stay but that it does not support the assertion that the IAD must issue additional or special reasons in this regard.
>
> [33] In dealing with the issue of whether or not to grant a stay, the IAD stated that "[s]tays of deportation are, by their very nature,

> special relief. However, as I have found the overall humanitarian and compassionate balance to weigh so negative as not to merit special relief. Special relief is therefore not warranted. It is therefore not appropriate for me to grant a stay". The IAD went on to note "[f]or all these reasons, I find that the case does not merit special relief under sections 67(1)(c) or 68(1)" of the Act.
>
> [34] It is clear that the IAD's analysis as a whole was meant to apply to its decisions with respect to both paragraph 67(1)(c) and subsection 68(1) of the Act. The IAD therefore did not merely state a conclusion with respect to the stay issue.

[45] Three points are of interest to the Court in this case. First, the Federal Court confirms *Archibald v Canada (Minister of Citizenship and Immigration)* (1995), 95 FTR 308, 29 Imm LR (2d) 259 in recognizing the significance of the risk factor of the safety and security of the public in determining whether the applicant will reoffend. Reoffending is often mentioned as a distinct factor. In fact, it is the objective of rehabilitation; to be rehabilitated is to be unlikely to reoffend. As already stated, the Court concludes that the likelihood of reoffending, distinguishes the application of section 67(1)(c) from section 68(1) based on the point of time when that conclusion is reached, either at the completion of the hearing for the appeal, or the completion of the stay period for the stay of removal.

[46] The second point relates to nomenclature. The Board in that case remarks that "the overall humanitarian and compassionate balance to weigh so negative as not to merit special relief" (*Rajagopal* at para 33). Despite the 2001 *IRPA* amendments, the Board and Courts insist on describing all of the seven *Ribic* factors as representing the overall humanitarian and compassionate grounds. Respectfully, this again stems from an incorrect interpretation of the amended sections 67(1)(c) and 68(1), which fails to recognize that Parliament separated humanitarian and compassion factors from the other two *Ribic* factors, in addition to any other

relevant factors, which for matters of serious criminality, relate to the safety and security of the public.

[47] Third, with respect, it is suggested that the reasoning of the Board as upheld by the Court, would not meet the standard of review set down in *Vavilov* requiring that the decision be "justified". The applicant contended that the IAD failed to "give good reasons" to refuse a stay, claiming that the Board "failed to provide any meaningful analysis or reasons for its refusal to grant a stay" (*Rajagopal* at para 31). The respondent argued that despite being entitled to know why the stay was required, there is no requirement that "the IAD must issue additional or special reasons in this regard" (*Ibid* at para 32). The Court upheld the concept that the overall H&C balance of factors did not merit special relief in either case.

[48] The problem is the same encountered in this matter. The Board is unable to provide a rational explanation of the differential standards distinguishing sections 67(1)(c) and 68(1) of the Act. The Supreme Court indicated in *Vavilov* at paragraph 85 that there must be "an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker" [emphasis added]. The Court respectfully submits that the absence of a statement of a purpose or defined legal standard distinguishing the application of the two provisions represents a constraint on the decision-maker. There is no coherent and rational chain of analysis of these provisions that justifies the same reasoning applying to two distinct provisions that allow for different relief outcomes.

[49] Moreover, if the standard in *Rajagopal* is that the same facts do not merit special relief under both provisions, where the same legal standard applies, this logically confirms that there must be a common threshold applying to both provisions. This reasoning does not appear to meet the standards of justification required in *Vavilov* without the thresholds for success described in both situations. There is no such thing as a rejection pulled out of the air so to speak, which is not grounded in the facts, applied to a reasonable standard relating to two provisions.

[50] It appears that the other Board members contemplating the reasoning in *Rajagopal* concluded it to be problematic. Otherwise, one would have thought that such a simple solution for the conundrum of differentiating the application of the two provisions would have been adopted in other cases, particularly after being confirmed by the Federal Court. If nothing else, *Rajagopal* is one more example of the struggles Board members and the Court face in grappling with a meaningful differentiation for refusing the stay, after the Board has expended all of its best efforts justifying the dismissal of the appeal.

(4) Distinguishing *Khosa* SCC's endorsement of the *Ribic* factors

(a) *Introduction*

[51] The Court commences its differential analysis of the two provisions by what will undoubtedly be seen as a novel conclusion. The precedential value of the interpretation of section 67(1)(c) of the *IRPA* in the Supreme Court of Canada's *Khosa* decision should be limited to its significant purpose of reconciling the assessment of facts with the reasonability standard of review in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

[52] In particular, *Khosa* SCC cannot be interpreted as a wholesale endorsement of the *Ribic* factors, and certainly not for their application to the interpretation of sections 67(1)(c) and 68(1) of the Act. The scheme of these provisions, and their intended methodology of application have not been the subject of a holistic and "modern" interpretation. The following analysis is intended to comprehensively interpret sections 67(1)(c) and 68(1), starting with a historical perspective of the treatment of the provisions they replaced.

(b) *Ribic and Chieu*

(i) *Ribic*

[53] The alternative equitable remedies that allowed inadmissible persons the option of an outright appeal, or merely granting a conditional stay of removal, dates back to section 11 of the *Immigration Appeal Board Act*, SC 1966-67, c 90. It provided for appeals to the Immigration Appeal Board (IAB), as it was then named, on any question of law or fact or mixed law and fact. Section 15 of this legislation conferred upon the IAB the power to stay or quash a deportation order made against a permanent resident having regard to "all the circumstances of the case".

[54] There was no distinct mention of humanitarian compassionate language, as exists in the 2001 amended provisions. Nor did the legislation provide a scheme that separated the factors into the component of hardship, or that of the two countervailing factors (the possibility of reoffending and the seriousness of the offence) that concern the safety and security of the public by essentially granting permanent resident status to persons formally convicted of serious criminality.

[55] It is also of considerable importance to note that the original phraseology of "all the circumstances of the case" in the 1966-67 legislation has been carried forward into the 2001 amended sections 67(1)(c) and 68(1). This is significant in that the Supreme Court in *Khosa*, in its singular paragraph interpreting section 67(1)(c), failed to consider the implications evoked by Parliament's continued reference to this phraseology.

[56] Moreover, the Board in *Ribic,* and the Courts in *Khosa*, were not contending with alternative requests for special relief that would initiate a differential interpretation providing for different outcomes. In *Ribic*, the appellant had failed to make her request for a change in conditions in writing as required by the Act. The strict application of the law did not provide for equitable considerations when the matter was before the adjudicator, resulting in a deportation order. It was an obvious case where equitable considerations were required.

[57] The Board described the application of its mandate of deciding the matter having regard to "all the circumstances of the case" at paragraphs 14 and 15 of *Ribic*, as follows, with the Court's emphasis:

> 14 Whenever the Board exercises its equitable jurisdiction pursuant to paragraph 72(1)(b) it does so only after having found that the deportation order is valid in law. In each case the Board looks to the same general areas to determine if <u>having regard to all the circumstances of the case</u>, the person should not be removed from Canada. …
>
> 15 The Board has determined that there are such circumstances that warrant allowing the appeal. The deportation order is quashed and the appeal is allowed.

(ii) *Chieu*

- Absence of scheme or purpose in the legislation

[58] Section 72(1)(b) became 70(1)(b) by the time that the Supreme Court considered the *Ribic* factors in *Chieu*, almost two decades later in 2002. In *Chieu*, the Court's primary focus was on the narrow issue of whether hardship in the appellant's country of origin was an appropriate *Ribic* factor, as opposed to being ousted by the Minister of Citizenship and Immigration's exclusive authority over the subject.

[59] Despite its limited purview, *Chieu*'s sanctioning of the *Ribic* factors is its principal continuing legacy. The factors themselves are not so problematic. The legacy issue is the continued endorsement of its methodology consisting of a global assessment of each of the seven specific factors, and then weighing them all together to determine the outcome of the appeals. Regarding this methodology in *Chieu*, there is no suggestion that the Court's interpretation was erroneous based upon the former wording of the section 70(1)(b) of the *IRPA*. These reasons are, however, intended to bring to an end its methodology precedent in applying sections 67(1)(c) and 68(1).

[60] Parliament had provided no direction for the granting of the appeal or stay of removal, besides "having regard to all of the circumstances of the case". It was up to the Board to confection the relevant considerations and the manner of the exercise of its discretion in applying them. In the context of the narrow issue in *Chieu*, and the general acceptance of the *Ribic* factors, there was no basis for reconsidering *Ribic*. It is the absence of any reasonable explanation in the jurisprudence to differentiate two different outcomes that has driven the Court to query what Parliament had in mind when prescribing the identical legal standard for both provisions.

