Federal Court of Appeal  Cour d'appel fédérale

Date: 20160427

Docket: A-280-15

Citation: 2016 FCA 131

CORAM: **RYER J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

Jose de Jesus BERMUDEZ

Respondent

Heard at Vancouver, British Columbia, on March 16, 2016.

Judgment delivered at Ottawa, Ontario, on April 27, 2016.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: RYER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] At issue in this appeal is whether a Canada Border Services Agency (CBSA) Hearings Officer (Hearings Officer) has the discretion to consider circumstances or factors that are not explicitly listed in section 108 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

[IRPA], more precisely humanitarian and compassionate factors and the best interests of the child (H&C), when assessing whether an application for cessation of refugee protection (cessation application) should be submitted to the Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD) for a determination that refugee protection has ceased for any of the reasons described in subsection 108(1) of the IRPA, particularly in instances involving a refugee who acquired permanent resident status in Canada.

[2] In a decision dated June 8, 2015 (2015 FC 639), a Federal Court Judge (the Judge) held that a Hearings Officer has the discretion to consider H&C factors when assessing whether a cessation application should be filed with the RPD. On this basis, the Judge granted Mr. Bermudez' (respondent) application for judicial review and set aside the decision made by the Hearings Officer to submit a cessation application to the RPD for determination as to whether the respondent's refugee protection had ceased:

> In my view, a Hearings Officer retains the discretion not to make a cessation application when she is of the view that the evidence before her does not support a reavailment determination under section 108. To arrive at that determination, she must have regard to the submissions of the individual concerned and not simply to their travel history. The Officer in this instance failed to consider relevant submissions and for that reason the application must be granted and the matter remitted for reconsideration by another Officer.
>
> (Judge's reasons, at para. 39)

[3] In so doing, the Judge agreed that the Hearings Officer, a delegate of the Minister of Citizenship and Immigration (Minister) under the IRPA, was not compelled to submit a cessation application in any and all of the circumstances listed under subsection 108(1) of the IRPA and in fact had discretion to refrain from making a cessation application on the basis of H&C

considerations. By failing to do so in the present case, the Hearings Officer fettered her discretion and committed a reviewable error, according to the Judge.

[4] In reaching this conclusion, the Judge emphasized that the respondent not only had refugee protection under the IRPA but also acquired permanent resident status when he entered Canada. The Judge accepted the respondent's argument to the effect that permanent residence is a status "'that attracts much greater stability, longevity and associated rights' than that of a foreign national" (Judge's reasons, at para. 30).

[5] This appeal is brought by the Crown and comes to our Court by way of paragraph 74(*d*) of the IRPA. The Judge, in rendering his judgment, certified that a serious question of general importance, that is one that is dispositive of this appeal, was at issue. The certified question reads as follows:

> Does the CBSA hearings officer, or the hearings officer as the Minister's delegate, have the discretion to consider factors other than those set out in s. 108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to s. 108(2) in respect of a permanent resident?

[6] Neither the issues raised before the Judge, nor the decision on appeal, nor the submissions of the parties contemplate specific factors beyond those set out in subsection 108(1) other than H&C considerations and the best interests of the child. As such, I would reformulate the certified question as follows:

> Does the CBSA Hearings Officer, or the Hearings Officer as the Minister's delegate, have the discretion to consider H&C factors and the best interests of a child, when deciding whether to make a cessation application pursuant to subsection 108(2) in respect of a permanent resident?

[7] For the reasons that follow, I propose to allow the appeal. The certified question should be answered in the negative and the decision of the Hearings Officer should stand.

II. Factual Background and Procedural Context

[8] The respondent was approved for refugee protection from within his native Colombia, where he was the victim of paramilitary violence and members of his family were killed in a massacre on May 31, 2001. He entered Canada on August 18, 2006 and, as a member of the "Source Country" refugee class, he acquired permanent resident status upon arrival.

[9] The respondent subsequently returned to Colombia in 2008 and 2009. On both occasions, he took measures to avoid detection in Colombia. The purpose of his trips to Colombia was to meet and marry his then fiancée. The wedding was postponed due to his fiancée's mother's health and, ultimately, their engagement was terminated.

