Date: 20091002

Docket: IMM-555-09

Citation: 2009 FC 945

Ottawa, Ontario, October 2, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

FARIBA MASOUMI BAVILI
SORMEH SALLY NAJAFI
RAHA RICHARD NAJAFI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of a Pre-Removal Risk Assessment Officer (the Officer) dated January 21, 2009, where the Officer refused the Applicant's application for permanent residence based on humanitarian and compassionate grounds.

Factual Background

[2] The Applicant, Fariba Masoumi Bavili, was born in Iran in 1960. The Applicant and her family were active members of the Baha'i faith. When the Applicant was 19 years old, she married

Abbas Najafi, a Muslim man. Shortly after she was married, the Ayatollah came into power in Iran and it was no longer safe for those practicing the Baha'i faith to remain in Iran. The Applicant's parents and three siblings fled to Canada, where her parents and two siblings became permanent residents. The Applicant remained behind in Iran with her husband.

[3] Shortly after her family left, the Applicant stated that her husband showed a more "fundamentalist" attitude toward her. He became very controlling and did not allow her to practice her faith. He also made many efforts to force her to renounce her faith and convert to Islam.

[4] In 1984, the Applicant and her husband immigrated to Sweden and became permanent residents. She stated that she worked for many years and learned Swedish while her husband did not work and developed gambling and drug additions. The Applicant also stated that her husband became more abusive and she divorced him in 2001. While in Sweden, she gave birth to two children who are also applicants in this case: Sormeh Sally Najafi, born January 5, 2000, and Raha Richard Najafi born November 3, 2002.

[5] The Applicant and her children entered Canada on May 10, 2004, after obtaining Temporary Resident visitor visas. These visas were extended twice. The Applicant then applied for refugee status for herself and her children on September 21, 2005. On September 28, 2005, the Applicant was determined to be ineligible to make a refugee claim under paragraph 101(1)(*d*) of the Act because she was recognized as a Convention refugee in Sweden. The children's refugee claims were

heard on December 21, 2006 and the RPD determined on February 21, 2007, that the children were not Convention refugees.

[6] The Applicant and her children applied for a Pre-Removal Risk Assessment. On July 14, 2008, the PRRA Officer determined that the children were not persons in need of protection or at risk of persecution, torture, risk to life or cruel and unusual treatment or punishment. On July 15, 2008, the PRRA Officer also refused the Applicant's application. All three applications were refused because Sweden could provide state protection and the Applicants had not shown that it was not possible to avail themselves of such protection.

[7] On January 9, 2009, the Applicant submitted a humanitarian and compassionate application for herself and her children. The Officer determined on January 21, 2009, that requiring the Applicants to apply for permanent residence from Sweden did not constitute unusual and undeserved or disproportionate hardship and the application was refused. The Applicants now seek judicial review of this decision.

Impugned Decision

[8] The Officer first reviewed the establishment of the Applicant in Canada. He noted many facts about the Applicant's work history in Sweden, and that the Applicant had not worked since arriving in Canada and has received social assistance since 2006. He acknowledged that the Applicant had stated that she found it difficult to search for work while raising her children. However, he also noted that none of the Applicant's family in Canada had sponsored her or her

children. Also, although the Applicant's family had stated that they would provide the Applicant with financial assistance, the Officer found that the Applicant's family was either unwilling or unable to do so considering the Applicant has been on social assistance since 2006. For these reasons, the Officer found that the Applicant's establishment in Canada was minimal.

[9] The Officer then considered the best interests of the children. The Officer indicated that he was aware that the Applicant's children were in grade 1 and 3, but he found that the school system in Sweden was not significantly different from that in Canada and that it was not unusual and undeserved or disproportionate hardship for them to switch schools. The Officer also considered the family ties to Canada, including the Applicant's parents and two sisters, one of which has been diagnosed with cancer. The Officer found that there was insufficient evidence to establish that the Applicant's removal from Canada would seriously impact the level of care that the Applicant's sister was receiving and would not constitute hardship. The Officer also found that while separating from close family may be difficult, it is not an uncommon occurrence that warrants granting the Applicant an exemption on humanitarian and compassionate grounds. The Officer found that his decision was supported by the fact that the Applicant had visited her family three times previously and would be able to do so again after the one-year waiting period resulting from her removal order.