- The likelihood of reoffending

[61] An important point to note in *Chieu* regarding the Court's reconciliation of the two provisions, is the Supreme Court's comments on the risk factor of reoffending. Given the importance that this Court concludes that Parliament attaches to this factor, or better described its purpose, the Supreme Court's comments are relevant to this discussion. At paragraph 32 below, the Court addressed the risk factor of reoffending to support its interpretation of the term "all" in section 70(1)(b). It emphasized the term "likelihood" and "likely", in addition to this Court's emphasis of the longer passage:

> 32 In addition, the inclusive nature of the word "all" suggests that realistic possibilities are just as relevant as certainties in making this discretionary decision. For instance, the likelihood that an individual will re-offend is an uncertain factor, but one that is commonly considered by the I.A.D. pursuant to s. 70(1)(*b*) when an individual is being removed as a result of a criminal conviction, as is the case in *Al Sagban*. This indicates that the I.A.D. should also be able to consider conditions in the likely country of removal, even when the ultimate country of removal is not known with absolute certainty at the time the s. 70(1)(*b*) appeal is heard.

[62] At first blush, the conclusion to draw from this paragraph is that, although not specifically mentioned as a *Ribic* factor, reoffending should be considered as another "uncertain" factor, "when an individual is being removed as a result of criminal conviction" (*Ibid* at para 32). With respect, this Court's view differs in concluding that neither the Board nor the Courts have fully recognized that the "risk of reoffending" is the purpose, or summary, of all the countervailing risk factors constraining the granting of special equitable relief.

[63] However, for the purpose of the present discussion, the significance relates to the Supreme Court's threshold of a "likelihood" of reoffending as the standard of proof. This Court concludes that a likelihood or probability of not reoffending is Parliament's intended failsafe measure limiting the granting of special relief under either sections 67(1)(c) or 68(1) of the Act.

[64] It is worth referring to the jurisprudence interpreting the contextual section 36(3)(c) of the Act. It stipulates that persons are not inadmissible if able to satisfy "the Minister that they have been rehabilitated". Reflecting on policies, the Courts have stated that a rehabilitation application "must at minimum, and expressly, weigh whether the foreign national will likely reoffend" (*Tahhan v Canada (Citizenship and Immigration)*, 2018 FC 1279 at para 21, Diner J; *De Campos Gregorio v Canada (Citizenship and Immigration)*, 2020 FC 748 at paras 23–26; *Ramirez Velasco v Canada (Citizenship and Immigration*), 2019 FC 543 at paras 8–9; and *Lau v Canada (Citizenship and Immigration)*, 2016 FC 1184 at para 24).

[65] The jurisprudence applying the *Ribic* "possibility of rehabilitation" factor rarely describes the test as proving a threshold of a likelihood of not reoffending. This appears to be due to *Khosa* SCC's wholesale endorsement of the *Ribic* factors. This has led the Federal Courts to fixate on the term "possibility" as some form of threshold, in contradistinction to that of a "likelihood". It is also a function of the recognition that the stay request must meet some less strict standard than that of the appeal. This misleadingly lends itself to a threshold of possibilities. As a result, the jurisprudence has not properly come to grips with Parliament's intention to establish the likelihood of not reoffending as the limitation on granting the appeals for both sections 67(1)(c) and 68(1).

[66] Parliament intended reoffending to be the compelling factor that summarizes the purpose and success of rehabilitation, remorse, seriousness of the offence or any other aspect of the countervailing factors of safety and security of the public that oppose granting the appeal or stay. It is similarly the Court's view that a likelihood of reoffending logically overrides even the strongest and most compelling of H&C evidence of a special exemption from deportation. For this reason, the likelihood of reoffending is also the defining factor that differentiates the application of the two provisions. The likelihood of reoffending is evaluated, however, based on the timing of the assessment of when the risk of reoffending may occur – after the appeal for section 67(1)(c) or after the expiration of the stay period for section 68(1).

- The possibility of rehabilitation

[67] In mentioning "likelihood" as the standard of proof of reoffending, it is noteworthy that this reference might appear to be in conflict with the *Ribic* factor of "a possibility of rehabilitation" (*Ribic* at para 14). This is not the case at all. Bearing in mind that the same factors apply to sections 67(1)(c) and 68(1), a different range of standards of proof is to be expected. The differentiation of the two provisions relates to scaling the risk of reoffending. Weighing the scaled countervailing summary of factors against the scaled equitable factors provides the optimum method of balancing the conflicting factors to determine the outcome of the appeal or request for a stay.

[68] A possibility of whatever is being evaluated, in contradistinction to a probability, has a range of 1% through 99% chance of occurrence. This is the distinction of a possibility measure as opposed to the 51% threshold of a "probability" or "likelihood" measure of factors, evidence or legal outcome. This explains why the standard, and really the only consistent workable

threshold throughout almost all legal determinations at either the factual or legal level, is based upon a probability threshold.

[69] There are exceptions where possibilities are legitimately used, e.g. to scale future damage awards, or where any scaling is impractical, such as fixing the lowest possible standard of the "scintilla of utility" in patent law. Otherwise, possibilities are eschewed in law. They undermine the Rule of Law by the subjective inconsistencies of determinations that a range of thresholds allows for, e.g. a serious possibility describing an indeterminate range of thresholds. Possibilities as a form of threshold below a probability, besides being subjectively amorphous, are unacceptably asymmetrical in their effect on the parties, if not intended to serve some policy purpose. In adjudicating public safety considerations when contesting a possibility finding that is not for scaling purposes, the Attorney General faces a standard akin to that of the prosecution in criminal law of "proof beyond a reasonable doubt". Working with indeterminate ranges of possibilities is also a more challenging mental decisional exercise than the simpler either/or, yes/no decision of a probability threshold.

[70] In this case, however, the measure and application of the *Ribic* factors represents a valid resort to possibilities. The weighing of the compassionate H&C factors against the countervailing public safety and security factors lends itself to a comparative scaled range of possibilities. This renders the graduation of the relative strength of both the equitable and safety and security factors relevant, particularly where the request for stay is an issue. Qualifying the equitable case of scaled possibilities as "sufficient", "good" or "strong" is a reasonable exercise in these circumstances. The total equitable scale is then weighed and balanced against the scaled

factors relating to reoffending. The difference, however, is that the likelihood of reoffending range is capped at not exceeding 50%. Any greater risk thereafter defines a likelihood of reoffending that results in the automatic rejection of either remedy. Below a likelihood, "sufficiently", "quite" and "highly" unlikely, can serve as scaled descriptors describing the degree of rehabilitation.

(c) *Khosa*

[71] The Supreme Court in *Khosa* by simply adopting *Chieu*'s conclusions for its purposes, had the effect of enshrining the *Ribic* factors in the amended sections 67(1)(c) and 68(1) of the *IRPA*. This extended to *Ribic*'s methodology of weighing each factor separately, and then cumulatively deciding the case on how the factors balance out as its interpretation of section 67(1)(c). The Court respectfully concludes that when the majority reasons in *Khosa* are carefully considered and assessed against the backdrop of *Vavilov* constraints, drawing such a broad interpretive precedential conclusion is neither "justified", nor "justifiable".

[72] When adopting *Chieu*'s endorsement of the *Ribic* factors, the Supreme Court of Canada in *Khosa* was not focused in any manner on conducting a holistic interpretation of the amended formulation of sections 67(1)(c) and 68(1) of the Act. The Court had much bigger fish to fry in terms of the challenge it faced. It had to determine the appropriate standard to review assessed facts (those involving the weighing of evidence). The recent decision in *Dunsmuir* had just eliminated the patently unreasonable standard, which heretofore had been applied to review facts.

[73] The circumstances and history of the review of the *Ribic* rehabilitation factor in the Federal Courts' decisions below, conspicuously brought this issue to the Supreme Court's attention. Both Courts rendered their decisions in the three-factor judicial review era, whereas the Supreme Court was applying *Dunsmuir* principles. First, the Federal Court in *Khosa* concluded at paragraph 33 that the patently unreasonable standard should apply because "Mr. Khosa's principal submission is that the IAD erred by misconstruing his evidence" relating to the "possibility of rehabilitation" factor (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1218). This finding was particularly in respect of the Court's interpretation of section 67(1)(c), stated as follows at paragraph 24:

> [24] The standard of review for decisions of the IAD on appeals under paragraph 67(1)(c), and the corresponding provisions of the former legislation, has consistently been characterized as patently unreasonable.