[10] In June 2011, the respondent applied for Canadian citizenship and declared his 2008 and 2009 trips to Colombia as part of his citizenship application.

[11] On February 5, 2014, the respondent entered Canada following a trip to Mexico and was questioned by a CBSA Officer. The CBSA Officer noted that the respondent was carrying a Colombian passport that contained evidence of his two previous trips to Colombia. On that basis, the respondent's file was brought to the attention of the CBSA Hearings Officer for cessation consideration.

[12] On May 26, 2014, the respondent's counsel filed written submissions with the CBSA Hearings Officer requesting that a cessation application not be made for H&C reasons. Included as part of the respondent's submissions was his affidavit sworn on May 26, 2014, articles and reports relating to the massacre in Colombia and the current status of paramilitary groups, as well as letters of support from many of the respondent's family members.

[13] The respondent's submissions proved unsuccessful and, on July 7, 2014, the Hearings Officer submitted the cessation application to the RPD under subsection 108(2) of the IRPA for a determination as to whether the respondent's refugee protection had ceased. The cessation application indicated the following grounds in support of the contention that the respondent had voluntarily reavailed himself of the protection of his country of nationality and that refugee protection had accordingly ceased:

> 4. At the time of his landing, the Respondent was in possession of a passport issued by the Republic of Colombia on November 9, 2005.
>
> 5. The Respondent used this passport to travel to Colombia on the following occasions:
>
> a. From December 9 2008 to January 8 2009; and
> b. From December 12 2009 to February 15 2010.
>
> 6. The latter entry to Columbia [*sic*] on December 12 2009 is not established by a passport stamp, but was indicated by the Respondent himself in submissions provided to CBSA through his counsel on May 26, 2014. The exit stamp from Columbia [*sic*] on this latter trip (February 15 2010) does not appear in the Respondent's passport.
>
> 7. The Respondent also used this passport to enter the United States of America on at least eight occasions, and used it to enter Mexico once in 2014.
>
> 8. On the basis of the attached evidence, the Minister submits that the Respondent has voluntarily re-availed herself [*sic*] of the protection of her [*sic*] country of nationality, and is a person described in [the] IRPA [paragraph] 108(1)(*a*).
>
> (Appeal Book, at p. 281)

[14] The respondent sought judicial review of that decision in the Federal Court. As explained earlier, the Judge granted the application for judicial review and the Crown now appeals the Judge's decision pursuant to paragraph 74(*d*) of the IRPA.

III. Relevant Statutory Provisions

[15] The circumstances under which cessation of refugee protection occurs are set forth under the IRPA at section 108:

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	**108** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
(*a*) the person has voluntarily reavailed themself of the protection of their country of nationality;	*a*) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
(*b*) the person has voluntarily reacquired their nationality;	*b)* il recouvre volontairement sa nationalité;
(*c*) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;	*c*) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;
(*d*) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or	*d*) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.

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

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

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

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

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

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

[16] A final determination pursuant to subsection 108(2) results in inadmissibility pursuant to section 40.1 of the IRPA:

40.1 (1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.

(2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(*a*) to (*d*).

40.1 (1) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire.

(2) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)*a*) à *d*), la perte de l'asile d'un résident permanent emporte son interdiction de territoire.

[17] Section 44 relates to reports on inadmissibility:

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44** (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.
(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.	(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

[18] Finally, paragraph 46(1)(*c*.1) provides that permanent resident status is lost when a positive cessation decision occurs:

46 (1) A person loses permanent resident status …	**46** (1) Emportent perte du statut de résident permanent les faits suivants: […]

(*c.*1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(*a*) to (*d*)	*c.*1) la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)*a*) à *d*), la perte de l'asile;

IV. Issues

[19] I would frame the issues raised in this appeal as follows:

1) Was the judicial review application before the Judge premature?

2) Does the Hearings Officer have discretion to consider H&C factors when deciding whether to make a cessation application pursuant to subsection 108(2) in respect of a permanent resident?