[10] The Officer then went on to consider the allegation of risk and the psychological reports provided by the Applicant. He reviewed the Applicant's prior attempts to seek protection in Canada and the reasons for the refusals to grant refugee status or a positive PRRA. He then went on to review the psychological report of the Applicant and her daughter, both indicating the trauma

resulting from the abuse of the Applicant's ex-husband. The Officer stated that he gave some weight to these reports in determining the effect that removal will have on the Applicant and her children, although he found that the conclusions regarding the suffering they would endure upon being returned to Sweden was speculative. The Officer also noted that did not give them much weight as evidence of the risk faced by the Applicant because these elements of the Applicant's case were found elsewhere.

[11] The Officer then considered the risk presented by the Applicant's ex-husband. He stated that he had difficulty determining the facts, as a variety of statements and reports differed with regard to the current and future risk to the Applicant. He reviewed the submissions made by the Applicant regarding her ex-husband's character and past abuse. He raised concerns regarding conflicting evidence, such as the fact that the Applicant described her husband as a "conservative" and "fundamentalist" Muslim. Yet, she also stated that he drank, gambled, womanized, and allowed her to work and run a taxi business.

[12] The Officer also reviewed the Applicant's and her family's evidence regarding the threatening phone calls her ex-husband had made. The Officer noted that the evidence of the Applicant and her family differed regarding the frequency of the calls. The Officer also noted that the Applicant stated that she and her sister had gone to the RCMP and the police regarding the phone calls, but no objective evidence of this was provided by the Applicant. The Officer also noted that the Applicant had stated that her ex-husband had threatened to come to Canada to harm her and her children, but there was no evidence to indicate that he had attempted to do so in the four years

that the Applicant has been in Canada. The Officer also noted that there was no evidence that the ex-husband had attempted to bring the children back to Sweden through legal means, even though the Applicant and her ex-husband had joint custody of the children.

[13] The Officer then outlined the objective third-party evidence that supported the Applicant's case. This evidence included two documents from the Swedish Tax Agency showing that the Applicant and her husband were divorced in 2001 and that they were no longer living together and a notarized statement from the ex-husband allowing the Applicant to travel out of Sweden with the children. The Officer contrasted this evidence with the statements of the Applicant and her family and stated that:

> … Taken individually, the noted discrepancies and implausibilities with the stated facts of the applicant's case may be insignificant. However, taken as a whole, and in the context of physical evidence which reasonably indicates the ex-husband's compliance and assistance, I find insufficient persuasive evidence that, on a balance of probabilities, the applicant and her children face an ongoing or forward-looking personalized risk from her ex-husband.

[14] The Officer also noted that the Applicant has a scar on her arm that she claims was a result of abuse. The Officer acknowledges that it is possible that the scar resulted from abuse, despite a lack of objective evidence. However, overall, the Officer found that there was insufficient evidence of a current or future risk to the Applicant and her children.

[15] The Officer found that even if the ex-husband presented a risk to the Applicant, particularly in light of the psychological report on the Applicant's daughter, the protection that can be provided

in Sweden diminishes any hardship and perceived risk. The Officer reviewed the US Department of State Country Report for Sweden and finds that there are many measures in place that can provide protection for the Applicant and her children. The Officer acknowledged that the existence of state protection is not determinative in an application based on humanitarian and compassionate grounds in the same manner as in a pre-removal risk assessment. However, the Officer found that the level of protection that can be provided in Sweden as a highly developed democratic state significantly mitigated any potential risk that the Applicant faced if she returned to Sweden.

[16] The Officer thus concluded that although he acknowledged that it would be difficult for the Applicant to leave her family and return to Sweden, the difficulty did not amount to unusual and undeserved or disproportionate hardship. The Officer also concluded that there was no unusual and undeserved or disproportionate hardship caused by a personalized risk, and therefore there were insufficient humanitarian and compassionate grounds to approve the application for exemption.

Relevant Legislation

[17] The relevant statutory provisions are contained in Appendix A at the end of this document.

Issues

[18] The Applicant has raised the following issues, restated below:

a. Did the Officer err in failing to adequately address the best interests of the children?

b. Did the Officer breach the duty of procedural fairness owed to the Applicants by making findings regarding the credibility of the principal Applicant without affording her the opportunity to respond to the Officer's concerns?

c. Did the Officer err in failing to adequately address the hardship that would be faced by the Applicants based on the risk posed by the principal Applicant's ex-husband?

d. Did the Officer err by incorrectly finding that the applicable removal order against the Applicants is a one-year exclusion order?

e. Did the Officer err by failing to refer to evidence obtained from the Swedish government that the child Applicants cannot obtain travel documents to Sweden without first getting permission from their father and by failing to disclose this evidence to the Applicants?

