Date: 20090904

Docket: IMM-326-09

Citation: 2009 FC 873

Ottawa, Ontario, September 4, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

NELL TOUSSAINT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

LOW INCOME FAMILIES TOGETHER and CHARTER COMMITTEE ON POVERTY ISSUES

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Ms. Nell Toussaint, a citizen of Grenada, came to Canada in December 1999 as a visitor. Her visitor status expired within 6 months of entering Canada and she has been without status since that time. She does not want to return to Grenada. The Applicant would like to apply to the Minister of Citizenship and Immigration (the Minister or the Respondent), pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), for an exemption from certain requirements of *IRPA* on the basis of humanitarian and compassionate (H&C)

considerations. Specifically, she wants: (a) to be exempted from the requirement in s. 11 of *IRPA* that she must apply for permanent residence status before entering Canada; and, (b) to be granted permanent residence from within Canada on H&C grounds. The fee required to process her in-Canada H&C application is $550, which, the Applicant claims, she cannot afford.

[2] Under cover of letter dated September 12, 2008, a Certified Canadian Immigration Consultant, acting on behalf of the Applicant, forwarded an H&C application to the Minister. The cover letter contained the following request:

> On behalf of my client Ms. Nell Toussaint I am hereby making a request under section 25(1) of the Immigration and Refugee Protection Act for her to be exempted from the requirement under sections 307 and 10(1)(d) of the Immigration and Refugee Protection Regulations to pay the $550 fee for the processing of her application for permanent residency based on humanitarian and compassionate considerations (H&C) …
>
> The basis of Ms. Toussaint's request for this fee exemption is set out in her affidavit, which is attached. As you can see, she is indigent and unable to afford to pay the fee.

[3] In a letter dated January 12, 2009, the Administrative Officer, Case Management Branch of Citizenship and Immigration Canada (CIC) returned the application without processing for the following reasons:

> Paragraph 10(1)(d) of the Immigration and Refugee Protection Regulations requires all applicants to include evidence of payment of the applicable fee. Your request for an exemption from the fees is contrary to this legislative requirement. If you wish to apply for permanent residence in Canada your application must be accompanied by the required fee.

[4] The Applicant seeks judicial review of this decision. In addition to a request that the decision of the Administrative Officer be quashed, the other key remedies sought may be stated as follows:

- An order that the Minister examine the Applicant's circumstances to determine whether an exemption from s. 11 of the *IRPA* is justified on H&C grounds, without the payment of any fee;

- A declaration that ss. 307, 10(1)(d) and 66 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRP Regulations* or the *Regulations*), which require the payment of a fee as a condition of accessing the procedure under s.25(1) of *IRPA* is *ultra vires* in that it fetters the Minister's discretion under s. 25(1) of *IRPA*; and

- A declaration that ss. 307 and 10(1)(d) are inoperative or invalid as being contrary to s. 15(1) and s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*), contrary to s. 1(b) of the *Canadian Bill of Rights* S.C. 1960, c. 44. (*Canadian Bill of Rights* or *Bill of Rights*), and contrary to the Rule of Law and the "constitutional norm of equality";

[5] By Order of Prothonotary Aalto, two organizations - the Charter Committee on Poverty Issues (CCPI) and Low Income Families Together (LIFT) – were granted intervener status in this application for judicial review.

II. Issues

[6] This application raises the following issues:

1. What is the applicable standard of review of the Minister's decision not to consider waiving the Applicant's in-Canada application fee?

2. On a proper statutory interpretation of the relevant provisions of *IRPA*, does s. 25 of *IRPA* require the Minister to consider a request to waive the fee for an in-Canada s. 25 application?

3. Are the provisions of *IRPA* or the *IRP Regulations* that purport to prevent foreign nationals, who are indigent or on social assistance, from seeking a waiver of fees for services under *IRPA*, invalid or inoperative on the basis of:

    a) s. 7 of the *Charter*; or

    b) s. 15 of the *Charter*.

4. Is the failure of the government to provide for the waiver of fees contrary to the rule of law and the common law constitutional right of access to the Courts.

[7] In her written submissions, the Applicant raised, as an issue, the possible application of certain provisions of the *Canadian Bill of Rights* to the facts. Since the Applicant did not address this argument during oral submissions, I have not considered the possible application of the *Bill of Rights*. Nevertheless, I would comment that the portion of the reasons and my conclusions relating to s. 7 of the *Charter* would also apply to any *Bill of Rights* argument advanced by the Applicant.

[8] Lastly, the Intervener LIFT focuses its issues specifically on the impact that a failure to waive fees has on the best interests of children directly affected. The Applicant has no children. Accordingly, the issue of the best interests of the child, as raised by LIFT, is not relevant to the consideration of this judicial review and any conclusions that I reach would not be determinative. This issue was, however, relevant to the situation facing two families whose applications for judicial review were heard together with this matter (*Krena v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-2926-08) and *Gunther v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-3045-08)). Because of the particular circumstances of each of these files, the matters were dismissed on the basis of mootness or lack of standing. Given the importance of having a proper factual foundation before the Court upon which to make important *Charter* determinations, I will not deal extensively with LIFT's arguments in these Reasons for Judgment.

III. Legislative Framework

[9] I begin by stating that: “The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country” (*Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 at para. 24). Thus, Parliament has established a scheme for immigration in which all applications for permanent residence in Canada must be made from outside Canada (*IRPA*, s. 11(1)). However, s. 25(1) of *IRPA* gives the Minister the discretion to exempt persons from that requirement on the basis of H&C considerations. Section 66 of the *IRP Regulations* provides that such an application be made in writing accompanied by an application to remain in Canada as a permanent resident.

[10] Section 89 of the *IRPA* allows for the making of regulations that govern fees for services provided in the administration of *IRPA* and the cases in which fees may be waived by the Minister.

[11] Section 307 of the *IRP Regulations* sets out the fees payable for in-Canada H&C applications. A principal applicant pays $550, a spouse or an applicant 22 years of age or older also pays $550, and a family member who is less than 22 years of age pays $150.

[12] Section 10(1)(d) of the *IRP Regulations* states that an application may not be processed unless the applicable processing fee is paid.

[13] The full text of these relevant provisions is set out in Appendix A to these reasons.

IV. Issue #1: What is the applicable standard of review?

[14] Given the nature of the issues raised, the Minister's decision is reviewable on the standard of correctness. In other words, was the Minister correct in his conclusion that an exemption from the fees is contrary to s. 10(1)(d) of the *IRP Regulations*?

V. Issue #2: Does s. 25 of *IRPA* require the Minister to consider a request to waive the fee for an in-Canada s. 25 application?

A. *Position of the Applicant and Interveners*

[15] On the issue of the proper statutory interpretation of s. 25, the position of the Applicant and the Interveners is simple. They submit that s. 25 provides that the Minister "shall", upon request of a foreign national in Canada, examine the circumstances and may grant an exemption from "any obligation of this Act". They argue that, since the Applicant is a foreign national in Canada and since she has requested an exemption from the requirement to pay an application fee (an obligation under the Act), the Minister must consider the waiver request on H&C grounds. This broadly stated statutory obligation of the Minister cannot be fettered, they assert, by regulation. Accordingly, their position is that ss. 307, 10(1)(d) and 66 of the *IRP Regulations*, which require the payment of a fee as a condition of accessing the procedure under s.25(1) of *IRPA*, are *ultra vires*.

B. *Principles of Statutory Interpretation*

[16] Since the first issue before me is one of statutory interpretation, it is useful to begin with an overview of the principles related to such matters. On a number of occasions, the Supreme Court of Canada has given guidance on how to approach a problem of statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21, Mr. Justice Iacobucci, speaking for the unanimous Court, endorsed the statement of Elmer Driedger in *Driedger on the Construction of Statutes*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1983) that:

> Today there is only one principle or approach, namely, 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.