[74] The majority of the Federal Court of Appeal disagreed on the basis that the trend in Supreme Court jurisprudence was towards expanding the scope of the reasonableness factor (*Khosa v Canada (Citizenship and Immigration)*, 2007 FCA 24 at paras 3–7 [*Khosa* FCA]). In addition, less deference was owed to the expertise of the Board regarding the issue of rehabilitation, a "concept with respect to which the Board cannot be said to have particular expertise", and on which it should generally take its lead from the criminal courts (*Ibid* at paras 9–12).

[75] The Supreme Court majority Judges disagreed with the Court of Appeal, noting that the IAD has a mandate different from that of the criminal courts, and that deference was properly owed to the IAD under s. 67(1)(c) of the *IRPA* (*Khosa* SCC at paras 66–67). It obviously agreed

that reasonableness was the appropriate standard of review, given that the patently unreasonableness standard no longer existed. This left the Court with the question of what to do with factual assessments under the reasonableness standard.

[76] Justice Fish's dissent forced the clear enunciation by the majority of what was originally a tentative "no reweighing of evidence" rule. Justice Fish embarked on a reweighing exercise and presented a more interventionist standard based on *Dunsmuir* language allowing intervention stating that "deference ends where unreasonableness begins" (*Ibid* at para 160). The majority Court recognized that such a broad statement of standard of review for assessment of facts permitting the reweighing of evidence would provide too extensive a scope for intervention in the factual assessments of tribunals. The concerns over the strictness of the standard of review of assessed facts largely mirrors that in the five/four Court split in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. To limit reviewing courts' scope of intervention, the Court majority in *Khosa* adopted the same no re-weighing standard as an additional component of the reasonableness standard (without admitting that it is a reasonableness standard).

[77] This Court describes this language as reverting to the former abolished standard because the methodology of the application of a standard represents the standard, not its label. Prohibiting the reweighing of evidence effectively reapplies the patently unreasonable, palpable, or clear error tests to fact-finding assessments, without stating that it is not a reasonableness standard. The majority Court in *Housen* indicated in the clearest of terms, particularly at paragraphs 21 to 22, that reweighing the evidence is a form of impermissible reasonableness analysis, and is an insufficiently strict standard for the review of facts. The examination to determine whether there

is some probative evidence to support the fact is a different exercise from that of analyzing the evidence anew to see whether the factual finding was reasonable. *Housen* applied that same distinction to the step of drawing an inference from the facts.

[78] In *Khosa*, the majority Court's reluctance, struggle and hesitation to prescribe the "no-weighing evidence" rule is apparent in its reasons after just abolishing the patently unreasonable standard. Justice Binnie first states at paragraph 61 that "I do not <u>believe</u> that it is the function of the reviewing court to reweigh the evidence" [emphasis added]. At paragraph 64, he similarly concludes that "[i]t <u>seems</u> evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts" [emphasis added]. "Believing" and "seeming" that a rule exists is not the usual language one would expect from the Supreme Court to state a fundamental methodology to review assessment of facts in administrative law. This standard represents the decision's legacy. Indeed, the head note drafters translated the Court's tentative statements into a peremptory rule quoted thereafter in thousands of cases.

[79] Speaking of legacy, *Khosa* <u>*SCC*</u> reinforces the application of the rule against reweighing evidence to questions of mixed fact and law. Justice Fish conducted a reasonability analysis of reweighing the evidence of the Board's negative rehabilitation finding. The majority Court adopted the same methodology followed by the Federal Court in singling out the factual essence of the mixed question of fact and law of what constitutes rehabilitation from the overall conclusion that the appeal should be allowed under section 67(1)(c). As is demonstrated by the guidelines assisting the determination of whether an appellant is "rehabilitated" pursuant to

section 36(1)(c), this is a question of mixed fact and law, even if the standard is created by the jurisprudence, i.e. negligence. Because it was not possible to extract the legal issue from the rehabilitation analysis, the Supreme Court treated the issue as factual in nature. It thereby incorporated the rule against reweighing evidence to questions of mixed fact and law in *Housen* (*Ibid* at paras 26–30) when determinative of the review outcome.

[80] *Vavilov* at paragraph 125 has squared the "standards" circle for the review of assessment findings of fact. Reviewing courts may not reweigh the evidence and may only intervene in "exceptional circumstances". This standard resembles the no intervention unless "palpable is plainly seen" rule in *Housen* at paragraph 6. The Court in *Housen* described the methodology of the palpable standard as "sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion" (*Ibid* at para 1). The Supreme Court in *Vavilov* also indicated that "many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review": see *Housen*, at paras. 15-18.

[81] All this is to say that the Supreme Court in *Khosa* was focusing its interpretation of sections 67(1)(c) entirely as it related to the continuing nomenclature issues of assessing and weighing the sufficiency of evidence. This is evident by the fact that at paragraph 57 of the reasons, the Court omitted the conclusory wording of section 67(1)(c), being "in light of all the

circumstances of the case", or in the French version "vu les autres circonstances de l'affaire." These words reveal Parliament's intended scheme for the application of the provision.

[82] With this background in mind, the majority Court interpreted the *Ribic* factors as comprising the interpretation of section 67(1)(c), and thereby 68(1), at paragraphs 57 and 137. These paragraphs are as follows, with the Court's emphasis highlighting the nature of the discretionary exercise of the IAD decision:

> [57] In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(*c*) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(*c*) requires the IAD to be "satisfied that, at the time that the appeal is disposed of … sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself.
>
> …
>
> [137] … The actual application of the *Ribic* factors to the case before it and its exercise of discretion is fact-based. I do not find that the factual findings of the IAD were perverse or capricious or were made without regard to the evidence. I would allow the appeal.

[83] In conclusion, the Supreme Court's interpretation of section 67(1)(c) was fixated on statements regarding the "sufficiency" of the evidence in the exercise of the Board's discretionary findings of fact. No attempt was made to conduct a textual, contextual or purposive interpretation of the amended provisions, when simply adopting in wholesale fashion the pre-amendment *Ribic* factors in the application of section 67(1)(c). This reflects that the factual matrix before the Court did not require a more comprehensive interpretation of the provision.

This led the Court to bypass the historical and challenging differential application issues arising from the highly unusual context whereby two identical statutory standards apply to significantly differentiated outcomes. The factual matrix circumscribes the *ratio decidendi* of a decision.

[84] It is submitted that the Supreme Court's limited focus on the issue of the review of factual assessments in administrative law, provides a reasonable basis to distinguish *Khosa SCC*, by limiting it to its specific ruling regarding the review of factual assessments. These grounds extend to the Court's apparent wholesale adoption of the *Ribic* methodology resulting from a limited interpretative exercise, without regard to the entire modified statutory wording, and Parliament's intended remedial purpose in enacting sections 67(1)(c) and 68(1) of the *IRPA*.

(5) Construing the 2001 amendments

[85] It is trite law that sections 67(1)(c) and 68(1) should be interpreted in accordance with Driedger's modern principle (for consistency. See para 2 of decision) adopted in *Rizzo Shoes* at paragraph 21 that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

(a) *The three component scheme of sections 67(1)(c) and 68(1)*

[86] It is useful to have a visual reference of comparison of section 70(1)(b) and section 67(1)(c) of the modern version of the Act, with what the Court describes as their three components numbered in square brackets in each provision:

70. (1) … where a removal order or conditional removal order is made against a permanent resident … that person may appeal to the Appeal Division	70. (1) […] les résidents permanents […] peuvent faire appel devant la section d'appel d'une mesure de renvoi ou de renvoi conditionnel en invoquant les moyens suivants :
…	[…]
(*b*) on the ground that, [1] having regard to all the circumstances of the case, the person should not be removed from Canada.	*b)* le fait que, [1] eu égard aux circonstances particulières de l'espèce, ils ne devraient pas être renvoyés du Canada.
Versus	Par rapport à
67(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67(1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
…	[…]
(c) … [1] taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations [2] warrant special relief [3] in light of all the circumstances of the case.	c) […] [1] compte tenu de l'intérêt supérieur de l'enfant directement touché – des motifs d'ordre humanitaire justifiant, [2] vu les autres circonstances de l'affaire, [3] la prise de mesures spéciales.

[87] In 1985, all seven *Ribic* factors were conceived by the IAB with a view to implementing the undescribed policies intended by Parliament in accordance with language that described a very broad exercise of discretion under section 70(1)(b). Appeals or deferrals of removal were to be granted "on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada." Thus, the Board interpreted "all the circumstances of the case" to include together, without any labelling distinction, what can properly be described as the five equitable "hardship" factors and the two "public safety and security factors" (seriousness of the offence and possibility of rehabilitation).