3) Did the Hearings Officer breach a duty of procedural fairness?

V. Standard of Review

[20] Because this is an appeal from a decision of the Federal Court on an application for judicial review, the role of this Court is to determine whether or not the Judge correctly identified the standard of review and, then, whether or not he properly applied it (*Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-57).

[21] Regarding the first issue set forth above, i.e. whether the judicial review application was premature, this involves the exercise of discretion. An appellate court will only interfere in the absence of a legal error or an error in legal principle, if it can be shown that there is a readily apparent error that could change the result of the case (*French v. Canada,* 2016 FCA 64, [2016]

F.C.J. No. 238 (QL); *Contrevenant no 10 c. Canada (Procureur général)*, 2016 CAF 42, [2016] A.C.F. no 176 (QL); *Turmel v. Canada*, 2016 FCA 9, [2016] F.C.J. No. 77 (QL)). As per *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 [*Kanthasamy*], at paragraphs 43 and 44, the second issue, stemming from a certified question is one of statutory interpretation and is reviewable on a standard of reasonableness (see also *Canada (Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237, [2015] F.C.J. No. 1324 (QL), leave to appeal to S.C.C. granted, 36784 (April 14, 2016)). Finally, the third issue, which relates to the principles of procedural fairness, was first raised by the Judge. As such, whether or not these principles were properly applied, it attracts the standard of correctness.

VI. Analysis

A. *Legislative Framework*

[22] Cessation of refugee protection is a concept that has formed part of Canada's immigration law since it first ratified the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, Can TS 1969, No. 6. Its current incarnation is expressed at section 108 of the IRPA and is based on the premise that refugee protection is a temporary remedy against persecution. It is no longer available when the circumstances enumerated in subsection 108(1) of the IRPA arise.

[23] The circumstances enumerated in subsection 108(1) of the IRPA include cases in which a person has voluntarily reavailed themselves of the protection of their country of nationality,

including by travelling to that country or by travelling elsewhere using that country's passport. Such circumstances can trigger a cessation application which leads to a determination by the RPD. Prior to 2012, as in the case of the respondent, the law was such that a cessation of refugee protection did not affect a person's permanent resident status.

[24] However, since 2012, legislative amendments enacted by Parliament through the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17, ss. 18-19 (2012 amendments) now provide that when a CBSA Officer submits a cessation application to the RPD, that in turn can lead the RPD to a final determination that refugee protection has ceased pursuant to paragraphs 108(1)(*a*) *to* (*d*), and loss of permanent resident status ensues – i.e. one becomes inadmissible under the IRPA (section 40.1 and paragraph 46(1)(*c*.1) of the IRPA).

[25] In addition, the 2012 amendments provide that cessation of refugee protection also entails the following under the IRPA:

- the refugee claim in question is deemed to have been rejected (s. 108(3));
- the person at issue no longer has the right to work or study without a permit (s. 30(1));
- the person at issue has no right of appeal to the Refugee or Immigration Appeal Divisions (para. 110(2)(*c*), s. 63(3));
- the person at issue is not entitled to a statutory stay of removal pending their judicial review of a cessation decision (ss. 231(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227); and
- the person at issue is subject to removal from Canada "as soon as possible" (ss. 48(2)).

[26] Against this legislative background, I now turn to the issues raised in this appeal.

B. *Was the Judicial Review Application before the Judge Premature?*

[27] The Crown placed considerable emphasis on the prematurity argument, asserting that the Judge erred in law in failing to exercise his discretion to dismiss the judicial review application on the grounds that it was premature. However, considering the issues put before the Judge, as well as the fact that a number of the provisions to be considered in this case (such as section 40.1 and paragraph 46(1)(*c*.1)) were brought as amendments to the IRPA in 2012, I am not prepared to conclude that the Judge made an error in exercising his discretion and that it was premature to address the issues at bar.