[19] The application for judicial review shall be dismissed for the following reasons.

Standard of Review

[20] The Applicant submits that according the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), there are two standards of review: correctness and reasonableness. The Applicant alleges that questions of law are reviewed on a correctness standard, and questions of fact or mixed fact and law are reviewed on a standard of reasonableness. The Applicant further contends, relying on *Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, 308 F.T.R. 280 that a breach of procedural fairness is an error in law and thus the applicable standard of review is correctness.

[21] The Respondent argues that the applicable standard of review of a decision with respect to a humanitarian and compassionate application is reasonableness, which is concerned with justification, transparency and intelligibility, falling within the range of acceptable outcomes defensible on the facts and in law. The Respondent relies on a number of cases for this proposition: *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*); *Dunsmuir*, above; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247.

[22] I agree that *Dunsmuir* sets out the applicable standards of review. I also agree with both the Applicant and the Respondent: questions of procedural fairness deserve no deference and are reviewed on a correctness standard, while other questions relating to the reasons of the Officer on a humanitarian and compassionate application involve discretion, which deserves deference, and are assessed on a standard of reasonableness. Thus, the standard of review for the first and third issues is reasonableness, and the standard of review for the second, fourth and fifth issues is correctness.

Analysis

Did the Officer err in failing to adequately address the best interests of the children?

[23] In determining the best interests of the child, I agree with the Applicant that *Baker* provides guidance to the officers, requiring that they be alert, alive and sensitive to the best interests of the children and that their interests not be minimized. However, I do not agree that the Court's decision in *Gill v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 613, 334 F.T.R. 229 provides

any further guidance. The Federal Court of Appeal held in *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] F.C.J. No. 713 (QL) that the analysis of the best interests of the child in *Gill* was

> … undeniably wrong and should not be followed. The consideration of a child's best interests in an immigration context does not readily lend itself to a family law analysis where the true issues are those of custody and access to children. Contrary to family law cases where "the best interests of the children" are, it goes without saying, the determining factor, it is not so in immigration cases, where the issue is, as in the case before us, whether a child should be exempted from the requirements of the *Act* and its *Regulations* and allowed to become a permanent resident. As Décary J.A. made clear in his Reasons for the majority in *Hawthorne, supra*, the principle which this Court enunciated in *Legault supra*, is that although the best interests of a child are an important factor, they are not determinative of the issue before the officer.

[24] Therefore, *Gill* offers no additional guidance, as family law principles are of no use in the immigration context. An officer must be alert, alive and sensitive to the best interests of the children; he need not treat it as a determinative factor.

[25] In light of this determination, I do not find the Officer’s decision regarding the best interests of the children to be unreasonable. The Officer identified all the relevant factors and discussed them in relation to other factors. The Officer does note that the psychological reports of the Applicant’s child does cause concern, but does not reach the level of humanitarian and compassionate grounds. I do not find anything in the Officer’s decision to indicate that he did not consider all the relevant issues and weigh them accordingly.

Did the Officer breach the duty of procedural fairness owed to the Applicants by making findings regarding the credibility of the principal Applicant without affording her the opportunity to respond to the Officer's concerns?

[26] I do not find that the Officer breached procedural fairness in this case. As the Respondent submits, there is no requirement to conduct an interview or an oral hearing. On humanitarian and compassionate applications, the content of the duty of fairness is quite low. All that is required, according to the Supreme Court in *Baker*, above is that the Applicant had the opportunity for "meaningful participation."

[27] I find that in this case, the Applicant had meaningful participation. She was allowed to make written submissions regarding her fear of returning to Sweden and any other matters that she considered relevant for the determination of her humanitarian and compassionate application. The Officer then weighed the evidence and considered it appropriately.

[28] The Applicant argues that the Officer made credibility findings and disregarded her sworn affidavit because of supposed inconsistencies. While I do agree with the Applicant that the Officer was not to make adverse credibility findings when the Applicant's credibility had not previously been questioned, I do not agree that the Officer has made credibility findings in this case. The Officer noted discrepancies between the different sources of information and reviewed all the submissions. He then concluded:

> … Taken individually, the noted discrepancies and implausibilities with the stated facts of the applicant's case may be insignificant. However, taken as a whole, and in the context of physical evidence

> which reasonably indicates the ex-husband's compliance and assistance, I find insufficient persuasive evidence that, on a balance of probabilities, the applicant and her children face an ongoing or forward-looking personalized risk from her ex-husband.