[88] Parliament conceptually removed the five equitable factors in *Ribic* from those that formerly comprised "all the circumstances of the case" of the previous section 70(1)(b). They are now comprised in the language of the first component of sections 67(1)(c) and 68(1), "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations". This language closely resembles that found in section 25(1) of the Act.

[89] It is reproduced below for comparison purposes, with the Court's emphasis:

25 (1) … the Minister must, on request of a foreign national in Canada … examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status … 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.	25 (1) […] le ministre doit, sur demande d'un étranger se trouvant au Canada […] étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent […] 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.

[90] According to the first component of sections 67(1)(c) and 68(1), hardship factors should comprise those described in the Guidelines and jurisprudence that apply to the similarly worded section 25(1) of the Act. This should not be controversial. In *Chieu* the Supreme Court of Canada stated at paragraph 79 "that a discretionary decision under section 70(1)(b) requires the consideration of 'every extenuating circumstance that can be adduced in favour of the deportee.'" Similarly, the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 27 [*Kanthasamy*] highlighted the H&C considerations, as referenced by the ministerial guidelines, to extend to "'any other relevant factor they wish to have considered not related to [ss. 96 and 97].'" Appellants seeking relief under either section

67(1)(c) or 68(1) have no "wish to have considered" countervailing public and safety factors that are not hardship factors and, if not met, will prevent them from obtaining special relief.

[91] The third component of sections 67(1)(c) and 68(1), "all the circumstances of the case", or in the French version "vu les autres circonstances de l'affaire", must have some role to play in addition to the equitable factors that have been extracted from the former wording of section 70(1)(b) and now are included in the new first component. Logic dictates that this third component comprises at a minimum the content of what remains of the *Ribic* factors based on the same language of the predecessor provision, with the equitable factors removed.

[92] This extends to the two public safety and security factors (seriousness of the offence and possibility of rehabilitation), in addition to what has been identified in the case law, such as "remorse" or "likelihood of reoffending". These factors reflect the purpose of section 3(1)(h) of the *IRPA*, i.e., "to protect public health and safety and to maintain the security of Canadian society". The second component of the provisions, i.e., that special relief is "warranted", in French "justifiant", by the public safety and security factors contextually confirms this interpretation.

[93] The scheme of sections 67(1)(c) and 68(1) therefore, becomes clear. Parliament intended that appellants first demonstrate their entitlement to special equitable relief in accordance with the same reasoning applying to section 25(1) of the Act. Upon meeting this requirement, the appeal or stay will be granted only if warranted as meeting the factors of the second component. It consists of all the public safety and security factors that are comprised in "all the

circumstances of the case". The dictionary definition of "warrant" is not ambiguous. It is the French equivalent: "justify or necessitate (a certain course of action)" (Google's English dictionary provided by Oxford Languages, online: <www.google.com>). Equitable relief may be granted only if first proven, and second, if the safety and security factors do not prohibit it, in which case the two classes of factors must be assessed against each other.

(b) *First demonstrate equitable relief is warranted*

[94] The foregoing interpretation is supported by the absurd consequences that follow if the equitable case is not first demonstrated as a threshold to proceed under either sections 67(1)(c) and 68(1). It is not reasonable that Parliament intended that an appellant convicted of serious criminality could succeed on the appeal, or a request for a stay of removal, if the Board was not first convinced that an equitable case had been proven. Surely, that is the essence of the provision. Moreover, any other interpretation would mean that an inadmissible individual who had committed serious acts of criminality would be given a preferred opportunity of obtaining permanent resident status over a law-abiding refugee claimant whose application had been rejected because no risk could be demonstrated, but who has a valid equitable claim. There is no better proof of this absurdity than the matter presently before this Court that does not approach a valid equitable claim.

[95] There are also a number of other practical reasons supporting an interpretation that sections 67(1)(c) and 68(1) be evaluated using a methodology that separates the assessment of the H&C claim from issues of public safety and security. Other advantages of working with thresholds and separate analysis of the provisions' two components include the following:

- An unsuccessful H&C claim terminates both processes. This avoids the wasteful expenditure of scarce adjudicative resources for the assessment and decision writing duties of the Board. Admittedly, there is an argument that good decision writing encourages describing alternative grounds for rejection, if they exist. Nevertheless, it remains the decision-maker's discretion to expand on further grounds for rejection of the appeal, even if satisfied the H&C claim is insufficiently supported;
- Cases like the one at hand where the H&C claim is not apparent, may similarly be more appropriately rejected at the leave stage, when no equitable foundation is provided, or thereafter by the reviewing Court, with equal efficiencies in either instance without any diminishment of the quality of justice provided;
- For the same reason, it is also fairer to the appellant to know the differentiated basis for rejection, and therefore better target submissions throughout all levels of the procedure;
- Decision-making is similarly facilitated on a positive H&C claim. The decision-maker may attach useful labels to describe the scaling of the global assessment, i.e. sufficient, good or strong. This should facilitate comparative cumulative assessments when weighed against the countervailing safety and security factors. Like the *Ribic*-based process, decision-making requires the scaling of the probative value of competing factors, which should be facilitated if first assessed for each component and then globally against each other;
- Perhaps most importantly, by forcing the IAD to consider hardship factors separately, they will finally get equal time to consider the safety and security factors. A review of the jurisprudence in this field demonstrates that most of the Board's assessment is expended on an examination of the safety and security factors. This probably occurs because they are the first two items on the *Ribic* list of factors. But they also require the most time because they are the most difficult to assess, often requiring perusal of decisions of criminal courts and the evidence before them. This prevents cases where there is no valid H&C foundation to proceed, as in this matter, because the Board to some extent loses its way when searching for reasons to justify refusing the stay or removal; and
- The reduction of effort to resolve the appeal may be similarly carried forward after a finding of a sufficient H&C case, which necessarily entails a separate consideration of the public safety and security factors. The Board may choose to commence its consideration of the appeal with the request for a stay under section 68(1). As described below, they too have a threshold of demonstrating no likelihood of reoffending, either at the time the appeal is granted, or at the time of the stay period is completed. The stay application requires a lower degree of probative value than the appeal. If the stay is rejected, logically, so too must be the appeal. Conversely, if granted, the Board can thereafter more readily identify the additional positive probative evidence to support granting the appeal. This is considerably simpler than

identifying the additional negative evidence to reject the stay, not to mention that a positive appeal outcome is less likely subject to review.

(c) *Then determine the differential purposes of sections 67(1)(c) and 68(1) based on the likelihood of reoffending*

[96] When first trying to understand Parliament's purpose in enacting two sections with the same legal standard applied to the same facts, the Court originally considered whether it intended to provide two mutually exclusive alternative remedies. Somehow, the appellant would have to decide which route to take – appeal or stay. It was somewhat led astray by the ambiguous phrase "if any" found only in the English version of section 69 of the Act. Ultimately, no meaningful interpretation came to mind, a conclusion that the French drafters appear to have shared.

[97] Instead, a "modern" interpretation of sections 67(1)(c) and 68(1) of the *IRPA* highlights three aspects that need to be revisited: the purpose of the third component on public safety and security, the contextual interpretation of sections 67(1)(c) and 68(1), and the appropriate legal test that applies to each provision.

[98] As already indicated, the Court concludes that Parliament's intended purpose was to circumscribe permanent resident status by not granting equitable H&C relief – no matter the strength of the evidence – to inadmissible persons convicted of serious criminality, without appropriately ensuring that they would not reoffend. No other interpretation of the purpose of the public safety and security factors makes sense. Its purpose is confirmed by the jurisprudence cited above interpreting the term "rehabilitated" in section 36(3)(c) of the Act. No Canadian, described in *Kanthasamy* when outlining the purpose of equitable relief, would be excited by the

circumstances of individuals to mitigate the strict application of Canadian immigration laws to grant such exceptional relief, without appropriate assurances that they would not reoffend.

[99] Contextually, with the overall purpose in mind, and the need for a reasonably clear and consistent application of the two alternatives of equitable relief, the only apparent reasonable interpretation of the two provisions is based upon ensuring reoffending not occur from the perspective of the determination when that assessment is made. For the appeal under section 67(1)(c), the appellant must provide sufficient evidence to ensure no reoffending at the time of the disposition of the appeal. For the stay of removal under section 68(1), the appellant must provide sufficient evidence supporting the necessary assurance at the time of the disposition of the stay request of not reoffending upon completion of the period of the stay granted.

[100] With respect to the statement of an appropriate test to apply in considering this contextual purposive interpretation, the sufficiency of evidence of not reoffending must be proven by the appellant as a probability or likelihood. In the Court's analysis above, discussing the concepts of the possibility of rehabilitation, the Court has already outlined why probabilities and likelihoods are the only reasonable and practical evidentiary standard in civil matters.