C. *Cessation of Refugee Protection under the IRPA*

[28] I would define the central issue in this appeal – i.e. whether the CBSA Hearings Officer has discretion to consider H&C factors when deciding to submit a cessation application to the RPD pursuant to subsection 108(2) – as one of interpretation of the IRPA's refugee protection cessation regime. This, in turn, requires a consideration of the respective roles and powers of the Hearings Officers and the RPD in addressing the cessation of refugee protection under the IRPA.

[29] The Judge in the present case held that the Hearings Officer had discretion to consider H&C factors to forestall a cessation application. He did so by implying that Hearings Officers are directed to consider the evidence as a whole outside the scope of the circumstances listed under section 108, including, in this case, H&C considerations. With respect, I am of the view that this interpretation is unreasonable as it injects considerations into section 108 of the IRPA

which were not intended by Parliament. In my view, the Judge's conclusion also fails to give due weight to key evidence in this case.

[30] First, as part of his analysis, the Judge relied on the Citizenship and Immigration Canada Enforcement Manual – 24 – Ministerial Interventions (ENF-24 manual) published in 2005 and considered the factors listed in Table 5 which apply to the exercise of discretion by the Hearings Officer. At the time of the judicial review before the Judge, the ENF-24 manual had not been updated in order to reflect the 2012 amendments to the IRPA. The ENF-24 manual has since been replaced by the CBSA Operational Bulletin: Procedures for Filing a Cessation Application at the RPD PRG-2015-07 (PRG-2015-07 manual) on February 5, 2015. On the basis of the factors listed in the ENF-24 manual, including "establishment", the Judge concluded at paragraph 38 of his reasons that the Hearings Officer is directed to consider factors of an "H&C nature", such as "establishment":

> The manual [ENF-24] contemplates that a cessation application need not be pursued if the individual in question is a permanent resident. Even where the individual is not a permanent resident, the Officer is directed to consider factors of an H&C nature such as establishment ….

[31] The Judge thus held that the factors listed in the ENF-24 manual extended to include H&C considerations on the basis that the manual directs the Hearings Officer to consider "establishment" as a relevant factor.

[32] Yet, this finding is contradicted by the evidence of a Senior Citizenship and Immigration Canada (CIC) Policy Advisor, Mr. Aaron Smith, who mentioned that the factors listed in the ENF-24 manual speak specifically to cessation criteria and are not of an H&C nature in their

proper application in this context (Transcript of the Cross-Examination of Aaron Smith, Appeal Book, Vol. I, Tab 5, at pp. 184-187). Mr. Smith explained that establishment "is a factor to consider in the assessment of whether or not … the provisions under 108(1) have been met" (*Ibid*, at p. 187, lines 30-32). Whereas establishment from an H&C perspective would mean giving independent weight to the extent to which the person is settled in Canada (factors such as whether or not the person has a spouse or children in Canada and whether or not they are employed or involved in the community), establishment in a cessation perspective is only relevant in so far as it suggests that the person has established themselves in Canada and, as such, has not re-established themselves in their country of origin. The Judge did not address this pertinent evidence in his reasons and did not explain why he ignored it.

[33] Second, the exercise of H&C discretion being exceptional by nature, there are very few references to H&C discretion under the IRPA. The main provision that addresses H&C discretion is section 25. The relevant portions of section 25 read as follows:

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of	**25** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime

this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

…

[…]

(1.2) The Minister may not examine the request if

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

…

[…]

(*c*) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was

c) sous réserve du paragraphe (1.21), moins de douze mois se sont écoulés depuis le dernier rejet de la demande d'asile, le dernier prononcé de son retrait après que des éléments de preuve testimoniale de

heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.	fond aient été entendus ou le dernier prononcé de son désistement par la Section de la protection des réfugiés ou la Section d'appel des réfugiés.
(1.21) Paragraph (1.2)(*c*) does not apply in respect of a foreign national	(1.21) L'alinéa (1.2)*c*) ne s'applique pas à l'étranger si l'une ou l'autre des conditions suivantes est remplie :
…	[…]
(*b*) whose removal would have an adverse effect on the best interests of a child directly affected.	*b*) le renvoi de l'étranger porterait atteinte à l'intérêt supérieur d'un enfant directement touché.