[29] The Officer did not dispute the fact that the Applicant was subject to abuse or that she has a legitimate fear of her husband. The Officer merely concludes, based on all the evidence before him, that there is no personalized risk from the ex-husband that meets the level of unusual and undeserved or disproportionate hardship. I find this conclusion to be a result of the weighing of evidence in light of all the circumstances and submissions before him, not a conclusion regarding the credibility of the Applicant or the reliability of her sworn affidavit.

[30] I also do not accept the Applicant's argument that the Officer was required to allow her to make additional submissions regarding the lack of sponsorship. The Applicant relies on Chapter 5 of the Inland Processing Manual (IP 5). In *Baker*, the Supreme Court found that ministerial guidelines were:

> ... a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

[31] The guidelines, however, are not binding on an officer. In *Mittal (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)* (1998), 147 F.T.R. 285, the Federal Court held:

> … Guidelines, of course, must be used with care. They can serve as " 'general policy, or 'rough rules of thumb' " to structure the discretion conferred upon the visa officer. Guidelines, however, should not fetter the visa officer's exercise of discretion by crystallizing into binding and conclusive rules. …

[32] The Manual stipulates that officers should allow additional submissions on the lack of sponsorship in cases where the application is based on reunification of relatives or applicants with family relationships. In this case, the Applicant's humanitarian and compassionate application was based primarily on personalized risk from the ex-husband, not on the reunification of family members.

[33] Also, the Officer only makes one mention of the lack of sponsorship in his decision:

> … However, I note that no member of the applicant's family has submitted a sponsorship and it appears that they are and have been (since February 2006) unable or unwilling to support the applicant financially, despite specific statements to the contrary. …

[34] There is nothing in the reasons of the Officer to indicate that the finding regarding sponsorship was given any significant weight that affected the Officer's findings regarding establishment or family connectedness. In light of this, I do not find that the Officer committed a reviewable error by failing to provide the Applicant an opportunity to make additional submissions regarding the lack of sponsorship.

Did the Officer err in failing to adequately address the hardship that would be faced by the Applicants based on the risk posed by the principal Applicant's ex-husband?

[35] I find that the Officer's decision regarding hardship was not unreasonable. All relevant evidence was considered and weighed appropriately. The Officer did not reject the Applicant's evidence that she was abused. He only determined that in light of all the evidence, her ex-husband

did not impose a personalized risk amounted to unusual and undeserved or disproportionate hardship. Similarly, the Officer did not determine that the Applicant did not go to the police or to the RCMP. While the Officer noted that the police response seemed unusual, his main determination was that there was not enough evidence before him to determine if the RCMP took any action or if the responses were permissible or legal, and thus the submissions regarding the police should not be given much weight as an unsubstantiated claim.

[36] Although the Officer did rely on the existence of state protection to mitigate any potential personalized risk, I do not agree that the Officer imported a PRRA analysis. The Officer clearly stated that he understood that the existence of state protection is not determinative of a humanitarian and compassionate application and he consistently speaks of potential hardship due to risk, not of the existence of risk.

[37] The Applicant has referred to *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, 304 F.T.R. 136, but I have not found this case to be persuasive in the present case. In *Ramirez*, the Court noted that there was absolutely no reference to hardship in the decision of the Officer, only to personalized risk, and thus the Officer applied the wrong test by assessing risk as opposed to hardship. In the case at bar, however, the Officer refers to hardship a number of times and indicates clearly that his discussion regarding state protection was not determinative and was only included as part of an analysis of unusual and undeserved or disproportionate hardship.

Did the Officer err by incorrectly finding that the applicable removal order against the Applicants is a one-year exclusion order?

[38] Section 229 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) outlines the removal orders applicable to particular situations. Paragraph 229(1)(*n*) is applicable to the Applicant, which states:

229. (1) Paragraph 45(d) of the Act – applicable removal order	**229. (1)** Application de l'alinéa 45d) de la Loi : mesures de renvoi applicables
For the purposes of paragraph 45(*d*) of the Act, the applicable removal order to be made by the Immigration Division against a person is	Pour l'application de l'alinéa 45*d*) de la Loi, la Section de l'immigration prend contre la personne la mesure de renvoi indiquée en regard du motif en cause :
[…] (*n*) an exclusion order, if they are inadmissible under paragraph 41(*a*) of the Act for any other failure to comply with the Act, unless subsection (2) or (3) applies.	[…] *n*) en cas d'interdiction de territoire au titre de l'article 41 de la Loi pour tout autre manquement à la Loi, l'exclusion, à moins que les paragraphes (2) ou (3) ne s'appliquent.