[101] Thus, Parliament, in the language of sections 67(1)(c) and 68(1), not only set up the order of consideration of determinative factors as first relating to H&C factors broadly defined. It also stipulated that the second condition that special relief should only be granted, i.e. warranted, "in light of all of the circumstances of the case." This interpretation of the two-step contingent process recognizes that public safety must trump H&C considerations when the risk of

reoffending is a likelihood. Parliament would not permit someone who has already been convicted of serious criminality to maintain or obtain permanent resident status, when there was a likelihood of the person reoffending; bearing in mind that H&C relief is granted only in special or exceptional circumstances in the first place.

[102] This is not to say that the evidence supporting a positive H&C claim – for example turning one's life around with a steady job, marriage and children – does not also contribute to a positive no reoffending conclusion. There is no contention that the overall assessments should change radically. The purpose is to apply these provisions, as Parliament would have intended, in a measured and consistent fashion. The process should permit criminally convicted persons to obtain or maintain permanent resident status by two different equitable avenues in accordance with the same requirements under section 25(1) of the Act. Nonetheless, the Board must not allow this under either provision if it would result in putting Canadians at an unacceptable risk of further criminal conduct.

[103] This is the only apparent interpretation that coherently represents Parliament's intention in enacting two identical equitable relief provisions and that provides a reasonable foundation to rationally, consistently and fairly justify their different outcomes. It is also the only interpretation whereby the Board may justifiably describe a differentiated outcome.

(6) Evaluating the safety and security factors

(a) *The degree of rehabilitation*

[104] Rehabilitation rests on the assumption that criminally convicted individuals can be treated and can return to a crime-free lifestyle. The degree of rehabilitation is therefore, directly related to the likelihood of reoffending. The seriousness of the offence is similarly a risk factor, but one relating to the effects or harm caused by reoffending. The seriousness of the offence can also be a negative compassionate factor in the equitable assessment of granting special relief from deportation. Seriousness of the offence is considered further below.

[105] Assessing the likelihood of any future conduct like that of reoffending is a challenging determination at the best of times. It is simpler to assess past intention to commit a crime than to assess the likelihood of committing a crime in the future. In essence, it is an attempt to judge the character of the appellant, in that deterrence often does not prevent reoffending when illegal situations of high self-interest present themselves, if not restrained by some moral or educative consideration. It is not a conclusion that should be arrived at without considerable care.

(b) *Reliance on criminal court sentencing evidence*

[106] Rehabilitation and the likelihood of not reoffending are common considerations in assessing special relief in inadmissibility cases and criminal law sentencing. Criminal sentencing evidence and reasoning is usually highly relevant to issues of rehabilitation. In the Court's view, the comments of Justice Décary in *Khosa* FCA at paragraph 9, with the modification of the term "possibility" to that of "probability", still apply. He stated that when a positive rehabilitation finding has been made by the criminal court, "[the Board] should explain why it is that rehabilitation has ceased to be a possibility." He also described, at paragraph 11, guidelines for

reliance upon the criminal sentencing record in the circumstances of the facts in *Khosa*, but which for the most part have general application:

> [11] In cases where, as suggested earlier in paragraph 9, a Board may question a finding of rehabilitation made by a provincial criminal court, the Board should, at a minimum, take into consideration the factors generally associated with the criminal law concept of rehabilitation. In the case at bar this would include the absence of a criminal record (other than the one at issue), the absence of previous convictions for dangerous driving, the response to community supervision and the recent history of the offender, including the upgrading of his education and his work record. On rehabilitation factors in criminal law, see *R. v. J.S.M.* [2006] B.C.R. No. 1947 (C.A.) *R. v. Laverty*, [1991] B.C.R. No. 3862 (C.A.)[.]

[107] The Supreme Court appeared to disagree somewhat with the Federal Court of Appeal statement at paragraph 9 that "[r]ehabilitation is a criminal law concept with respect to which the Board cannot be said to have particular expertise". The Court pointed out that "IAD members have considerable expertise in determining appeals under the *IRPA*" (*Khosa* SCC at para 58). In other words, the Board must approach its own evaluation of the appellant's rehabilitation with the antagonist litigator's frame of mind: looking for areas where it may legitimately disagree with the fairness or reasonableness of the criminal court's reasoning and evaluation of the issue at hand.

[108] There are also many circumstances where the Board is not required to accept the rehabilitation conclusions of the criminal courts, besides having its own different mandate as noted by the Supreme Court in *Khosa* at paragraph 66. For example, the Court pointed out in *Khosa* that the appellant did not testify in the criminal proceedings, although he did before the Board. This alone would afford greater scope for that Board to reconsider conclusions of the

provincial criminal court. The IAD is also in a position to examine the efforts, as well as the success, of the rehabilitation over a longer period, as its decision often comes some time after the sentencing disposition. The Board is equally adept at considering the expert medical evidence before the criminal court in terms of the reliability of the evidence (see in particular *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at para 78). In the present case, the Board raised several points where the expert psychological report was unreliable, including relying solely on the appellant for its information. There is no suggestion therefore, that the Board did not point out its reasons for not agreeing with the psychologist's report.

(c) *Motivation for the crime*

[109] The issue of rehabilitation is not about intention. This has already been proven for conviction. Motivation, said to excuse the poor judgment, is significant, particularly when there is evidence of a serious lack of empathy towards others, accompanied by significant harm, which suggests psychological counselling is necessary.

[110] In the Court's view, this case provides an example of failing to sufficiently consider the motivation behind the crime as a factor in rehabilitation (and sentencing). The Applicant's improper, and frankly worrying, motive to interfere in his girlfriend's relationships with other males should have been a matter of serious reflection. Decision-makers must be alive and alert to these issues, especially when there have been innumerable significant concerns raised about the dismissive societal response to acts of violence and discrimination against women.

[111] The expert psychologist retained by the Applicant opined that his misbehaviour "was more situational than characteristic" and that he was not someone "who likely represents a risk of violence in the community." The Applicant acknowledged that his conduct was motivated by worry that continued interaction of the victim with his girlfriend would lead to their separation. It was largely downplayed as a concern for his criminal behaviour by the expert on the uncorroborated claim that he was acting under the influence of his younger friends and his two previous attempts to stop the victim from continuing his entreaties. This opinion prevailed in the sentencing of the Applicant.

[112] It is difficult to reconcile this opinion with the facts and the worrying concern that the Applicant might resort to similar situational controlling behaviour towards women with whom he may have a serious relationship in the future, when not a subject of rehabilitative counselling. The Board may have vaguely recognized this situational concern when it distinguished the conclusion of the psychologist on the Applicant's behaviour, of not representing a risk of violence in the community, from the finding of this being insufficient to demonstrate that he would not reoffend non-violently or with less violence.

[113] Spotting and framing the issue is often the most difficult task in all forms of testimonial adjudication. Some grace must be allowed in assessing this task. It is much easier to spot the real issue at a secondary or even tertiary level. The Court's advice to less experienced counsel is to avoid their second worst failure: learning about the issue at trial; the worst being to learn about it on appeal, which in the Court's experience has occurred on both occasions. Counsel has the primary duty to properly spot and frame the issue. It dictates the concise submission at the

hearing or contained in the memorandum, and especially the questions to ask at the hearing to prove the factual foundation for the issue. But, it is also the decision-maker's duty to bear down to espy and properly frame the issue, as it is for the reviewing court.

[114] The Court does not think it speculative to state that the treatment of the girlfriend was in the back of the mind of everyone in this matter. It is only because the "situational circumstances" were described as the prevailing justification that it became the intuitive issue of the Board and Court's review, which brought the matter back to motivation. The Board could not put its finger on the issue, because it did not recognize that motivation was a significant issue in the Applicant's rehabilitation. Focusing on motivation, when discernable, assists in recognizing the true essence of much of the evidence on rehabilitation.

[115] Accordingly, the Court does not agree with the Applicant's challenge of the Board's distinction in community and individual situational rehabilitation. It is the essence of the Board's reasoning in contradiction of the psychological report, even if not clearly expressed. Even if the Board's reasoning went beyond connecting the dots and the Respondent's failure to raise motivation as an issue, which the Court does not find to be the case, given all the other deficiencies of the expert's report and otherwise described by the Board, the dismissal of the appeal would be unaffected.

[116] This is also a good example of where the Board was entitled to differ with the criminal court Judge, who relied upon the submissions of Applicant's criminal counsel demonstrating his rehabilitation. Counsel's submissions were not before the Board.