[34] In *Kanthasamy*, the Supreme Court of Canada very recently addressed section 25 of the IRPA, albeit in circumstances different from the ones at issue.

[35] In that case, following a rejection of a pre-removal risk assessment, Mr. Kanthasamy filed an H&C application under section 25 of the IRPA seeking to apply for permanent resident status from within Canada. It is worthy of note that section 25 of the IRPA was squarely engaged in *Kanthasamy* and the existence of the Officer's discretion was not challenged.

[36] Specifically, the issue in *Kanthasamy* was not whether the Officer had discretion to consider H&C factors under section 25, but rather whether the Officer had properly assessed the circumstances as a whole in exercising the discretion conferred by section 25 of the IRPA.

[37] Turning to the present matter, I note that the certified question uses language inspired by section 25 of the IRPA. The Court must thus consider whether H&C discretion as contemplated by section 25 should have been exercised in the context of a cessation application filed by the Hearings Officer. I am of the view that this question must be answered in the negative.

[38] Section 25 of the IRPA includes specific delegations of the Minister's authority to a limited class of individuals to exercise H&C discretion under clearly and expressly defined circumstances. It follows that non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status (*Canada (Minister of Citizenship and Immigration) v. Varga,* 2006 FCA 394, [2006] F.C.J. No. 1828 (QL), at para. 13; *Medovarski v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 51, [2005] 2 S.C.R. 539*; Esteban v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 51, [2005] 2 S.C.R. 539, at para 47). In other words, section 25 of the IRPA "was not intended to be an alternative immigration scheme" (*Kanthasamy,* at paras. 23 and 85).

[39] Parliament's intent, as reflected by the wording of section 108 of the IRPA – which was not modified by the 2012 amendments – is clear and unambiguous: a claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, if one or more of the enumerated circumstances listed in subsection 108(1) occur. The scope of section 108 is clearly defined and leaves very little room for discretion in terms of the circumstances that trigger its application. As described under subsection 108(2) of the IRPA, such circumstances trigger a process as part of which the RPD is tasked "[o]n application by the

Minister" to determine whether the refugee protection "has ceased for any of the reasons described in subsection [108](1)". It follows that the role of the Hearings Officer, as a delegate of the Minister, is to determine whether a *prima facie* case for a cessation application exists under the grounds listed at subsection 108(1) of the IRPA. If it does, the Hearings Officer accordingly proceeds with the application. The Hearings Officer's role ends there and the process is taken over by the RPD to determine if cessation of refugee protection is warranted.

[40] It is also clear from a reading of sections 40.1, 46 and 108 of the IRPA that Parliament specifically intended that the right to remain in Canada not be available to refugees who are no longer in need of state protection, including refugees who have acquired permanent residence in Canada. In other words, when circumstances as described in subsection 108(1) of the IRPA arise, and a positive determination to that effect is made by the RPD, inadmissibility under the IRPA ensues. H&C factors have simply not been deemed by Parliament to be of relevance within that context. Had Parliament intended that H&C considerations be taken into account in the cessation process, it would have used language to that effect. It has not done so.

[41] It is recalled that in this appeal, the respondent in fact contends that the Hearings Officer has discretion to consider H&C factors for the purpose of determining whether or not a cessation application should be made. Yet the respondent's counsel recognized that the RPD itself does not have such discretion. The Judge also alluded to this in his reasons (para 34). This begs the question: on what basis can a Hearings Officer be deemed to have discretion to consider H&C factors when all agree that the RPD, a quasi-judicial body, does not? There were no persuasive answers provided to the Court in this respect. In the absence of any language in the IRPA to this

effect, I cannot agree that the Hearings Officer has discretion to consider H&C factors in determining whether a cessation application should be made.

[42] With the above in mind, while I accept that the consequences of cessation of refugee protection, as well as the consequences of inadmissibility under the IRPA are significant, these consequences do not, in and of themselves, allow this Court to inject into the statute something that Parliament did not intend. It is open for Parliament to amend the IRPA such that permanent resident status not be lost in the event of a favourable cessation application, or that H&C factors be considered by Hearings Officer prior to making the application under subsection 108(2) or, more generally, that the situation *ante* the 2012 amendments prevail. Courts, however, must respect the policy choices of Parliament and apply the law as it stands.