[17] Accordingly, the task of the Court in interpreting legislation cannot be restricted to analysing the plain meaning of the provision in question. Further, while the statutory words must be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objectives" (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12), attention must be directed to the scheme and objective of the statute, the intention of the legislature, and the context of the words in issue (*Rizzo*, above, at para. 23). Regardless of how clear and unambiguous the words of a provision may be, further analysis must be carried out. Indeed, a failure to determine the intention of the legislature in enacting a particular provision has been found to be an error (*Rizzo*, above, at paras. 23, 31). It follows that, where there are conflicting but not unreasonable interpretations available, the contextual framework of the legislation becomes even more important.

[18] In short, my task cannot be limited to interpreting the individual words or phrases used in s. 25; rather, I must have regard to the context in which the words are placed, the objects of *IRPA* and the intention of Parliament.

[19] In considering the context of *IRPA*, the nature or architecture of the statutory scheme is important. In *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 at paragraph 23, the Court of Appeal described *IRPA* as "framework legislation":

> That is to say, the Act contains the core principles and policies of the statutory scheme and, in view of the complexity and breadth of the subject-matter, is relatively concise. The creation of secondary policies and principles, the implementation of core policy and principles, including exemptions, and the elaboration of crucial operational detail, are left to regulations, which can be amended comparatively quickly in response to new problems and other developments. Framework legislation thus contemplates broad delegations of legislative power.

[20] In *De Guzman* (at paragraph 26), the Court also commented that if there is a conflict between the express language of an enabling clause and a regulation purportedly made under it, the regulation may be found to be invalid. Otherwise, courts approach with great caution the review of regulations promulgated by the Governor (or Lieutenant-Governor) in Council.

C. *Analysis*

[21] I begin by acknowledging that a bare reading of the words of s. 25 without reference to any other provision of *IRPA* may support the interpretation preferred by the Applicant and the Interveners. The "grammatical and ordinary sense" of the words identified within s. 25 by the Applicant and Interveners could be interpreted to mandate the Minister to consider the Applicant's request for a fee waiver. However, as taught by the jurisprudence, the question before me cannot be answered without consideration of the words of s. 25 within the entire context of *IRPA*.

[22] In the case before me, the Applicant is in breach of the obligation of s. 11 of *IRPA* that she must have a visa before entering Canada. Thus, she clearly does not meet a requirement of *IRPA* and s. 25(1) is available to her. Pursuant to s. 25(1), upon request, the Minister must consider whether to exempt the Applicant from the s. 11 obligation. In other words, if the Applicant applies, the Minister is obliged to consider whether to exempt her from the requirement or inadmissibility criterion that prevents her from gaining permanent residence in Canada. The question before me is whether the Minister must also consider the Applicant's request that the application fee be waived.

[23] There is no question that "Section 25 itself is very broad and covers much more than requests for an exemption to apply for a permanent visa from within Canada" (*Monemi v. Canada (Solicitor General)*, 2004 FC 1648, 266 F.T.R. 31 at para. 37). I agree. Section 25(1) is available to foreign nationals in Canada and those who are outside Canada (albeit on slightly different terms). The Minister may, on his own initiative, examine the circumstances concerning a foreign national and exempt such person from obligations of *IRPA* or the *Regulations*. In addition to H&C

considerations, taking into account the best interests of a child directly affected, the Minister may take public policy considerations into account.

[24] A review of recent jurisprudence of this Court or the Court of Appeal shows that applications under s. 25(1) have been used to seek exemptions of the following:

- the obligation of ss. 117(9)(d) of the *IRP Regulations*, that dependents be declared by the foreign national at the time of a grant of a permanent resident visa (*Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] F.C.J. No. 713 (QL));

- the application of s. 35(1)(a) of *IRPA* that makes a foreign national inadmissible on grounds of committing a crime against humanity (see, for example, *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2009] F.C.J. No. 549 (QL));

- medical inadmissibility (see, for example, *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1357, 51 Imm. L.R. (3d) 262);

- the criteria to be met for a permanent resident visa from outside Canada (see, for example, *Nalbandian v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128, 309 F.T.R. 1); and

- inadmissibility due to criminality under s. 35 of *IRPA* (see, for example *Keymanash v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 641, [2007] 2 F.C.R. 206).

[25] However, a broad and liberal interpretation of s. 25 does not necessarily mean that this provision is available in respect of every type of obligation that arises under *IRPA* or the *Regulations*. Section 25(1) is available as a matter of right to any foreign national in Canada "who is inadmissible or who does not meet the requirements of this Act". From this phrase, we can see that the focus of s. 25(1) is on substantive obligations that fundamentally affect the ability of a foreign national to come to or remain in Canada. This focus is reflected in the various types of s. 25(1) decisions that have been considered by the Federal Court, as set out above.

[26] In general terms, the "exemption from any applicable criteria or obligation of this Act" logically refers to such criteria or obligations as cause the foreign national to be inadmissible or to not meet the requirements of *IRPA*. In my view, Parliament never intended s. 25(1) to create the possibility of exemption from administrative requirements whether established under *IRPA* or the *IRP Regulations*. To access the extraordinary benefits of s. 25(1), the foreign national must meet certain administrative requirements to make his or her "request", including: filing a written application; providing certain documents and information; and paying the fees set by the *IRP Regulations*.

[27] Consistent with this view of the intention of Parliament is the inclusion in *IRPA* of s. 89. As noted above, s. 89 permits the enactment of regulations that govern fees for services provided in the administration of *IRPA*. This provision also expressly provides for the ability of the government (through the Governor in Council), by regulation, to establish cases in which fees may be waived by the Minister. Under s. 89, the government has the exclusive mandate to establish and waive fees for services. It is clear that Parliament intended that the waiver of fees be done through regulations and not through the operation of s. 25(1). This is consistent with my assessment that s. 25(1) is available in respect of substantive criteria or obligations under *IRPA* and not to administrative requirements.

[28] When s. 25(1) and s. 89 are read together, in the context of the legislative scheme of IRPA, the two provisions can co-exist. Each has meaning.

[29] The Applicant and Interveners refer to past practices of the Minister where fees were waived by the Minister, apparently using s. 25(1) as authority. In December 2004, the Honourable Judy Sgro, then-Minister applied a temporary fee waiver for persons affected by the Tsunami and earthquake disaster of December 26, 2004. In the news release, it was stated that "the Minister has established the following temporary public policy under section 25 of the *Immigration and Refugee Protection Act*". In October 2005, a similar waiver was granted for persons affected by the Pakistani earthquake. Initially, in his Memorandum of Argument at the leave stage of this judicial review, the Minister stated that s. 25(1) gave the Minister authority to provide these general waivers of fees. In the further Memorandum of Argument, this statement was not made. The Applicant and the Interveners made much of this apparent change of positions. In my view, the Minister's past practices and his changed position on this judicial review is of no great moment. Whether the

general public policy waivers of 2004 and 2005 ought to have been done through regulation is not the question before me. I make no determination on whether the Minister's actions in those cases were *ultra vires*.

[30] Moreover, the interpretation of the legislative scheme that I have found also avoids absurd results. Part 19 of the *Regulations* establishes the fees payable for services provided under *IRPA*. Those fees are wide ranging. For example, fees are established for sponsorship applications ($75), for work permits ($150), for a permanent resident card ($50), for a study permit ($125) and for certification of an immigration document ($30). If I were to accept the interpretation submitted by the Applicant and Interveners, any of the fees could be the subject of an application for waiver under s. 25. Further, any such assessment would have to take into account all H&C considerations. I suspect that the Minister would be inundated with requests for waivers of any and all fees. In addition, applicants for any service under *IRPA* could also seek waiver of other non-fee requirements set out in s. 10 of the *IRP Regulations*. That would mean that applicants could ask the Minister to waive such requirements as making an application in writing (s. 10(1)(a)) or identifying accompanying partners (s. 10(1)(e)) or providing information of the names of all family members (s. 10(2)(a)). Surely, Parliament cannot have intended that s. 25 be used in this manner.