[39] Section 229(2) states:

229. (2) Eligible claim for refugee protection – If a claim for refugee protection is made and the claim has been determined to be eligible to be referred to the Refugee Protection Division or no determination has been made, a departure order is the applicable removal order in the circumstances set out in	**229. (2)** Demande d'asile recevable – Dans le cas d'une demande d'asile jugée recevable ou à l'égard de laquelle il n'a pas été statué sur la recevabilité, la mesure de renvoi à prendre dans les circonstances prévues aux alinéas (1)*f*), *g*), *j*), *m*) ou *n*) est l'interdiction de séjour.

paragraph (1)(*f*), (*g*), (*j*), (*m*), or (*n*).

[40] In this case, the Applicant is being removed because her temporary visitor visa has expired. This would fall under paragraph 229(1)(*n*) of the Regulations. Although the Applicant applied for refugee status, she was found to be ineligible to apply. As a result, subsection 229(2) does not apply to the Applicant, as it only applies to those who have an eligible claim for refugee protection. The applicable order was an exclusion order.

[41] As for the Applicant's children, they were eligible to claim refugee status, but their claim was denied. Thus, under subsection 229(2), the applicable order was a departure order.

[42] Section 229(3) goes on, stating:

229(3) Exception – The applicable removal order in the circumstances set out in paragraph (1)(*f*), (*g*), (*h*), (*j*), (*l*) or (*n*) is a deportation order if the person	**229 (3)** Exception **–** Dans les circonstances prévues aux alinéas (1)*f*), *g*), *h*), *j*), *l*) ou *n*), la mesure de renvoi à prendre dans les cas ci-après est l'expulsion :
[…]	[…]
(b) has failed to comply with any condition or obligation imposed under the Act or the *Immigration Act*, chapter I-2 of the Revised Statutes of Canada, 1985, unless the failure is the basis for the removal order; […]	b) outre le manquement sur lequel la mesure de renvoi se fonde, il ne s'est pas conformé aux conditions et obligations qui lui ont été imposées aux termes de la Loi ou de la Loi sur l'immigration, chapitre I-2 des Lois révisées du Canada (1985); […]

[43] For the reasons discussed previously, the order applicable to the Applicant is an exclusion order. She is not a failed refugee claimant, so the Applicant's submissions regarding failed refugee claimants do not apply to the Applicant.

[44] The children, however, are subject to a departure order as failed refugee claimants, so the submissions regarding failed refugee claimants are applicable. However, the Applicant's submissions regarding a removal order against a failed refugee claimant are also wrong. Under paragraph 49(2)(*c*) of the Act, a removal order does not become enforceable until 15 days after notification that the claim has been rejected has been received by the claimants. Once the notification is received, subsection 224(2) states that the person subject to a departure order then has 30 days to leave Canada or the departure order becomes a deportation order.

[45] In light of these conclusions, I do not find that the Officer was wrong in stating that the applicable order against the Applicant was an exclusion order. The Officer's analysis regarding the hardship faced by being separated from family is also not unreasonable.

Did the Officer err by failing to refer to evidence obtained from the Swedish government that the child Applicants cannot obtain travel documents to Sweden without first getting permission from their father and by failing to disclose this evidence to the Applicants?

[46] There was no requirement to disclose information that was already known to the Applicant. While it is not binding on the Officer, IP 5 states that extrinsic information is:

i. Information that is from a source other than the applicant; and

ii. Information that the applicant does not have access to or is not aware of and is being used in the decision.

[47] The letter from the Swedish government is extrinsic evidence in that the information was from a source other than the Applicant. However, the Applicant was clearly aware that her ex-husband's permission was required in order to travel with the children as she has already obtained such permission in order to travel to Canada. There is no evidence that the permission already obtained is insufficient for the children to return to Sweden. Also, the evidence was not relied on as part of the Officer's decision, as he does not cite or source the letter in question. The Federal Court stated in *Rafieyan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 727, [2007] F.C.J. No. 974 (QL) (*Rafieyan*) at paragraph 33:

> In the context of an H&C application, there is no duty to disclose documents where an officer does not rely on extrinsic evidence prepared by a third party; correspondingly, there is no obligation to provide the affected individual with an opportunity to respond (*Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.); see also *Jayasinghe v. Canada (M.C.I.)*, 2007 FC 193, [2007] F.C.J. No. 275 (QL) at para. 26; *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407, [2000] F.C.J. No. 854 (QL) (C.A.) at para. 26).