D. *Duty of Procedural Fairness*

[43] The respondent claims that the Hearings Officer has an imposed duty of procedural fairness in the present case. In addressing this issue, the Judge relied on the decision in *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2005] F.C.J. No. 533 (QL) [*Hernandez*], a case involving a permanent resident, in which it was held that a Hearings Officer's discretion should be more broadly interpreted in order to take into consideration H&C factors. In *Hernandez*, this issue was raised in connection with subsection 44(1) of the IRPA. The Federal Court found that subsection 44(1) of the IRPA conferred a degree of residual discretion by stating that the Minister's delegate "may prepare a report".

[44] A few observations will suffice to conclude that the *Hernandez* decision is inapposite in the present case. First, *Hernandez* addressed section 44 and not section 108 of the IRPA, the wording of which differs entirely. As indicated above, section 44 uses the word "may" whereas subsection 108(1) uses the word "shall" thereby not leaving any possibility of residual discretion. Also, a number of decisions post *Hernandez*, including decisions involving permanent residents, have tended to significantly narrow the discretion contemplated at section 44 of the IRPA in *Hernandez* (*Nagalingam v. Canada (Minister of Public Safety and Emergency Preparedness),* 2012 FC 1411, [2012] F.C.J. No. 1517 (QL); *Faci v. Canada (Minister of Public Safety & Emergency Preparedness),* 2011 FC 693, [2011] F.C.J. No. 893 (QL); *Richter v. Canada (Minister of Citizenship & Immigration),* 2008 FC 806, [2009] 1 F.C.R. 675; *Spencer v. Canada (Minister of Citizenship & Immigration),* 2006 FC 990, [2006] F.C.J. No. 1269 (QL)).

[45] The Judge also referred to another Federal Court decision in *Olvera Romero v. Canada (Citizenship and Immigration),* 2014 FCA 671, [2014] F.C.J. No. 720 (QL) [*Olvera*] which also involved a permanent resident. The Federal Court in *Olvera* notably held that the Hearings Officer had no discretion to consider the factors beyond those related to paragraphs 108(1)(*a*) to (*d*) – including H&C factors – and that the duty of fairness owed by the Hearings Officer was minimal. Significantly, the Federal Court in *Olvera* was of the view that "little turn[ed] on the distinction between permanent residents and other categories of non-citizens in this case" (para. 98).

[46] In the present case, however, the Judge emphasized that such a distinction must be drawn. Referring to the *Olvera* decision, the Judge noted the importance of the outcome of a cessation application for the respondent and concluded as follows at paragraph 35:

> I agree with Justice Strickland that the participatory rights required by the duty of fairness in this context did not call for an interview or oral hearing. In my view, however, given the importance of the decision to the applicant, the duty of fairness required that the applicant be given an opportunity to present full submissions as to why the application to the RPD should not be made. As the record shows, he attempted to do so but the Hearings Officer chose to ignore the bulk of that material on the ground that the Minister considered it irrelevant. She made her decision solely on the basis of information showing the applicant's travels out of the country. In doing so, in my view, she fettered her discretion.

[47] On the basis of the above, the respondent insists that he was entitled to what can only be described as a "pre-hearing hearing" before the Hearings Officer, one that would take place prior to the full hearing before the RPD. He also submits that the wording "[o]n application by the Minister" at subsection 108(2) of the IRPA entails that the said application should only be made after an H&C assessment has been conducted by the Hearings Officer. The Hearings Officer, the respondent argues, should also provide reasons which could be judicially reviewed before the Federal Court.

[48] In reality, the respondent's submission, if accepted, would be tantamount to creating a bifurcated process under the IRPA where cessation applications involve a permanent resident. With respect, this is something that Parliament did not intend and the terms of section 108 of the IRPA do not allow for this.