[31] The Applicant and the Interveners submit that the relevant provisions of *IRPA* and the *Regulations* must be interpreted in a manner that is consistent with international instruments to which Canada is a signatory (*De Guzman*, above, at paras. 61-62). A complete response to this argument is reflected by the words of Chief Justice McLachlin, speaking for the Court in

Medovarski v. Canada (Minister of Citizenship and Immigration), 2005 SCC 51, [2005] 2 S.C.R. 539 at paragraph 48:

> Charter values only inform statutory interpretation where "genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14. Both readings are not equally in accordance with the intention of the *IRPA*. Thus it is not necessary to consider Charter values in this case.

In my view, there is no ambiguity in s. 25(1) that requires resort to *Charter* value assessment.

[32] In sum on this issue, I conclude that s. 25(1) does not require that the Minister consider a request to exempt a foreign national from the payment of fees established pursuant to s. 89 of *IRPA* and the relevant *IRP Regulations*. Indeed, the Minister is without authority to do so. This interpretation is apparent when s. 25(1) is read harmoniously in its entire context and in its grammatical and ordinary sense, together with the scheme of *IRPA*, the object of *IRPA* and the intention of Parliament.

[33] This interpretation does not, however, complete my analysis. Regardless of the statutory interpretation, the relevant provisions could be invalid based on the other grounds advanced by the Applicant and the Interveners.

VI. Issue #3(a): Is the failure of the government to provide for fee waiver a breach of Section 7 of the *Charter*?

A. *Nature of the Issue*

[34] The Applicant submits that the refusal of the government to waive fees results in a situation where foreign nationals may be removed from Canada and separated from their children without consideration of the relevant H&C factors or the best interests of the children involved. This, she argues engages s. 7 *Charter* interests. She claims that, for persons who live in poverty and cannot afford to pay the application fee, removal without any review of their H&C grounds and the best interests of their children is inconsistent with the principles of natural justice.

[35] Section 7 of the *Charter* states that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

B. *Deprivation of the right to life, liberty and security of the person*

[36] The first question to be asked is whether removal of the Applicant prior to consideration of her H&C factors deprives her of her right to life, liberty or security of the person.

[37] The Applicant is not a citizen of Canada. The situation faced by Ms. Medavarski, in *Medovarski*, above, was similar to that of the Applicant. Because of an earlier criminal conviction,

provisions of *IRPA* precluded Ms. Medovarski from having an assessment of H&C factors prior to her deportation. As do the Applicant and Interveners before this Court, Ms. Medovarski argued that her removal prior to an assessment of such considerations was contrary to s. 7 of the *Charter*. In dismissing this argument, the Supreme Court stated, at paragraph 46, "the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the Canadian Charter of Rights and Freedoms". This statement appears to be a full answer to the s. 7 arguments of the Applicant and the Interveners.

[38] Moreover, there is no evidence before me that the Applicant is facing any risk to her life, liberty or security of person upon her deportation. If that had been the case, the Applicant could have sought to remain in Canada as a Convention refugee, or a protected person. Specifically, she could have brought a claim for protection under s. 96 (the refugee protection) or s. 97 (risk of torture or cruel and unusual treatment) of *IRPA*. She did not. She could have applied for a pre-removal risk assessment (PRRA). She did not. Either of these assessments could have been accessed at no cost to her. From this, I can conclude two things: (a) the Applicant does not fear for her safety should she return to Grenada; and (b) she has been afforded the right to two different proceedings that could have, to a large degree, considered whether her deportation to Grenada would have deprived her of life, liberty or security of her person.

[39] For other claimants pursuing permanent residence through s. 25, most have already have had the benefit of a refugee hearing or a PRRA, with negative results. In *Singh v. Canada (Minister of Employment and Immigration*), [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, the Supreme Court concluded that a well-founded fear of persecution in Mr. Singh's country of origin was sufficient to

engage s. 7 of the *Charter*. For failed refugee claimants and those in receipt of a negative PRRA, a determination has been made that certain of the life, liberty and security interests are not at risk under Canada's international obligations (in particular, *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137, (the *Refugee Convention*) or the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Dec. 10, 1984, UNGA Res. 39/46, 39 UN GAOR Supp. (No. 51) 197 (the *Convention Against Torture*)). To the extent, however, that the right to life, liberty and security of the person, as contemplated by s. 7 of the Charter, may extend beyond those rights assessed during a refugee hearing or a PRRA, I will continue my analysis.

C. *Fundamental Justice*

[40] I turn now to a consideration of the second aspect of s. 7. Is the Applicant being deprived of her rights without application of the principles of fundamental justice? In my view, there has been no breach of fundamental justice.

[41] The jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfil three criteria (see *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 113):

1. It must be a legal principle (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503).

2. The legal principle must be one that is "vital or fundamental to our societal notion of justice" (see *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590). Stated in different terms, the principle must be viewed by society as "essential to the administration of justice" (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 8 (referred to as *Canadian Foundation*).

3. "The principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results" (*Canadian Foundation*, above, at para. 8)

[42] The Applicant submits the addition of two alleged principles are engaged: consideration of H&C factors for a foreign national prior to removal, and consideration of the best interests of the child. Does either of these alleged "principles" rise to the level of principles of natural justice? In my view, they do not.

[43] The first alleged principle of fundamental justice is the right of a foreign national to an assessment of H&C factors. Unlike the "best interests of the child" (discussed below), I am not persuaded that an assessment of humanitarian and compassionate considerations is a legal principle.

[44] What is a legal principle? The words of Chief Justice McLachlin in *Canadian Foundation*, above, at paragraph 9 provide some guidance:

> A legal principle contrasts with what Lamer J. (as he then was) referred to as "the realm of general public policy" (*Re B.C. Motor Vehicle Act*, above, at p. 503), and Sopinka J. referred to as "broad" and "vague generalizations about what our society considers to be ethical or moral" (*Rodriguez*, above, at p. 591), the use of which would transform s. 7 into a vehicle for policy adjudication.

[45] The Applicant is, in effect, seeking an appeal of her deportation on the basis that H&C considerations would warrant her remaining in Canada. In general, a foreign national has no constitutional right to enter or remain in Canada (see *Singh*, above, at para. 13; *Chiarelli*, above, at para. 24 (SCC); *Medovarski*, above, at para. 46).

[46] Further, a foreign national has no right to come to or remain in Canada because of her personal H&C circumstances. The situation faced by the Applicant (and others in her situation) is similar to that considered by the Supreme Court in *Chiarelli*, above. In that case, Mr. Chiarelli was being deported because of serious criminal convictions. By operation of the *Immigration Act*, 1976, S.C. 1976-77, c. 52, he was not permitted to have all of the circumstances of his situation considered by the of the Immigration and Refugee Board, Immigration Appeal Division (IAD). In other words, the IAD was not able to hear an appeal from Mr. Chiarelli on H&C grounds that could have resulted in a stay of his deportation; Mr. Chiarelli was deprived of the ability to make such submissions. With respect to the right to appeal on H&C grounds, the Court commented that Mr. Chiarelli had no substantive right to an appeal on compassionate grounds. “It is entirely within the discretion of Parliament whether an appeal on this basis is provided” (*Chiarelli*, above, *at* para. 43). In *Chiarelli*,

the Court held that the removal of Mr. Chiarelli prior to review of compassionate factors did not amount to a breach of natural justice.