(d) *Assessing the probative value of rehabilitation evidence*

[117] The likelihood of reoffending should, to some extent, be a long-term vision. This means that it is not necessarily limited to envisioning short-term or even similar types of offences. In most respects, it is an assessment based on (1) the credibility of the appellant who must provide (2) sufficient (3) probative evidence, (4) corroborated when expected and possible, (5) demonstrating a commitment to self-improvement and a rehabilitated lifestyle that correlates well with the social and economic habits of law-abiding individuals, (6) to the standard of a likelihood, (7) while always ensuring that biases, prejudices and stereotypes do not negatively influence the assessment. If available prior to drafting decisions, a review of the transcripts of the Board hearing can significantly improve the quality of decision-making, particularly in assessing a witness's testimony.

[118] Most institutional rehabilitation pertains to an applicant's participation in an array of programs relating to mental health and educational services for offenders. These may include specialty programs developed for specific areas such as bullying, gang behaviour and of particular interest here, relating to physical, psychological and sexual violence against women. Evidence regarding the Applicant's commitment to, attendance at, and outcomes from such programs – as documented by responsible officers and rehabilitation experts – has excellent probative value. In this matter, the Board reasonably criticized the Applicant for not following up on suggested programs, with little justification for not doing so. This is significant probative evidence of his lack of commitment to rehabilitation, or his acceptance that he was in need of counselling in regard to his behaviour of serious criminality.

[119] As indicated, a well-documented positive change in lifestyle is a valid indicator of rehabilitation. This evidence is often reflected in various degrees of a positive H&C assessment, proving a new commitment to family and community care and support. The advantage of all such evidence is that it tends to be concrete, as it is normally corroborated, thereby adding to its probative value. Carrying on with one's educational career, as the Board noted, provides little probative value demonstrating rehabilitation, given the obvious self-interest of obtaining a higher education.

[120] Much less weight can be given to the uncorroborated testimony of a convicted appellant. There is no "Maldonado effect", whereby the credibility of the appellant is assumed in refugee matters. Having already seriously violated the law, there is little reason to accept exculpatory statements without corroboration, particularly where corroboration is expected and available. Negative credibility and trustworthiness assessments are equally important in IAD proceedings, as in refugee matters, and can be sufficient, in and of themselves to reject the appeal.

[121] Similarly, remorse and shame should not be confused with the regret of being caught that often just as much underlies these emotions. Neither can concerns about behaviour be simply written off for the poor judgment said to have initiated the unacceptable conduct. Of particular concern for the present case, was the apparent retributive satisfaction that appears to have been displayed in reaction to the terror caused by the attack on the victim in the restaurant, in which the Applicant directly participated. The Board's concern about this evidence was reasonable in all the circumstances.

(e) *Seriousness of the offence*

[122] The seriousness of the offence is concrete evidence of the potential harm associated with reoffending. If sufficiently serious, it affects the risk analysis by the consequence of harm associated with offending. Thus, risk is always the degree of the possibility of the harm occurring, plus the gravity of harm that results.

[123] A hypothetical mathematical example, that is not suggested should be employed, might help demonstrate the point. If the risk of the harm occurring is rated as low as 3 out of 10, but the degree or extent of harm caused is measured at 8 of 10, the overall measure of the risk of harm would be the average of the two, i.e. $(3 + 8) \div 2 = 5.5$. If 5 is the threshold for an unacceptable risk, then steps are required to prevent the harm occurring, even if the probability of the harm happening is relatively low. In fact, the consequence of harm often weighs more heavily than the probability of the offence recurring, which explains why the seriousness of some criminal offences are difficult to overcome. Two other comments need to follow from this example.

[124] First, the question might quite properly be asked that if the risk associated with reoffending varies with both the potential of it occurring and the harm it causes, weighed against strength of the claim for equitable relief, then why establish a strict cut off of no reoffending for permanent residency on the appeal, instead of undertaking the full analysis? The answer is straightforward: any conclusion of a likelihood of reoffending, regardless of the degree of seriousness of the crime is unacceptable. Parliament never intended to provide equitable relief from an inadmissibility finding regarding serious criminality to anyone who is likely to disobey Canada's criminal laws, regardless of the seriousness of any anticipated offence. This is Parliament's reasonable line in the sand.

[125] But this is not to deny the legitimacy of the question. If the appellant has succeeded on the threshold of not likely reoffending, which necessarily entails also first having a positive H&C claim, it is very likely that the appeal should be granted. Rejection would only occur for the most serious offences overriding the combination of a barely sufficient equitable claim and a merely sufficient likelihood of not reoffending assessment.

[126] Second, the seriousness of the offence may also negate some degree of the compassion that otherwise supports the appellant's positive H&C case. Just as humanitarian and compassionate grounds represent a crossover factor that can support an argument of sincere change demonstrating rehabilitation, a significantly harmful or malicious offence can diminish the emotion of compassion that an H&C claim must otherwise generate.

[127] The H&C factors in sections 67(1)(c) and 68(1) share the "common purpose" described *in Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at page 350, 1970WL96710. This was acknowledged in *Kanthasamy* at paragraph 21, i.e. "to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'". The Court also indicated at paragraphs 30 and 31, "the language in *Chirwa* as co-extensive with the Guidelines", because it "focuses more on the equitable underlying purpose of the humanitarian and compassionate relief application process."

[128] In other words, the sense or emotion of compassion is not a one-way street when the conduct of the appellant evidences a serious absence of reciprocal compassion to fellow humans.

It scales downward the final overall assessment of the factors together in some degree that correlates with the appellant's mistreatment of others evidenced by the offence.

[129] Even though an H&C factor, the effect of the seriousness of the crime cannot be assessed in the initial consideration of H&C evidence because it is not a hardship factor, but rather a countervailing element that diminishes the warranting of equitable special relief from removal. Besides, deferring the seriousness of the crime provides the Applicant a greater opportunity to reach the non-reoffending stage of analysis, by first presenting the best equitable case possible, before the seriousness of the offence might downgrade the equitable case.

C. *Review of the Board's decision*

(1) Applying the amended legal standards

[130] To recap, the textual, contextual and purposive interpretation of sections 67(1)(c) and 68(1) of the *IRPA* describe the following issues of mixed fact and law that appellants must prove to succeed on an appeal, or a request for a stay of removal:

i. Appellants cannot succeed under either section 67(1)(c) or 68(1) unless the evidence establishes a positive H&C claim on the same basis as a claim made pursuant to section 25(1) the *IRPA*, but without regard to the seriousness of the offence;

ii. Appellants will succeed on appeal pursuant to section 67(1)(c), if able to prove as a likelihood that they will not reoffend by reoffending, in light of an assessment of all the equitable and safety and security factors supporting that conclusion; and

iii. If not successful on the appeal, appellants will succeed in obtaining a stay of removal subject to appropriate conditions, if able to prove as a likelihood that they will not reoffend <u>after the stay of removal</u>, in light of an assessment of all the equitable and safety and security factors supporting that conclusion.

[131] There are obvious procedural problems in applying these standards because the Court is reviewing several issues on legal principles that were not before the Board. This is not a matter such as arose in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*]. It was described in *Vavilov* at paragraph 98, as follows:

> [I]t concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. [Emphasis added.]

[132] The issues not being before the Board arise from the Court's "modern" interpretation of sections 67(1)(c) and 68(1) of the Act that describes an amended approach to apply these provisions than that stated based on the *Ribic* factors. The Court is attempting to comply with the directives in *Vavilov* referring to "constrains" not complied with by the decision-maker in respect of the facts and law, when distinguishing past incomplete constraints on the application of sections 67(1)(c) and 68(1).

[133] There is nothing akin to reasoning in *Alberta Teachers* suggesting that the Court is applying "a well-established interpretation of the statutory provision in question"; indeed quite the opposite. It contends that the amended sections 67(1)(c) and 68(1), if holistically interpreted, impose legal standards "constraints" that are irreconcilable in many respects with the presently "well-established interpretation of the statutory provision[s] in question".

[134] If invoking a fresh interpretation that results in a fresh amended set of legal standards, fairness normally requires that the parties be provided with an opportunity to lead new evidence and fashion different submissions, which could affect the outcome of their application. However, a reasonable exception to this requirement would arise if an issue can be determined based on factual findings where all of the relevant evidence was before the decision-maker.

[135] The new standard based on the purpose of the provisions to ensure someone likely to reoffend not succeed application, as a distinct form of analysis only after an equitable basis for relief is proven would clearly necessitate setting aside the decision for re-evaluation by another decision-maker in accordance with the Court's directions.

[136] Nonetheless, there does not appear to be the same limitations on the Court relying upon the Board's equitable hardship evidence and findings to decide whether a positive H&C claim has been advanced by the Applicant. This is a reasonable legal constraint that does not necessitate returning the matter for a reconsideration. In other words, there is no scope for additional evidence or changed arguments on whether the Applicant presented a sufficient H&C claim to warrant special relief. In accordance with the amended standard, this conclusion would prove cause for dismissal of both the appeal and stay request.