[49] Indeed, it is apparent upon a plain reading of subsections 108(1) and (2) of the IRPA that Parliament intended that the RPD, a quasi-judicial body with broad procedural powers, be

responsible for determining whether cessation has occurred in any particular case, not the Hearings Officer. Thus, when a cessation application is filed before the RPD, the person at issue has an opportunity to fully and fairly present their case in an open and impartial process before the RPD. Specifically, a person appearing before the RPD can file submissions, is entitled to a full quasi-judicial hearing, has a right to counsel, has a right to call witnesses and has a right to lead evidence. This process allows the RPD to perform its adjudicative functions and make a decision as to whether a cessation application pursuant to the subsection 108(2) is allowed or dismissed. The RPD assesses the full evidence and takes into account criteria such as voluntariness, intention and whether reavailment occurred. It follows that the filing of the application under subsection 108(2) can only be viewed as a preliminary determination that triggers the proceedings before a quasi-judicial body, namely the RPD.

[50] This is not to say that the Hearings Officer does not have a duty of fairness under the IRPA for purposes of section 108. The scope of this duty, however, is minimal. Indeed, prior to filing a cessation application, the Hearings Officer can solicit additional information, review it and give it consideration with respect to subsection 108(1) grounds. The Crown itself confirmed that this is a practice that Hearings Officers can follow but it is not a mandatory one. In that regard, I note that this practice is reflected in the PRG-2015-07 manual, which has since replaced the ENF-24 manual. The PRG-2015-07 manual indicates that “in certain circumstances, it may be necessary for the Hearings Officer to gather additional information prior to making a decision to submit an Application to Cease Refugee Protection, including, as warranted, by interviewing the protected person concerned” (Joint Book of Authorities, Vol. III, Tab. 62, at p. 2). The information collected can assist the Hearings Officers in establishing whether or not there is a

prima facie case and whether it is appropriate to move forward with a cessation application. Although no rights are being determined at that stage, the Hearings Officer's assessment is subject to a minimal duty of fairness. The contextual inquiry will depend upon the context upon which it arises (*Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817, at p. 837, [1999] S.C.J. No. 39 (QL); *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, [1990] S.C.J. No. 26 (QL)).

[51] In the present case, the respondent was called to an interview and his counsel also provided submissions before the Hearings Officer with the knowledge that a cessation application was being considered. In such circumstances, it cannot be said that the Hearings Officer in any way breached the duty of fairness owed to the respondent.

[52] The respondent also takes issue with the fact that the Certified Tribunal Record (CTR) provided by the Minister was expunged of approximately 200 pages of material submitted by the respondent. As such, the respondent contends that the Hearings Officer failed to consider all of the evidence prior to making the decision to file the cessation application with the RPD.

[53] Yet, there is no conclusive evidence in the record that the Hearings Officer ignored the material at issue. Rather, the record shows that the Hearings Officer included two pages of the material as part of the CTR, which suggests that they were the only two pages that she considered to be relevant to the circumstances outlined in subsection 108(1).

[54] Since the Hearings Officer did not have the discretion to address H&C considerations in making a cessation application and there is no evidence that she failed to consider the respondent's material, I see no reason to interfere with the Hearings Officer's decision.

VII. Conclusion

[55] I would answer the certified question as follows:

Question: Does the CBSA Hearings Officer, or the Hearings Officer as the Minister's delegate, have the discretion to consider H&C factors and the best interests of a child, when deciding whether to make a cessation application pursuant to subsection 108(2) in respect of a permanent resident?

Answer: No.

[56] For these reasons, I would allow the appeal without costs.

"Richard Boivin"
J.A.

"I agree
C. Michael Ryer J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-280-15

(APPEAL FROM AN AMENDED JUDGMENT OF THE HONOURABLE MR. JUSTICE MOSLEY OF THE FEDERAL COURT OF CANADA DATED JUNE 8, 2015, DOCKET NUMBER IMM-5825-14.)

STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. Jose de Jesus BERMUDEZ
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 16, 2016
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	RYER J.A. NEAR J.A.
DATED:	APRIL 27, 2016

APPEARANCES:

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