[47] If it is within the discretion of Parliament whether to provide for an H&C review prior to a deportation, it is certainly within Parliament's discretion to establish fees to access such an appeal process. I conclude that an H&C assessment prior to deportation is not a legal principle and, thus, cannot be a principle of fundamental justice to which s. 7 applies.

[48] The second alleged principle of fundamental justice is the "best interests of the child". This alleged principle does not apply to the Applicant; she is childless. However, the Intervener (in particular, LIFT) has intervened and provided extensive arguments on this point.

[49] In *Canadian Foundation*, above, the Canadian Foundation for Children, Youth and the Law (the Foundation) sought a declaration that the exemption from criminal sanction for parents or teachers who corporally punished children was unconstitutional. This was on the basis that the provision violated s. 7 of the *Charter*. The Foundation argued that the provision in the *Criminal Code*, R.S.C. 1985, c. C-46 failed to give procedural protections to children, did not further the best interests of the child, and was both overbroad and vague. In respect of the best interests of the child, Chief Justice McLachlin, writing for the majority of the Court, agreed that "the best interests of the child" was a "recognized legal principle" (*Canadian Foundation*, above, at para. 8). However, Chief

Justice McLachlin found that the “best interests of the child” was not a principle of natural justice (*Canadian Foundation*, above, at paras. 10-12).

> However, the "best interests of the child" fails to meet the second criterion for a principle of fundamental justice: consensus that the principle is vital or fundamental to our societal notion of justice. The "best interests of the child" is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice. Article 3(1) of the *Convention on the Rights of the Child* describes it as "a primary consideration" rather than "the primary consideration" (emphasis added). Drawing on this wording, L'Heureux-Dubé J. noted in *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, at para. 75:
>
> > [T]he decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.
>
> It follows that the legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests. Society does not always deem it essential [page95] that the "best interests of the child" trump all other concerns in the administration of justice. The "best interests of the child", while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice.
>
> The third requirement is that the alleged principle of fundamental justice be "capable of being identified with some precision" (*Rodriguez*, above, at p. 591) and provide a justiciable standard. Here, too, the "best interests of the child" falls short. It functions as a factor considered along with others. Its application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield, particularly in areas of the law where it is one consideration among many, such as the criminal justice system. It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

> To conclude, "the best interests of the child" is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice.

[50] I agree and would conclude that, for the same reasons given by Justice McLachlin in *Canadian Foundation*, the “best interests of the child” is not a principle of fundamental justice.

D. *Conclusion on this issue*

[51] In conclusion on this issue, I find that the deportation of the Applicant prior to consideration of H&C factors does not engage the liberty and security issues protected by s. 7 of the *Charter*. In any event, since neither the assessment of H&C factors or of the best interests of the child are principles of fundamental justice to which s. 7 of the *Charter* applies, it follows that there is no breach of s. 7 of the *Charter*.

VII. Issue #3 (b): Does the failure of the government to provide for waiver of fees violate Section 15 of the *Charter*?

A. *Nature of the s. 15 Issue*

[52] The Applicant and Interveners (in particular CCPI) advance two different arguments under s. 15(1) of the *Charter*. First, they submit that persons living in poverty are protected under s. 15 of the *Charter;* thus, the Minister’s failure to provide a fee waiver entails an improper failure to exercise the discretion available under s. 25 of *IRPA*. In the alternative, they assert that, by failing to

provide for a fee waiver pursuant to the regulation-making authority of s. 89 of *IRPA*, the government violates s. 15.

[53] Section 15(1) of the *Charter* provides as follows:

Equality before and under law and equal protection and benefit of law	Égalité devant la loi, égalité de bénéfice et protection égale de la loi
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[54] As I have already determined that the Minister has no discretion to waive fees under s. 25 of *IRPA*, the first argument fails. Thus, the question before me is directed at the failure of the government to enact, by regulation under s. 89 of *IRPA*, a waiver of fees for in-Canada H&C applications for persons who live in poverty. Does this failure deprive the Applicant from her right to equality under s. 15 of the *Charter*?

[55] The question before me is comparable to the situation before the courts in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 where the hospital system had failed to provide interpretative services for deaf patients to allow them to communicate with medical service providers. In *Eldridge*, as before me, there was a regulation-making authority, which had not been acted upon by the Government of British Columbia. The Supreme Court (at paragraph 77) stated that:

> The provision [s. 15] makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government would be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.

[56] Thus, I am faced with a question that could result in a determination that the government's failure to make a distinction on the basis of poverty produces discrimination within the meaning of s. 15 of the *Charter*.

[57] The Applicant bears the burden of establishing, on a balance of probabilities, the elements of s. 15 discrimination (see *Miron v. Trudel* [1995] 2 S.C.R. 418 at para. 36).

[58] I turn now to the s. 15 analysis.

B. *The s. 15 framework*

[59] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 has long been considered to be the foundational jurisprudence for a s. 15 analysis. The Supreme Court of Canada called for "an analysis of the full context surrounding the claim and the claimant". In *Law v. Canada*, [1999] 1 S.C.R. 497, at paragraph 88, Justice Iacobucci (writing for a unanimous court) set out guidelines that reflected three broad inquiries:

1. Does the law, program or activity, based on a personal characteristic, impose differential treatment between the claimant and others with whom the claimant may fairly claim equality?

2. Is the differentiation based on one or more of the enumerated or analogous grounds?

3. Does the differentiation amount to a form of discrimination that has the effect of demeaning the claimant's human dignity?

[60] The *Law* framework was revisited In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483. In *Kapp*, the Supreme Court reasserted *Andrews* as the seminal decision and focused on the "underlying identification of the perpetuation of disadvantage and stereotyping as the primary

indicators of discrimination" (*Kapp*, above, at para. 23). With respect to the multi-step analysis of *Law*, the Supreme Court stated the following:

> Viewed in this way, Law does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in Andrews and developed in numerous subsequent decisions. The factors cited in Law should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in Andrews - combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping
>
> (*Kapp*, above, at para. 24).

[61] In the result, I am taught by the jurisprudence to employ the two-step analysis enunciated in *Kapp*, above, at paragraph 17:

1. Does the failure of the GIC to establish waiver for persons in poverty create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[62] The first question requires that I address sub-issues. First, does the failure create a distinction based on a personal characteristic or fail to take into account the Applicant's already disadvantaged position in Canadian society, as compared to others? This involves identifying what is known as the comparator group. Secondly, is such a distinction based on an enumerated or analogous ground? Finally, only if there is a distinction based on an enumerated or analogous ground, do I need to turn to an examination of whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

C. *Comparator group and distinction*

[63] I begin my analysis by first identifying the appropriate comparator group for the s. 15 analysis. The Supreme Court has emphasized that equality is a comparative concept and that an analysis under s. 15 requires that a comparison be made between a group with which the claimant identifies and some other group. In *Hodge v. Canada*, 2004 SCC 65, [2004] 3 S.C.R. 357, at paragraph 23, the SCC offered guidance on the section of the appropriate "comparator group":

> The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter.

[64] The submission of the Interveners rests on the argument that s. 25 is discriminatory to the group of individuals who receive social assistance and who can be categorized as experiencing the social condition of poverty. The comparator group would therefore be foreign nationals who seek to make an in-Canada H&C Application and who are not impecunious nor in receipt of social assistance.

[65] Having identified the comparator group, the next question is whether s. 25 has created a distinction between the Applicants and those in the comparator group on the basis of an analogous ground.

