

Federal Court



Cour fédérale

**Date: 20110902**

**Docket: IMM-5841-10**

**Citation: 2011 FC 1043**

**Ottawa, Ontario, September 2, 2011**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**KITTS WHITE  
BY HIS LITIGATION GUARDIAN,  
JULINE WHITE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION AND  
THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] In 1984, Mr. Kitts White arrived in Canada from Jamaica. He was 10 years old. He became a permanent resident in 1985. When he was 18, in 1991, he suffered a serious, permanent brain

injury in a traffic accident. His injury reduced his mental capacity, caused behaviour changes, and provoked delusions and depression. Over the ensuing years, Mr. White committed a number of crimes, including kidnapping and aggravated sexual assault.

[2] Mr. White requires ongoing care and constant supervision to protect him and the public. He resides at the Royal Ottawa Hospital. A financial settlement arising from the accident provides Mr. White with an allowance of \$6,000.00 a month.

[3] In 1997, Mr. White was found to be inadmissible to Canada on the basis of serious criminality. In 2006, he applied for a pre-removal risk assessment [PRRA] and for relief on humanitarian and compassionate grounds [H&C]. An immigration officer dismissed his PRRA. His H&C was turned down, but this Court ordered a re-determination on judicial review. His second H&C was also denied and, again, this Court quashed the decision and ordered a re-determination.

[4] On a third H&C, an immigration officer referred Mr. White's file to the Director of Case Determination. The Director concluded that the humanitarian and compassionate grounds in Mr. White's favour did not warrant waiving his inadmissibility to Canada.

[5] Mr. White argues that the Director failed to treat him fairly, rendered an unreasonable decision, breached his rights under the Canadian Charter of Rights and Freedoms, and failed to consider whether his removal to Jamaica would violate Canada's international obligations.

[6] I agree with Mr. White that the Director rendered an unreasonable decision and I must, therefore, allow this application for judicial review. It is unnecessary to consider the other grounds for relief put forward by Mr. White.

[7] The main issue, therefore, is whether the Director's decision was unreasonable. A related question is the proper remedy.

## II. The Director's Decision

[8] The Director divided her analysis into three sections: (a) Analysis of the Nature of Mr. White's Criminality and his Prospects for Rehabilitation; (b) Humanitarian and Compassionate Factors; and (c) Balancing.

### (a) *Analysis of the Nature of Mr. White's Criminality and his Prospects for Rehabilitation*

[9] The Director reviewed the events leading to Mr. White's 1996 convictions for kidnapping, including the comments of the sentencing judge that incarceration was "out of the question" and that "he won't gain anything and won't be rehabilitated there." The judge concluded that a conditional sentence was appropriate, and that Mr. White was not a danger to the public if properly supervised. However, the judge concluded that Mr. White's problems, including a low attention span, poor memory, and problems with anger, did not substantiate a defence of not criminally responsible due to mental disorder.

[10] The Director then reviewed in detail the circumstances surrounding Mr. White's next conviction for aggravated sexual assault. In 1997, Mr. White broke into the apartment of a woman who was a stranger to him. He confronted her in the bathroom. When she refused his sexual advances, he beat her, stabbed her with a knife, and then sexually assaulted her. Police interviewed Mr. White's girlfriend at the time, who stated that Mr. White had not been taking his medication for about a week prior to the attack.

[11] The Director considered Mr. White's counsel's submissions with respect to the police report documenting Mr. White's most serious offence. Counsel pointed out that the purpose of deportation is not to punish, but conceded that Mr. White presented a danger to the public, both in Canada and Jamaica, and to himself.

[12] The Director found "raw police data" to be of particular interest because it demonstrated both Mr. White's abilities and the danger he poses. The Director noted that in 1997 he was sufficiently lucid, coherent and emotionally aware to have a girlfriend and live in the community in an unsupervised fashion. The fact that Mr. White could appear to behave within a normal range but, at the same time, be a danger to the public heightened his dangerousness. The Director noted that Mr. White's current pharmaceutical regimen amounted to "chemical castration", but he was nonetheless dangerous to women, even women who were strangers to him.