[137] Opposing this conclusion, there might be some concern that the reinterpretation of sections 67(1)(c) and 68(1) permits applicants to provide expanded hardship evidence from that applied under the *Ribic* standard, as found in the Guidelines for an H&C claim pursuant to section 25(1). Arguably, the Guidelines list more hardship factors than the five factors in the

Ribic formula. But the *Ribic* standard was always described as not placing limits on advantageous evidence that appellants may wish to bring forward to support their equitable case. In terms of the extent of the limited hardship factors available under the *Ribic* formula, it appears to be a distinction with little difference.

[138] Nonetheless, were the Court to return the matter for redetermination, it would not be on the same factual findings of the Board, with directions to apply a staged examination of the evidence requiring the appellant first to prove an initial positive H&C claim. The situation is therefore analogous to that where any reasonable reconsideration of the evidence would not change the outcome (see *Maple Lodge Farms Ltd v Canada (Food Inspection Agency)*, 2017 FCA 45 at para 55).

[139] The Court is satisfied that the Applicant has no reasonable prospect of demonstrating a sufficient H&C claim, based upon either the five *Ribic* factors or the section 25(1) guideline hardship factors. He is comfortable in both Canada and China. He has numerous family members and relatives on both sides of the ocean, and travels back and forth. There is no unusual establishment evident, and no real degree of hardship to family or relatives in Canada, who all appear to be well off and in no manner dependent on the Applicant. The only point of hardship turns on the issue of the Applicant being unable to complete his engineering degree, or the loss of credits already earned, if removed, regarding which no corroborative evidence was provided. His circumstances do not evoke any special compassionate or humanitarian emotion or ground for special relief from deportation. Moreover, this conclusion does not rely on the impact of the

seriousness of the Applicant's offence as a factor abating a sentiment of compassion in accordance with the *Chirwa* test endorsed by *Kanthasamy*.

[140] Finding no reasonable conclusion based on the evidence before the Board for any equitable basis to support his claims, the Court rejects the Applicant's appeal and request for a stay.

(2) Applying the *Ribic* standard

[141] In order to respond to the Applicant's principal submission, the Court will also review the Board's reasons and decision dismissing the request for stay of his removal. In order to assist the analysis, the single paragraph containing the Board's reasoning is repeated here:

> [23] The panel has taken into consideration the option of a stay of the removal order, which was a position suggested by the Respondent. In the particular circumstances of this case, a stay would do little to serve the objectives of the IPRA. Actions such as those by the Appellant undermine public confidence in the IRPA and they undermine public support for Canada's generous immigration and refugee system. They cast a cloud of suspicion over the many honest and hardworking immigrants trying to make a better life for themselves in Canada. The public would be offended if the Appellant was allowed to remain in Canada, even with conditions. A stay of the deportation order is not appropriate.

[142] The Board's first statement justifying rejection of the stay was that "a stay would do little to serve the objectives of the IRPA." This obviously refers to section 3(1)(h) of the Act. It also ties back to the Board's statement immediately after initially citing the *Ribic* factors that "[t]he exercise of discretion must be consistent with the objectives of the IRPA. These include the need to protect the health and safety of Canadians and maintain the security of Canadian society."

[143] As indicated, the Court concludes that the Board's reference to "the need to protect the health and safety of Canadians and maintain the security of Canadian society" is referring to the first two *Ribic* factors (the seriousness of the offence and the possibility of rehabilitation). This happens to be the Respondent's submission, namely that paragraph 23 rejecting the stay of removal, refers back to the Board's repeated statements finding the offences to be extremely serious. The Court agrees with this interpretation as the essence of the Board's reasoning rejecting the stay. However, it does not agree that relying on a peremptory conclusion without an explanation meets the requirement of "justifying" the decision, particularly after the Supreme Court's emphasis on this aspect of judicial review throughout the *Vavilov* decision.

[144] This brings the Court to interpret the second portion of the Board's reasons, which is intended to explain why the seriousness of the offence additionally excludes any possibility of a stay of removal based upon the reasoning used to reject the appeal. The additional reasoning describes the highly negative reaction of the average Canadian disagreeing that a permanent resident or foreign national should be allowed to remain in the country, even with conditions, after committing such a serious offence.

[145] The Applicant describes this reasoning as being in the nature of expressing a form of "general deterrence" against inadmissible persons committing serious crimes as not being sufficiently punished if allowed to remain in Canada. The Applicant relies upon the decision of my colleague Justice Barnes in the matter of *Li v Canada (Citizenship and Immigration)*, 2009 FC 992 [*Li*]. At paragraph 17, the Court correctly warned against "blurring of the IAD's

humanitarian and compassionate discretion into the criminal sphere". The Court described the rationale and purpose of general deterrence as follows:

> The rationale for the principle of general deterrence in criminal sentencing is to send a message into the community. The imposition of a criminal sanction for the purpose of setting an example is clearly an aspect of punishment which has no place in the process of immigration deportation.

[146] However, in the *Li* matter, the Board clearly raised the issue of general deterrence as a factor in its decision, as reproduced at paragraph 6 by the Federal Court:

> [27] This reaction on the appellant's part and his performance in the appeal hearing bring to mind how important it is to have a result which will discourage foreign nationals and permanent residents from getting involved in these types of criminal activities in the first place. [Emphasis added.]

[147] As well, there is no indication in *Li* that the Court was not suggesting that the likelihood of reoffending was not a valid consideration, per paragraph 11 of the decision, with this Court's emphasis:

> [11] Having regard to the *Ribic* factors, it was entirely appropriate for the IAD to examine Mr. Li's apparent lack of remorse and the absence of a serious commitment to rehabilitation and, on the evidence before it, to come to a conclusion different from that reached in the criminal proceeding. These are matters which are obviously relevant to the risk of re-offending. The question before me is whether, in denying relief to Mr. Li, it was correct in law for the IAD to take into consideration general deterrence, which is a criminal law principle of sentencing.

[148] The Court therefore, disagrees that the Board's reasoning in this matter is in the nature of expressing a form of "general deterrence" against inadmissible persons committing serious crimes, as described in *Li*. There is no suggestion of sending a message to the community, or

preventing these types of crimes from occurring in the first place. Rather, the Board is expressing a novel form of reasoning in the application of the *Ribic* factors. The reasoning reflects the reasonably anticipated associated negative emotional reaction of a well-informed compassionate Canadian assessing the granting of an equitable concession allowing the Applicant to remain in Canada having regard to the evidence proving the Applicant's criminal offences.

[149] This harks back to the *Chirwa* test endorsed by *Kanthasamy* and the Court's conclusion that the seriousness of the Applicant's offence can be recognized as a factor abating a sentiment of compassion in the mind of the reasonably compassionate civilized person reviewing "all the circumstances of the case." The Board's reference to "the public" which is "offended if the appellant was allowed to remain" refers to the same reasonable person, also imbued with a spirit of compassion. In the circumstances, the diminishment of any emotion of compassion is not unreasonable for someone who shows little compassion in harming others, namely in partaking and engaging younger friends to criminally confine, publicly humiliate, assault and extort a victim as a form of intimidation that interferes in a woman's relationship with the victim.

[150] By interpreting the Board's reasons to reject the request for stay of removal in a manner affecting the issue of compassion, the Court is mindful of the limits that "allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn." This reference is to the statement of Justice Rennie in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at paragraph 11, which was cited with approval in *Vavilov* at paragraph 97.

[151] In extending the dots in favour of the Board's comments as relevant to the reasonable emotion of compassion due to the seriousness, or perhaps the character of the offender, this is not a situation of the Court interfering to "supply the reasons that might have been given and make findings of fact that were not made." With respect, it is a situation of the Court drawing the line from the facts found by the Board and its reasons that implicitly relate to the reasonable Canadian reacting by diminishing the excitement of compassion for relief from deportation.

[152] Thus, the Court further rejects the Applicant's submission that the Board's reasons rejecting the request for a stay based on the *Ribic* factors is unreasonable.

D. *Certified question*

[153] The Court's decision distinguishes the reasoning in *Khosa* because the Supreme Court did not intend to consider the ramifications of Parliament's modifications to the legal standards and methodology to guide the application of sections 67(1)(c) and 68(1) of the Act with the result that the reasoning in *Ribic* is irreconcilable with a "modern" interpretation of the *IRPA*. This conclusion clearly raises a question that should be appealed with a minimum of delay given that the *Ribic* decision is used daily in inadmissibility decisions of the Board.