[48] The Officer did not err in failing to refer to the evidence in his decision. An officer is not required to make reference to every piece of evidence before him. There is a presumption that the Officer properly considered all the evidence that had been presented (*Rafieyan* at paragraph 23). In addition to the letter from the Swedish government, the Officer also had evidence that the Applicant knew that she was required to obtain permission from her ex-husband because she had already done

so once before. Thus, I do not find that a failure to refer to the evidence or to disclose it to the Applicant constitutes an error of law in this case.

[49] No questions for certification were proposed and none arise in this case.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

APPENDIX A

Relevant Legislation

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

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.

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.

49. (1) A removal order comes into force on the latest of the following dates:

(a) the day the removal order is made, if there is no right to appeal;

(b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and

(c) the day of the final determination of the appeal, if an appeal is made.

49. (1) La mesure de renvoi non susceptible d'appel prend effet immédiatement; celle susceptible d'appel prend effet à l'expiration du délai d'appel, s'il n'est pas formé, ou quand est rendue la décision qui a pour résultat le maintien définitif de la mesure.

(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:

(*a*) the day the claim is determined to be ineligible only under paragraph 101(1)(*e*);

(2) Toutefois, celle visant le demandeur d'asile est conditionnelle et prend effet :

a) sur constat d'irrecevabilité au seul titre de l'alinéa 101(1)*e*);

(*b*) in a case other than that set out in paragraph (*a*), seven days after the claim is determined to be ineligible;

b) sept jours après le constat, dans les autres cas d'irrecevabilité prévus au paragraphe 101(1);

(*c*) 15 days after notification that the claim is rejected by the Refugee Protection Division, if no appeal is made, or by the Refugee Appeal Division, if an appeal is made;

c) quinze jours après la notification du rejet de sa demande par la Section de la protection des réfugiés ou, en cas d'appel, par la Section d'appel des réfugiés;

(*d*) 15 days after notification that the claim is declared withdrawn or abandoned; and

d) quinze jours après la notification de la décision prononçant le désistement ou le retrait de sa demande;

(*e*) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(*c*) or (*d*).

e) quinze jours après le classement de l'affaire au titre de l'avis visé aux alinéas 104(1)*c*) ou *d*).

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

(2) The following provisions govern an application under subsection (1):

(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :

(*a*) the application may not be made until any right of appeal that may be provided by this Act is exhausted;

a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

(*b*) subject to paragraph 169(*f*), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169*f*), la date où le demandeur en est avisé ou en a eu connaissance;

(*c*) a judge of the Court may, for special reasons, allow an extended time for filing and

c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

serving the application or notice;

(*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

(*a*) refugee protection has been conferred on the claimant under this Act;

(*b*) a claim for refugee protection by the claimant has been rejected by the Board;

(*c*) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;

(*d*) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

(*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or

(*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).

101. (1) La demande est irrecevable dans les cas suivants :

a) l'asile a été conféré au demandeur au titre de la présente loi;

b) rejet antérieur de la demande d'asile par la Commission;

c) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)*c*) — , grande criminalité ou criminalité organisée.

***Immigration and Refugee Protection Regulations*, SOR/2002-227.**

224. (1) An enforced departure order is prescribed as a circumstance that relieves a foreign national from having to obtain authorization under subsection 52(1) of the Act in order to return to Canada.

Requirement
(2) A foreign national who is issued a departure order must meet the requirements set out in paragraphs 240(1)(*a*) to (*c*) within 30 days after the order becomes enforceable, failing which the departure order becomes a deportation order.

224. (1) L'exécution d'une mesure d'interdiction de séjour à l'égard d'un étranger est un cas prévu par règlement qui exonère celui-ci de l'obligation d'obtenir l'autorisation prévue au paragraphe 52(1) de la Loi pour revenir au Canada.

Exigence
(2) L'étranger visé par une mesure d'interdiction de séjour doit satisfaire aux exigences prévues aux alinéas 240(1)*a*) à *c*) au plus tard trente jours après que la mesure devient exécutoire, à défaut de quoi la mesure devient une mesure d'expulsion.