[66] I am not convinced that application of the applicable statutory scheme results in a differential effect that effectively bars the H&C review for those foreign nationals living in poverty. There is no evidence to suggest that those foreign nationals who manage to file H&C applications, complete with the processing fee, are not impecunious and not in receipt of social assistance. Indeed, the evidence produced by the Minister suggests, by implication, that some persons living in poverty have paid the applicable fee (see the discussion below beginning at paragraph [95]). Further, the volume of applications for judicial review of H&C decisions brought to the Federal Court by those on social assistance suggests that impecunious and social assistance recipients have been able to access the procedure set out in s. 25 of *IRPA* (see, for example, *Veitch v. Canada (Minister Of Citizenship And Immigration)*, 2008 FC 1400; *Tharmalingam v. Canada (Minister Of Citizenship And Immigration)*, 2008 FC 463; *Palumbo v. Canada (Minister of Citizenship and Immigration*), 2009 FC 706).

[67] If I can find no distinction made on the basis of poverty that denies an equal benefit or imposes an unequal burden, it appears to me that the s. 15 argument must fail. In spite of my concerns, I will continue the analysis. Without deciding, I am prepared to accept, at this stage of the analysis, that persons living in such poverty that they cannot afford the processing fee face a distinction as compared to the comparator group.

D. *Enumerated or analogous ground*

[68] Having established a comparator group and assuming that there is discrimination, I move to a consideration of whether the government failure to establish a waiver of fees for persons in

poverty discriminates against that group on the basis of an enumerated or analogous ground. In other words, is poverty included in the protection offered by s. 15(1)?

[69] Section 15 of the *Charter* recognizes the right to equal protection and equal benefit of the law without discrimination for several specified or enumerated grounds. To prove discrimination, the claimant must show that the unequal treatment is based on one of the grounds expressly mentioned in s. 15(1) -- race, national or ethnic origin, colour, religion, sex, age or mental or physical disability -- or some analogous ground. Not all inequities are "worthy of constitutional protection" (see *Miron*, above, at para. 31).

[70] Poverty is not an enumerated ground. Thus, any protection provided under s. 15 may only be afforded to the Applicant on the basis that poverty is an analogous ground. The Applicant and Interveners argue that it does. I disagree.

[71] On the issue of whether a ground constitutes an analogous ground for the purposes of s. 15, the jurisprudence from the Supreme Court teaches that unacceptable forms of discrimination are those that focus on "personal characteristics", which are somehow inherently part of an individual's identity (*Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13):

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable

> only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.
>
> [Emphasis added]

[72] In short, the test is whether poverty is a personal characteristic that is either: (1) actually immutable; or (2) constructively immutable because it is changeable only at unacceptable cost to personal identity or, put differently, a characteristic that the government has no legitimate interest in expecting the individual to change.

[73] Can it be said, in the case before me, that the characteristic of being impecunious or in receipt of social assistance is a personal characteristic that is inherently part of an individual's identity or is one that the government does not have a legitimate interest to be changed?

[74] I begin by noting that the very notion of poverty as a social condition is somewhat problematic. The argument of the Applicant and CCPI is based on a conceptualization of poverty as a social condition, which refers not only to a person's economic status or income level but rather to a long-term condition that encompasses the social dimensions associated with inadequate income (such as stigma, stereotype and social exclusion).

[75] I am not sure that such a distinction can be made. Financial circumstances may change; individuals may come into and out of the state of poverty and experience the social consequences that follow. Further, even if I were to accept the concept of poverty as a social condition, there is no clear evidence which links durable poverty to any particular group of people. There are numerous factors that contribute to situations in which persons experience long periods of durable poverty. This would not be a social condition that occurs only to a particular demographic or a particular discrete or insular minority or group that historically has suffered discrimination.

[76] More importantly, for the purposes of s.15, it cannot be said that the state of being in the social condition of poverty or in receipt of social assistance is a personal characteristic that cannot be changed, such that certain people are inevitably poor or impoverished and will continue to be this way for a sustained period because that is an inherent part of who they are. As expressed by Justice Fichaud in *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17, 275 N.S.R. (2d) 214 at paragraph 42: “Poverty is a clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources. Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age.”

[77] I would also adopt Justice Fichaud’s reasoning in finding that neither the social condition of poverty, nor the receipt of social assistance is a characteristic that the government does not have a legitimate interest to expect to be changed. On the contrary, “the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances attending an

immutable characteristic, but to eradicate that mutable characteristic of poverty itself" (*Boulter*, above, at para.42).

[78] The Applicant and CCPI rely on the decision of the Ontario Court of Appeal in *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.).

[79] In *Falkiner*, the Court was called upon to determine whether the definition of "spouse" in s. 1(1)(d) of Regulation 366, R.R.O. 1990, as amended by O. Reg. 409/95, under the *Family Benefits Act*, R.S.O. 1990, c. F.2, infringed s. 15(1) of the *Charter*. Because of the impugned definition, persons adversely affected shared three relevant characteristics: "they are women, they are single mothers solely responsible for the support of their children and they are social assistance recipients" (*Falkiner*, at para. 70). As described by the Court of Appeal, the equality claim in *Falkiner* alleged "differential treatment on the basis of an interlocking set of personal characteristics" (*Falkiner*, above, at para. 72).

[80] For purpose of its s. 15 analysis, the Court recognized the receipt of social assistance as an analogous ground, summarizing its views in paragraph 92:

> The Divisional Court also recognized that social assistance recipients deserved s. 15 protection. The Divisional Court, however, defined the analogous ground more narrowly as sole support parents on social assistance or single mothers on social assistance. The intervener LEAF supported the Divisional Court's characterization. It seems to me, however, that recognizing the broader or more general category, receipt of social assistance, is preferable. It is more truly analogous to the enumerated grounds, which themselves are general; it conforms to the similar protection accorded to social assistance recipients in human rights legislation; it recognizes a group that is vulnerable to discrimination and that historically has been subjected to negative stereotyping; and it simplifies the equality analysis under

> s. 15. By contrast, recognizing as analogous a highly specific ground like sole support mothers on social assistance makes the s. 15 analysis, which is difficult enough, unnecessarily complex. Moreover, single mothers on social assistance already receive twofold s. 15(1) protection on the grounds of sex and marital status. What is novel about the respondents' position is that they seek recognition that their status as social assistance recipients is also relevant to the equality analysis. In my view, the most coherent way to achieve this is to recognize receipt of social assistance as an analogous ground.

[81] While the Court of Appeal accepted the receipt of social assistance as an analogous ground, the Court's analysis cannot be separated from the multi-faceted set of characteristics of the affected persons. The Court's conclusion (above, at paragraph 105) demonstrates that identification of the receipt of social assistance as an analogous ground is inseparable from the facts of the *Falkiner* case:

> I conclude that the 1995 definition of spouse in s. 1(1)(d)(iii) of Regulation 366 under the *Family Benefits Act* imposes differential treatment on the respondents on the combined grounds of sex, marital status and receipt of social assistance and that this differential treatment discriminates against them, contrary to s. 15 of the Charter.

[82] In other words, the Court in *Falkiner* did not determine that the affected persons suffered discrimination simply because they received social assistance.

[83] Five years later, in *R. v. Banks*, 2007 ONCA 19, 84 O.R. (3d) 1, leave to appeal denied [2007] SCCA No. 139, a different panel of the Ontario Court of Appeal held that anti-panhandling legislation did not violate s. 15(1). On the issue of analogous ground, Justice Juriansz (at paras. 104 and 105) stated as follows (albeit in *obiter*):

> It is worth noting that the appellants took care not to argue that "poverty" in and of itself is a ground of discrimination. While the "poor" undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The "poor" are not a discrete and insular group defined by a common personal characteristic. While it is common to speak of the "poor" collectively, the group is, in actuality, the statistical aggregation of all individuals who are economically disadvantaged at the time for any reason. Within this unstructured collection, there may well be groups of persons defined by a shared personal characteristic that constitute an analogous ground of discrimination under s. 15.
>
> *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), on which the appellants rely, is distinguishable from the present case. The differential treatment in that case was based on three grounds: sex, marital status and "receipt of social assistance". Falkiner did not recognize poverty as a ground of discrimination.