[154] Although an issue of overriding significance, the Court is required to describe how the above questions are determinative of this matter (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36). This requirement applies to both renditions of the reasons for the dismissal of the application regarding the Board's decision rejecting the request for a stay of removal.

[155] In the first case, a different methodology separating out the H&C factors from the public safety and security factors is the result of a modified interpretation of sections 67(1)(c) and 68(1). It is determinative of the dismissal of the application as a whole applying to both the appeal and the stay request.

[156] In the second instance, the outcome upholding the rejection of the stay request as reasonable is determined by the Court's interpretation of the Board's innovative reasoning applying the following standard:

> The reasonably anticipated additional negative emotional reaction of a well-informed Canadian assessing an equitable concession allowing the Applicant to remain in Canada relating to the seriousness attaching to the Applicant's criminal offences.

[157] In light of the Court's conclusion, the Court provided a copy of these reasons attached to a Direction, requesting that the parties formulate an appropriate question or questions, for certification for appeal. The Court suggested that the questions should refer to the reformulation of the legal standards and methodology used to guide the application of sections 67(1)(c) and 68(1) of the *IRPA*. In particular, the Court suggested the following questions for certification:

i. Is the decision of the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 distinguishable on the basis that the Supreme Court did not conduct an interpretation in accordance with *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 with the intention of comprehensively and exhaustively interpreting sections 67(1)(c) and 68(1) of the *IRPA*?

ii. Can appellants succeed under either section 67(1)(c) or 68(1) if unable to first establish a positive H&C claim on the same basis as a claim made pursuant to section 25(1) of the *IRPA*?

iii. Can appellants succeed on an appeal pursuant to section 67(1)(c) of the *IRPA*, if unable to prove as a likelihood that they will not reoffend, and further in light of a positive assessment of the relevant equitable and public safety and security factors?

iv. Can appellants succeed on a request to stay their removal pursuant to section 68(1) of the *IRPA*, if unable to prove as a likelihood that they will not reoffend after completion of the stay of removal, and further in light of a positive assessment of the relevant equitable and public safety and security factors?

[158] The Applicant agreed that the four suggested questions be certified for appeal. The Respondent opposed certification of all four questions because they did not raise a serious issue of general importance, but failed to provide any supporting reasoning. The Court agrees with the Applicant that the questions raise serious issues of general importance as discussed above.

[159] The Respondent submitted in the alternative that if the questions were to be certified for appeal, the third and fourth questions should apply specifically to appellants inadmissible for serious criminality. The Court agrees with the suggested modifications.

[160] The Respondent opposed certification of the second question. It submitted that a shift to a two-step assessment methodology (described as a gate-keeping exercise) would make it "impossible to assess whether an applicant had succeeded in establishing a positive H&C claim without first looking to the security factors to identify the threshold that must be met." The Court does not agree that the security factors could identify the H&C threshold that must be met. There is no concept that the security issues set a threshold to be met for a positive H&C claim. The threshold is the same as that required pursuant to section 25(1) of the Act.

[161] The Respondent contends that "the intent of 67(1)(c) is to combine the tests of 'having regard to all the circumstances of the case' for appeals of removal orders by permanent residents and 'compassionate or humanitarian consideration that warrant the granting of special relief' into one standard test." As described above, that is not the Court's interpretation of either section 67(1)(c) or 68(1) of the Act. Based on the structure and apparent scheme of the provisions and the continued partial wording from the predecessor provision, the Court interpreted the effect of both provisions as intended to provide a two-step methodology. A fulsome interpretative explanation of the Court's two-step methodology intended by Parliament has already been provided. In essence, the amended provisions state that demonstrated section 25(1) equitable relief is warranted only if security factors are met, which interpretation is supported by a raft of common sense reasons to divide the analysis into clearly defined, distinct workable steps.

[162] If the IAD does not first require inadmissible applicants to demonstrate a positive H&C claim, the inadmissible applicants would be in a better situation to achieve permanent resident status than failed refugee applicants. Although not having been found to have engaged in serious criminality, refugee applicants are required to demonstrate that they merit equitable relief pursuant to section 25(1). In the fifty or so years of jurisprudence, inadmissibility applicants have not been required to demonstrate that they actually merited equitable relief in the first place. It all gets convoluted when considering their risk of reoffending. This matter is the perfect example of why the legislation was amended to avoid such an absurd contextual result. The bottom line is that if an equitable claim cannot be demonstrated, the application should end, as Parliament intended.

[163] The Court surmises that the Respondent's submission misapprehended the well-established principle that the same evidence may be applied for different purposes of an H&C assessment and the likelihood of reoffending. The Court agrees, and indeed recognized that this applied to the evidence of the seriousness of the offence, which can have a dual negative effect on both an H&C claim and the risks associated with reoffending. On the one hand, it is evidence of an outcome risk factor if reoffending occurs; on the other, the Court opined for the first time that serious offences may mitigate the excitement of compassion to grant special relief to the applicant. The opinion that non-hardship evidence may bolster or reduce compassionate empathy in an H&C case was advanced only recently by this Court in *Pryce v Canada (Citizenship and Immigration)*, 2020 FC 377. This matter is presently before the Federal Court of Appeal. If it rejects non-hardship empathy in an H&C matters, then the evidence of the seriousness of the offence will not have any mitigating effect on an H&C claim, and it will be relegated only to security issues.

[164] In any event, as indicated, evidence can be used for dual purposes to prove different facts or purposes. Marriage, raising a family and regular employment was equally noted as a form of evidence that could positively serve both an H&C claim (establishment, family connections) on the basis of a hardship analysis, while also demonstrating a degree of rehabilitation. However, contrary to the seriousness of the offence, a conclusion of rehabilitation – as opposed to the evidence proving it –, serves no positive purpose to prove an equitable claim. It is only a 51% or better assessment of a likelihood of applicants conducting themselves in the future, as would ordinary law-abiding Canadians. This is why the threshold for an H&C claim is unaffected by any conclusion on reoffending.

[165] Assuming that the seriousness of the offence can similarly be considered in the H&C analysis to mitigate compassion towards the applicant, this does not mean that it cannot be moved to be considered in the H&C assessment as an empathy factor, if for some reason that suits. The Court placed the "empathy-reducing" nature of the seriousness of the offence factor in the second step when determining the likelihood of reoffending. It did so mainly because this reduces somewhat the negative gate-keeping effect in favour of applicants leaving it to the final stages of the overall assessment. Hardship factors have also traditionally been limited to advantages that the applicant seeks to bring forward. The Court is also concerned about the undetermined acceptability of empathy-reducing evidence as a valid H&C factor.

[166] As an additional consideration, the test expressed in questions 3 and 4, ultimately is to ensure that applicants demonstrate a positive assessment of all other relevant factors, even if able to demonstrate a likelihood that they will not reoffend. It is not as though any equitable evidence, positive or negative, will not be considered in arriving at a final summary conclusion on the merits of the application.

[167] Accordingly, the Court does not agree with the Respondent's submissions that establishing a positive H&C claim cannot be determined without first looking at the security factors to identify the threshold that must be met. The second question for certification will be that as proposed by the Court and accepted by the Applicant.

E. *Conclusion*

[168] In accordance with *Vavilov*, the Court concludes that the Board's decisions pursuant to sections 67(1)(c) and 68(1) of the *IRPA* are justified based on an internally coherent and rational chain of analysis, with a justifiable outcome in relation to the facts and law that constrain the Board, while bearing the hallmarks of reasonableness (justification, transparency and intelligibility).

JUDGMENT in IMM-6722-19

THIS COURT'S JUDGMENT is that the application is dismissed, with the following questions certified for appeal:

i. Is the decision of the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 distinguishable on the basis that the Court did not conduct an interpretation in accordance with *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 with the intention of comprehensively and exhaustively interpreting sections 67(1)(c) and 68(1) of the *IRPA*?

ii. Can appellants succeed under either section 67(1)(c) or 68(1) if unable to first establish a positive H&C claim on the same basis as a claim made pursuant to section 25(1) the *IRPA*?

iii. Can appellants, inadmissible for serious criminality, succeed on an appeal pursuant to section 67(1)(c) of the *IRPA*, if unable to prove, at the time the appeal is disposed of, as a likelihood that they will not reoffend, and further in light of a positive assessment of all the other relevant equitable and public safety and security factors?

iv. Can appellants, inadmissible for serious criminality, succeed on a request to stay their removal pursuant to section 68(1) of the *IRPA*, if unable to prove as a likelihood that they will not reoffend after completion of the stay of removal, and further in light of a positive assessment of all the other relevant equitable and public safety and security factors?

"Peter B. Annis

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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