229. (1) For the purposes of paragraph 45(d) of the Act, the applicable removal order to be made by the Immigration Division against a person is

(a) a deportation order, if they are inadmissible under subsection 34(1) of the Act on security grounds;

(*b*) a deportation order, if they are inadmissible under subsection 35(1) of the Act on grounds of violating human or international rights;

(*c*) a deportation order, in the case of a permanent resident inadmissible under subsection 36(1) of the Act on grounds of serious criminality or a foreign national inadmissible under paragraph 36(1)(*b*) or (*c*) of the Act on grounds of serious criminality;

(*d*) a deportation order, if they are inadmissible under paragraph 36(2)(*b*), (*c*) or (*d*) of the Act on grounds of criminality;

(*e*) a deportation order, if they are inadmissible under subsection 37(1) of the Act on grounds

229. (1) Pour l'application de l'alinéa 45*d*) de la Loi, la Section de l'immigration prend contre la personne la mesure de renvoi indiquée en regard du motif en cause :

a) en cas d'interdiction de territoire pour raison de sécurité au titre du paragraphe 34(1) de la Loi, l'expulsion;

b) en cas d'interdiction de territoire pour atteinte aux droits humains ou internationaux au titre du paragraphe 35(1) de la Loi, l'expulsion;

c) en cas d'interdiction de territoire pour grande criminalité du résident permanent au titre du paragraphe 36(1) de la Loi ou de l'étranger au titre des alinéas 36(1)*b*) ou *c*) de la Loi, l'expulsion;

d) en cas d'interdiction de territoire pour criminalité au titre des alinéas 36(2)*b*), *c*) ou *d*) de la Loi, l'expulsion;

e) en cas d'interdiction de territoire pour criminalité organisée au titre du paragraphe

of organized criminality;

(*f*) an exclusion order, if they are inadmissible under subsection 38(1) of the Act on health grounds, unless subsection (2) or (3) applies;

(*g*) an exclusion order, if they are inadmissible under section 39 of the Act for financial reasons, unless subsection (2) or (3) applies;

(*h*) an exclusion order, if they are inadmissible under paragraph 40(1)(*a*) or (*b*) of the Act for misrepresentation, unless subsection (3) applies;

(*i*) a deportation order, if they are inadmissible under paragraph 40(1)(*d*) of the Act for misrepresentation;

(*j*) an exclusion order, if they are inadmissible under paragraph 41(*a*) of the Act for failing to comply with the requirement to appear for examination, unless subsection (2) or (3) applies;

(*k*) a departure order, if they are inadmissible under paragraph 41(*b*) of the Act;

(*l*) an exclusion order, if they are inadmissible under paragraph 41(*a*) of the Act for failing to establish that they have come to Canada in order to establish permanent residence, unless subsection (3) applies;

(*m*) an exclusion order, if they are inadmissible under paragraph 41(*a*) of the Act for failing to establish that they will leave Canada by the end of the period authorized for their stay, unless subsection (2) applies; and

(*n*) an exclusion order, if they are inadmissible under paragraph 41(*a*) of the Act for any other failure to comply with the Act, unless

37(1) de la Loi, l'expulsion;

f) en cas d'interdiction de territoire pour motifs sanitaires au titre du paragraphe 38(1) de la Loi, l'exclusion, à moins que les paragraphes (2) ou (3) ne s'appliquent;

g) en cas d'interdiction de territoire pour motifs financiers au titre de l'article 39 de la Loi, l'exclusion, à moins que les paragraphes (2) ou (3) ne s'appliquent;

h) en cas d'interdiction de territoire pour fausses déclarations au titre des alinéas 40(1)*a*) ou *b*) de la Loi, l'exclusion, à moins que le paragraphe (3) ne s'applique;

i) en cas d'interdiction de territoire pour fausses déclarations au titre de l'alinéa 40(1)*d*) de la Loi, l'expulsion;

j) en cas d'interdiction de territoire au titre de l'article 41 de la Loi pour manquement à l'obligation de se soumettre au contrôle, l'exclusion, à moins que les paragraphes (2) ou (3) ne s'appliquent;

k) s'agissant du résident permanent, en cas d'interdiction de territoire au titre de l'article 41 de la Loi, l'interdiction de séjour;

l) en cas d'interdiction de territoire au titre de l'article 41 de la Loi pour manquement à l'obligation de prouver qu'il vient s'établir au Canada en permanence, l'exclusion, à moins que le paragraphe (3) ne s'applique;

m) en cas d'interdiction de territoire au titre de l'article 41 de la Loi pour manquement à l'obligation de prouver qu'il aura quitté le Canada à la fin de la période de séjour autorisée, l'exclusion, à moins que le paragraphe (2) ne s'applique;

n) en cas d'interdiction de territoire au titre de l'article 41 de la Loi pour tout autre

subsection (2) or (3) applies.