[84] The very recent decision of the Nova Scotia Court of Appeal in *Boulter*, above, is almost directly on point. In that case, a number of persons were challenging a provision of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 that did not permit the Nova Scotia Utility and Review Board (the Board) to set a lower rate for low income consumers than the rate chargeable to other consumers for the same electrical service. Nova Scotia Power Incorporated (NSPI), a virtual monopolist, provides electrical service. The Board must approve all rates charged by NSPI. Under s. 67(1) of the *Public Utilities Act* all rates must be charged equally to all persons. In *Boulter*, the claimants challenged the validity of s. 67(1). They submitted that poverty is an analogous ground under s. 15(1) of the *Charter* and that s. 67(1)’s exclusion of the option for an ameliorative program

to assist the poor discriminates contrary to s. 15(1). It is interesting to note that, in *Boulter*, Mr. Bruce Porter, who has also brought his opinions to this Court, appeared as an expert witness before the Board.

[85] The Court of Appeal analyzed the s. 15(1) *Charter* claim, in accordance with the Supreme Court of Canada guidance in *Law* and *Kapp* and concluded that "Poverty *per se* does not suit the legal pattern for an analogous ground under Corbière's formulation (*Boulter*, above, at para. 42).

[86] In short, the applicants in *Boulter* brought the same argument to the Board and, in appeal, to the Nova Scotia Court of Appeal as the Applicant and Interveners now bring to this Court. In *Boulter*, the Court did not find that poverty is an analogous ground under s. 15(1). I can see nothing to distinguish the case before the Nova Scotia Court of Appeal from the case before me. The only serious difference – which does not operate in favour of the Applicant – is that, unlike electricity service, persons seeking the Minister's discretion under s. 25 of *IRPA* are doing so by choice. Electrical service is as close to an essential service as one can find. In contrast, the processing of a claim for permanent residence from inside Canada is an exceptional and non-essential benefit. Persons who wish to apply for permanent residence in Canada may always do so from outside Canada even where it may be difficult for them to do so.

[87] Finally, I refer to the decision of *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134, [2007] 3 F.C.R. 411. In that case, Justice Simon Noël was asked by Ms. Guzman to strike down s. 133(1)(k) of *IRPA* on the basis that it violates section 15 of the *Charter*. Under s. 133(1)(k), Ms. Guzman, a permanent resident of Canada, was prevented from

sponsoring her husband, Mr. Cosma, as a “member of the family class” because she was in receipt of social assistance. Justice Noël declined to quash s. 133(1)(k), concluding that the receipt of social assistance by Ms. Guzman was not a “personal characteristic”. Nor did he find that the receipt of social assistance was an analogous ground. Justice Noël distinguished *Falkiner* as follows (at para. 21):

> This situation is distinguishable from *Falkiner* as in that case the individuals concerned had a long history of receipt of social assistance combined with other factors, which contributed to them being discriminated against. The Court of Appeal for Ontario in *Falkiner* found that subparagraph 1(1)(d)(iii) of Regulation 366 of the *Family Benefits Act*, R.S.O. 1990, c. F-2, discriminated on the grounds of sex, marital status and the receipt of social assistance. In contrast to *Falkiner*, in the case at hand the only ground for discrimination alleged is that of receipt of social assistance, and there is no indication in the record that the applicant's receipt of social assistance is of any permanency.

[88] The Federal Court of Appeal dismissed the appeal of Ms. Guzman, on the basis of mootness; Mr. Cosma had left Canada after the Federal Court decision (*Guzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 358; leave to SCC dismissed, [2008] S.C.C.A. No. 4).

[89] In sum, but for the *Falkiner* decision, there is no post-*Corbière* jurisprudence supporting the position of the Applicant and Interveners. Even the *Falkiner* decision can be readily distinguished. There is not one case where a Court has concluded that poverty – in and of itself – is an analogous ground. For the same reasons as expressed by Justice Fichaud in *Boulter*, Justice Juriansz in *Banks*, and Justice Noël in *Guzman*, I do not accept poverty as an analogous ground.

[90] In conclusion on this question, the Applicant has not persuaded me that the failure of the government to provide for fee waivers for persons living in poverty is based on an enumerated or analogous ground.

E. *Discrimination*

[91] Having determined that any distinction between the Applicant and those in the comparator group is not based on an enumerated or analogous ground, there is no need to proceed with the second part of the *Kapp* analysis. However, were I to do so, I would conclude that the Applicant and CCPI fail to persuade me that the distinction creates a disadvantage by perpetuating prejudice or stereotyping. My reasons follow.

[92] As taught by the jurisprudence, at this final stage of the analysis, a number of contextual factors are relevant. Those factors include:

1. Pre-existing disadvantage, stereotyping, prejudice or vulnerability;

2. Relationship or correspondence between the ground on which the claim is based and actual need, capacity or circumstances of the claimant;

3. Ameliorative purpose or effects of the law upon more disadvantaged persons or group; and

4. Nature and scope of the interest affected by the impugned law.

[93] The Applicant put forward the affidavit evidence of Mr. Porter to address the question of the disadvantages, stereotyping, prejudice and vulnerability of persons living in poverty. Mr. Porter is the Director of the Social Rights Advocacy Centre and describes himself as "a consultant and researcher in the area of discrimination, poverty and human rights". He is also a Coordinator of CCPI and, in that capacity, has played a role in interventions in a number of legal cases in Canada. In this case, he was retained to assess "the effect of the absence of a fee waiver for applications for Humanitarian and Compassionate consideration under section 25(1) of the Immigration and Refugee Protection Act on social assistance recipients". In his affidavit, Mr. Porter concludes that:

> [T]he absence of a fee waiver for those living in poverty seeking Humanitarian and Compassionate consideration perpetuates negative stereotypes and stigma attached to social assistance recipients and low income families, newcomers, persons with disabilities and racialized minorities and robs them of the sense of being valued as members of society worthy of equal dignity and respect.

[94] While I do not for a minute doubt Mr. Porter's sincerity and passion, I have serious difficulties with his evidence in this case. Compared to the evidence provided by the Respondent, Mr. Porter makes broad, generalized statements unsupported by empirical data or analysis. He appears to have no direct experience in the field of immigration. His comments and opinions with respect to immigration are apparently based on anecdotal and hearsay information. Further, in spite of the fact that he is not a lawyer, Mr. Porter purports to provide legal opinions (for example, on the interpretation of the *Charter* and on the "rights affirmed in the decision of the Supreme Court of Canada in *Baker*"). Quite simply, his opinion does not meet the basic threshold of either reliability or relevance (see *R. v. Mohan*, [1994] 2 S.C.R. 9).

[95] The Applicant faces further evidentiary problems with respect to the second and third factors listed above. The Applicant points to her own affidavit and other affidavit evidence showing that some foreign nationals are unable to pay and thus receive consideration of their in-Canada H&C applications. However, this evidence (other than from the Applicant) is purely anecdotal and hearsay.

[96] On the other hand, the Minister's evidence provides reliable evidence of the numbers of H&C applications and analysis of the data. It appears from the statistical data that large numbers of foreign nationals are able to file in-Canada H&C application, in spite of the fee. Highlights of those data, as presented in the affidavit evidence of Ms. Martha Justus, Acting Director, Strategic Research and Statistics Division, Research and Evaluation Branch, CIC, are as follows:

- In 2008, 2456 foreign nationals made in-Canada H&C applications (this counts every individual within an application). The number of applicants has diminished steadily and significantly from 2003 when 10439 foreign nationals sought in-Canada landing. Part of the decrease can be attributed to the 2005 policy that now permits claimants to apply from within Canada as members of the "spouse and common-law partner in Canada class".