(2) If a claim for refugee protection is made and the claim has been determined to be eligible to be referred to the Refugee Protection Division or no determination has been made, a departure order is the applicable removal order in the circumstances set out in paragraph (1)(*f*), (*g*), (*j*), (*m*) or (*n*).

(3) The applicable removal order in the circumstances set out in paragraph (1)(*f*), (*g*), (*h*), (*j*), (*l*) or (*n*) is a deportation order if the person

(*a*) was previously subject to a removal order and they are inadmissible on the same grounds as in that order;

(*b*) has failed to comply with any condition or obligation imposed under the Act or the *Immigration Act*, chapter I-2 of the Revised Statutes of Canada, 1985, unless the failure is the basis for the removal order; or

(*c*) has been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment or of two offences under any Act of Parliament not arising out of a single occurrence, unless the conviction or convictions are the grounds for the removal order.

232. A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, and the stay is effective until the earliest of the following events occurs:

(*a*) the Department receives confirmation in

manquement à la Loi, l'exclusion, à moins que les paragraphes (2) ou (3) ne s'appliquent.

(2) Dans le cas d'une demande d'asile jugée recevable ou à l'égard de laquelle il n'a pas été statué sur la recevabilité, la mesure de renvoi à prendre dans les circonstances prévues aux alinéas (1)*f*), *g*), *j*), *m*) ou *n*) est l'interdiction de séjour.

(3) Dans les circonstances prévues aux alinéas (1)*f*), *g*), *h*), *j*), *l*) ou *n*), la mesure de renvoi à prendre dans les cas ci-après est l'expulsion :

a) l'intéressé est interdit de territoire pour les mêmes motifs qui sous-tendent une mesure de renvoi dont il a été préalablement frappé;

b) outre le manquement sur lequel la mesure de renvoi se fonde, il ne s'est pas conformé aux conditions et obligations qui lui ont été imposées aux termes de la Loi ou de la *Loi sur l'immigration*, chapitre I-2 des Lois révisées du Canada (1985);

c) il a été déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions aux lois fédérales qui ne découlent pas des mêmes faits, à moins que la mesure de renvoi ne se fonde sur cette infraction ou ces infractions.

232. Il est sursis à la mesure de renvoi dès le moment où le ministère avise l'intéressé aux termes du paragraphe 160(3) qu'il peut faire une demande de protection au titre du paragraphe 112(1) de la Loi. Le sursis s'applique jusqu'au premier en date des événements suivants :

a) le ministère reçoit de l'intéressé

writing from the person that they do not intend to make an application;

(*b*) the person does not make an application within the period provided under section 162;

(*c*) the application for protection is rejected;

(*d*) if a decision to allow the application for protection is made under paragraph 114(1)(a) of the Act and the person has not made an application within the period provided under subsection 175(1) to remain in Canada as a permanent resident, the expiry of that period;

(*e*) if a decision to allow the application for protection is made under paragraph 114(1)(a) of the Act, the decision with respect to the person's application to remain in Canada as a permanent resident is made; and

(*f*) in the case of a person to whom subsection 112(3) of the Act applies, the stay is cancelled under subsection 114(2) of the Act.

confirmation écrite qu'il n'a pas l'intention de se prévaloir de son droit;

b) le délai prévu à l'article 162 expire sans que l'intéressé fasse la demande qui y est prévue;

c) la demande de protection est rejetée;

d) s'agissant d'une personne à qui l'asile a été conféré aux termes du paragraphe 114(1) de la Loi et qui n'a pas fait sa demande de séjour au Canada à titre de résident permanent dans le délai prévu au paragraphe 175(1), l'expiration du délai;

e) s'agissant d'une personne à qui l'asile a été conféré aux termes du paragraphe 114(1) de la Loi, la décision quant à sa demande de séjour au Canada à titre de résident permanent;

f) s'agissant d'une personne visée au paragraphe 112(3) de la Loi, la révocation du sursis prévue au paragraphe 114(2) de la Loi.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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