- The Minister's evidence does not indicate that women are disadvantaged in making applications. Rather, women file a large number of H&C applications as the principal applicant in a group (794 female to 892 male, in 2008). Further, more than 50% of successful H&C applications for permanent resident status are women

(18,112 females to 15,249 males for the period 2003 to 2008). In 2003, principal claimants identified their marital status as married or in a common-law relationship in 674 cases and as divorced, single, separated or widowed in 1012 cases. If poverty affects single persons or women disproportionately, the H&C application statistics do not appear to be reflect this disproportionate effect.

- Level of education, which also correlates strongly to poverty, shows a wide variation in those foreign nationals who are ultimately accepted for permanent residence through the in-Canada application process. Or the period 2003 to 2008, about 33% of those admitted had less than nine years of education.

- Foreign nationals from over 30 nations commenced H&C applications in the period from 2003 to 2008.

[97] Given this evidence, it is reasonable to infer that foreign nationals living in poverty are filing in-Canada H&C applications. Based on my review of the statistical evidence, I am unable to conclude that poverty prevents any significant number of foreign nationals from filing in-Canada H&C applications. The need to waive the fees to allow persons who can be distinguished on the basis of poverty is simply not demonstrated. There is no evidence that shows that foreign nationals who are living in poverty suffer disproportionate hardship that can be attributed to the failure of the government to provide for fee waivers.

[98] The final factor asks the Court to examine the nature of the interest affected by the impugned law. An in-Canada H&C application provides foreign nationals with a discretionary and exceptional benefit – and not a right. As I noted earlier in these reasons, Canada's immigration laws require a foreign national to apply for residence in Canada from outside our country. Only in exceptional circumstances is this requirement waived. In some situations, the overarching commitment of Canada to international instruments (such as the *Refugee Convention* or the *Convention Against Torture*) allows a claimant to seek protection from within Canada's borders. For refugee claimants and persons who could return to the risk of torture, no fee is charged for a determination of their claims. Thus, Canada recognizes its obligations under these two important international conventions and the importance of allowing free access to government services in situations where a foreign national is impacted by such conventions.

[99] An H&C application does not fall into that category of claim. Access to the Minister's discretion is not a basic right as was considered, for example, in *Eldridge*, above. An H&C application is not meant to be another track equivalent to a claim for protection pursuant to s. 96 or s. 97 of *IRPA* or a pre-removal risk assessment.

[100] I make one additional observation. With the enactment of the *IRP Regulations*, Parliament has chosen to establish a set of criteria that must be met before an application for H&C relief can be assessed by the Minister. Section 10 of the *Regulations*, which imposes the processing fee, reflects Parliament's view on the issue of fee structure and cost recovery in the immigration and refugee protection context. While applications relating to possible risk and the need for international protection are assessed free of charge, those relating to immigration (and H&C applications for

waivers of the requirements for immigration) are assessed upon the payment of the required fee. In my view, this was a legitimate policy decision that may not lend itself to a review under s.15 of the *Charter*. In other words, the fee for processing in-Canada H&C applications "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] S.C.J. No. 37 (QL)). As noted by Justice Kroft of the Manitoba Court of Queen's Bench, in *Barker v. Manitoba (Registrar of Motor Vehicles)*, (1987) 47 D.L.R. (4th) 69:

> In a case of this kind, and when deciding whether so called economic discrimination could possibly be read into the ambit of s. 15(1), it is well to keep in mind that almost any law dealing with sales or income taxes, licence fees, tariffs or social benefits will have a different and more adverse impact on some groups of persons than others. If one were to accept that the policy decisions underlying these laws were subject to review by the court, then one would be led to the untenable conclusion that Parliament had by s. 15(1) intended to create an economically egalitarian society with judges as its supervisors.

[101] The Applicant also asserts that the fee requirement causes adverse effect discrimination on the basis of race, gender, disability and ethnic origin. This argument relies on the assertion that there are "recognized intersections" of poverty with other grounds of discrimination, such as sex, race, age and marital or family status. However, beyond a bare assertion of adverse effect discrimination, the Applicant has not shown how women, the disabled, single mothers and racial minorities have experienced discrimination as against the appropriate comparator groups for each of those alleged grounds.

[102] In order to succeed in making this argument, the Applicant and Interveners would need to show that the processing fee has an adverse effect on a disproportionate number of individuals who

are disabled, women, single mothers and racial minorities as compared to the relevant comparator group (i.e. able-bodied, men, families, non-minorities, respectively) (see *Eldridge*, above, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493). They have failed to do so. There is no evidence, for example, that more women are barred from making an H&C application because of an inability to pay than men. The same goes for the other grounds of discrimination raised. Indeed, as reflected above, the evidence is that large numbers of foreign nationals that would fall within those identified groups have found no barriers to filing in-Canada H&C applications.

[103] I would therefore reject the submissions on adverse effect discrimination.

[104] Lastly, LIFT argues that the failure to waive the H&C fees constitutes substantively differential treatment of Canadian children born to foreign national parents. LIFT seems to be saying that the *IRPA* provisions are discriminatory because Canadian children born to foreign national parents are denied the benefit of making an H&C application, as compared to Canadian children born to Canadian parents. In my view, this argument is without merit. The *IRPA* provisions relating to H&C applications are applicable only to foreign nationals who are seeking permanent resident status in Canada. They do not apply to Canadian children born to Canadian parents. Therefore, it cannot be said that the Minister's refusal to consider H&C applications where the processing fee has not been paid effectively denies the claimants a benefit that Canadian nationals are receiving.

[105] I am also not satisfied that immigrant families have somehow been denied equal protection of the integrity of their family life and the best interests of the child under international law by virtue

of the *IRPA* provisions relating to H&C applications. LIFT does not provide any examples or explanations apart from a bare assertion of discrimination. They have therefore failed to show the alleged discriminatory activity.

[106] Taken altogether, the factors do not support a finding that the failure of the government to provide for a waiver of H&C processing fees discriminates against the Applicant and others living in poverty by imposing upon them burdens or obligations that are not imposed on others. Nor does the fee impact the Applicants in a way that perpetuates the pre-existing disadvantage and stereotyping experienced by them so as to constitute discrimination.

F. *Conclusion on this issue*

[107] In sum, even if I were to accept that persons living in a state of poverty, within which they cannot afford the s. 25 processing fee, face a distinction as compared to the comparator group, the s. 15(1) claim fails. This is because I have concluded that: poverty is not an analogous ground. Further, and even if poverty were accepted as an analogous ground, there is insufficient evidence to persuade me that any distinction caused by the failure of the Minister to implement a fee waiver for foreign nationals living in poverty perpetuates the prejudice or stereotyping of persons living in poverty.

[108] In conclusion on this issue, the Applicant and Interveners have failed to satisfy me that, on a balance of probabilities, the failure of the government to implement a fee waiver is contrary to s. 15(1) of the *Charter*.

VII. Issue #4: Is the failure of the government to provide for the waiver of fees contrary to the common law constitutional right of access to the Courts or to the rule of law?

[109] The Applicant and the Intervener, CCPI, submit that the failure of the government to provide for a waiver of fees for foreign nationals who are unable to afford the processing fee is contrary to the rule of law and the common law constitutional right of access to the Courts.

[110] The Applicant and CCPI rely on the case of *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 (Div. Ct.) in support of their position. The case of *Polewsky* involved fees charged for matters coming before the Ontario Small Claims Court when the court was given no discretion to waive such fees. The Ontario Divisional Court found that the failure to waive Small Claims Court fees for indigent individuals violated both the common law right of access to courts *in forma pauperis* and the constitutional principle of the rule of law. They submit that the same principles should extend to the s. 25 in-Canada application on H&C grounds.

[111] With respect to the concept of *in forma pauperis*, the Court in *Polewsky* commented as follows (at para. 44):

> The purpose of allowing a claimant or a defendant to proceed *in forma pauperis* was to allow people who are indigent to access the courts. The concept has had a long-standing presence in the common law and has found its way into statute law. Its presence in some statutes, combined with what we find to be the common law right based upon the constitutional principle of access to the courts, buttresses our conclusion that the indigent should not be denied access to the Small Claims Court in cases where their claims or defences are meritorious and their inability to pay prescribed fees is proven on the balance of probabilities.

[112] On the issue of the common law right of access to the court, the Court (at para. 62) concluded as follows:

> . . . quite apart from the Charter, there is at common law a constitutional right of access to the courts. The fact that the provision to waive or reduce prescribed fees is omitted, deliberately or otherwise, does not make it correct in law. The result is that for persons with demonstrated inability to pay prescribed fees and with meritorious cases, there must be a statutory provision to which they can resort for relief from the requirement to pay fees.

[113] I acknowledge that the right of access to the courts is, under the rule of law, an essential element for the protection of the rights and freedoms of persons who might come before them. However, the fundamental flaw in the argument of the Applicant and CCPI is that access to the Minister under s. 25(1) cannot be equated to a right of access to the courts.

[114] Section 25(1) provides a discretionary benefit to foreign nationals. Parliament has no obligation to provide for foreign nationals to remain in Canada on H&C grounds (*Chiarelli*, above, at para. 43). Section 25 itself does not provide any right to make an in-Canada H&C application; rather, it provides an opportunity to apply for an exemption from provisions of *IRPA* or the *Regulations*. The Minister is only obliged to consider H&C factors "upon request". Immigration is not a right; nor is access to s. 25 of *IRPA*.

[115] In my view, the principles applied in *Polewsky* do not extend to discretionary administrative determinations. *Polewsky* and the jurisprudence relied on by the Applicant and CCPI (for example, *R. v. Lord Chancellor ex parte John Witham*, [1997] 2 All E.R. 779 (Q.B.); *R. v. Secretary of State for the Home Department and others, ex parte Saleem*, [2000] 4 All E.R. 814 (C.A.)) do not apply to the situation before me. In Canadian cases where the doctrine of *in forma pauperis* has been

accepted (*Polewski*, above; *Moss v. R.*, [1997] T.C.J. No. 712; *Pearson v. Canada* (2000), 195 F.T.R. 31) the context has always been access to a constitutional or statutory court.

[116] Furthermore, the provisions relating to the payment of the H&C application fee are not rendered invalid by virtue of the rule of law. The Supreme Court of Canada's statements, at paragraphs 58 and 59, in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, on the precise content of the rule of law and its application to the constitutionality of legislation is informative:

> This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*, at p. 749. The third requires that "the relationship between the state and the individual ... be regulated by law": *Reference re Secession of Quebec*, at para. 71.
>
> So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 Can. Bar Rev. 67, at pp. 114-15.

[117] The Supreme Court also cautioned, at paragraph 67: “The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour.” Applying the Supreme Court’s reasoning to the present situation, I find that the rule of law cannot be used to create a fee waiver in the context of H&C applications. This is not an appropriate application of the rule of law.

IX. Conclusion

[118] For the above reasons, I conclude that this application for judicial review will be dismissed.

[119] In general, decisions of the Federal Court in matters arising under *IRPA* are final. However, pursuant to s. 74(d) of *IRPA*, an appeal to the Federal Court of Appeal may be made “only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question”. In the recent decision of *Varela*, above , the Court of Appeal emphasized that any question certified must meet certain criteria:

- The question must be a serious question of general importance.
- The question must arise from the issues in the case and not the judge’s reasons.
- A serious question is one that is dispositive of the appeal.

- The reference in s. 74(d) to “a serious question” means that a single case will raise more than one question only as an exception to the rule that only “a” question may be certified

[120] In this case, there was more than one issue raised. Had I found in favour of the Applicant on any one of the issues, I would have allowed the application for judicial review. Accordingly, each of the issues raises a question that could be dispositive of an appeal. Further, given the number of in-Canada H&C applications that are made each year and the far-reaching impacts of a decision in favour of the Applicant on any of the issues, each of the issues is a “serious question of general importance”.

[121] All of the parties have proposed questions for certification that were similar in substance. Having reviewed the proposed questions, the following are the questions that I will certify:

1. On a proper statutory interpretation of s. 25(1) of *IRPA*, is the Minister obliged to consider a request to grant an exemption from the requirement to pay the H&C processing fee, otherwise required under s. 307 of the *IRP Regulations*?

2. Does the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to s. 25(1) of *IRPA* infringe the Applicant’s rights under s. 7 or s.15 of the *Charter*?

3. Is the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to s. 25(1) of *IRPA* contrary to either the rule of law or the common law constitutional right of access to the Courts?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Application for judicial review is dismissed; and

2. The following questions are certified:

   a) On a proper statutory interpretation of s. 25(1) of *IRPA*, is the Minister obliged to consider a request to grant an exemption from the requirement to pay the H&C processing fee, otherwise required under s. 307 of the *IRP Regulations*?

   b) Does the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to s. 25(1) of *IRPA* infringe the Applicant's rights under s. 7 or s.15 of the *Charter*?

   c) Is the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status

pursuant to s. 25(1) of *IRPA* contrary to either the rule of law or the common law constitutional right of access to the Courts?

"Judith A. Snider"
Judge

APPENDIX "A"

Immigration and Refugee Protection Act, S.C. 2001, c, 27

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Humanitarian and compassionate considerations

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

Fees

Regulations

89. The regulations may govern fees for services provided in the administration of this Act, and cases in which fees may be waived by the Minister or otherwise, individually or by class.

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

Séjour pour motif d'ordre humanitaire

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

Frais

Règlement

89. Les règlements peuvent prévoir les frais pour les services offerts dans la mise en oeuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

Immigration and Refugee Protection Regulations, SOR/2002-227

Form and content of application

10. (1) Subject to paragraphs 28(*b*) to (*d*), an application under these Regulations shall

. . .

(*d*) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations;

Division 5

Humanitarian and Compassionate Considerations

Request

66. A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa.

Application under Section 25 of the Act

Fees

307. The following fees are payable for processing an application made in accordance with section 66 if no fees are payable in respect of the same applicant for processing an application to remain in Canada as a permanent resident or an application for a permanent resident visa:

(*a*) in the case of a principal applicant, $550;

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Forme et contenu de la demande

10. (1) Sous réserve des alinéas 28*b*) à *d*), toute demande au titre du présent règlement :

. . .

d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;

Section 5

Circonstances d'ordre humanitaire

Demande

66. La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou, dans le cas de l'étranger qui se trouve hors du Canada, d'une demande de visa de résident permanent.

Demande en vertu de l'article 25 de la Loi

Frais

307. Les frais ci-après sont à payer pour l'examen de la demande faite aux termes de l'article 66 si aucuns frais ne sont par ailleurs à payer à l'égard du même demandeur pour l'examen d'une demande de séjour au Canada à titre de résident permanent ou d'une demande de visa de résident permanent :

a) dans le cas du demandeur principal, 550 $;

(*b*) in the case of a family member of the principal applicant who is 22 years of age or older or is less than 22 years of age and is a spouse or common-law partner, $550; and

b) dans le cas d’un membre de la famille du demandeur principal qui est âgé de vingt-deux ans ou plus ou qui, s’il est âgé de moins de vingt-deux ans, est un époux ou conjoint de fait, 550 $;

(*c*) in the case of a family member of the principal applicant who is less than 22 years of age and is not a spouse or common-law partner, $150.

c) dans le cas d’un membre de la famille du demandeur principal qui est âgé de moins de vingt-deux ans et n’est pas un époux ou conjoint de fait, 150 $.

FEDERAL COURT

SOLICITORS OF RECORD

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