[13] The Director reviewed Mr. White's prospects for rehabilitation. The Director noted that Mr. White's brain injury resulted both in a loss in cognitive functioning and behavioural impairments. These problems were described by one of his former doctors, Dr. Newwell, as including

impulsivity, difficulty in appreciating the extent of his actions (while knowing the difference between right and wrong), and trouble with anger control. Dr. Newwell emphasized that these were impairments of brain function, and were not wilful. She also noted that Mr. White had developed post-traumatic psychosis (hearing voices) which required psychiatric care and medication. Dr. Newwell observed that the prospect for further rehabilitation was “very guarded”, and that Mr. White required a controlled environment, structured activity, abstinence from the use of illicit substances, and cessation of inappropriate social interactions in order to become productive. In her opinion, an integrated lifelong program was needed, which would be financially demanding, or a corresponding commitment by family members. Dr. Newwell also noted that Mr. White’s total cooperation was required. As such, she concluded that the prospect for implementation of such a program was bleak, and that without it, Mr. White would be likely to engage in activities that would put him in conflict with the law.

[14] The Director concluded that Mr. White’s prospects for rehabilitation were limited to behavioural improvements from therapy and medication. However, there was no chance he would regain his formal social functioning or ever be free of the need to take medication to control his behaviour. The Director then reviewed a number of reports that provided insight into Mr. White’s post-accident character and abilities, including:

- A 1995 pre-sentence report;
- A 1997 medical-legal assessment by a Dr. Van Reekum; and
- A 2007 report from a forensic psychologist.

[15] The following are the key points raised in these reports:

- Persons living with brain injuries have extreme difficulties with interpersonal relationships;
- Mr. White's prognosis is for permanent suffering and disability; he is unlikely to regain further neurological function;
- Any further improvements would be due to treatment, and to and his and his family's efforts;
- Mr. White presents an increased risk of further psychotic episodes and major depression, and is also at risk of suicide and behavioural problems leading to adverse social consequences; and
- Mr. White's profile includes key predictors of future violence: a history of assaults, and a history of being physically abused as a child.

[16] The Director also considered the most recent report on file, a 2010 report from Dr. Colin Cameron of the Royal Ottawa Hospital's Secure Treatment Unit [STU], where Mr. White is currently held. Dr. Cameron noted that:

- Since February 2010, Mr. White has shown a very significant improvement in his mood and behaviour;
- Mr. White has shown an increased ability to manage conflicts without resorting to aggression;
- There have been no recent reports of inappropriate sexual comments or advances;
- Given his progress, it would be quite realistic to expect Mr. White to be safely discharged to the community, so long as proper supports were in place; but
- Given his history, finding an appropriate placement remains a challenge.

[17] The Director contacted counsel in July 2010 to find out what plan was in place in the event Mr. White was released from the STU. Counsel submitted that:

- If he were released, it would likely be pursuant to a diversionary Community Treatment Order [CTO];
- Given that his condition is only manageable, not treatable, the CTO could continue in effect for the rest of his life;

- While family members could be incorporated into the release plan, STU envisaged that Mr. White would be cared for in a secure residential setting, and that he required ongoing expert supervision to manage his medication;
- A CTO requires the person's consent, but Mr. White had been compliant with the management of his condition and deferential to authority figures;
- A CTO could be a necessary condition to continue to hold a Temporary Resident Permit [TRP].

[18] The Director observed that the medical-legal options for patients such as Mr. White were beyond her expertise. Consequently, she consulted articles on the *Mental Health Act*, which were disclosed to counsel, and reviewed them in her decision.

[19] The Director noted that counsel's understanding was that Mr. White was seeking a placement in a "secure residential facility", yet the most recent report from the STU does not use this language. Instead, Dr. Cameron discussed release to a "supported housing residence" or "group home." The Director considered that restraints on Mr. White's mobility in such a setting had not been explained or discussed, but observed that the purpose of a CTO was to be "less restrictive" than life in a psychiatric facility. The Director also noted that while CTOs can be renewed indefinitely, in most cases they are of short duration.



[20] Based on this evidence, the Director found three “shortcomings” with respect to the use of a CTO to protect the public from Mr. White: (1) CTOs require patient consent; (2) there is nothing to indicate that a CTO would limit Mr. White’s daytime mobility; and (3) CTOs do not appear to be renewed indefinitely even for permanently impaired patients. Moreover, ensuring that a psychiatric patient takes his or her medication is likely to be a perennial problem. Mr. White’s failure to take his medication appeared to be a factor in the sexual assault.

[21] The Director also observed that Mr. White appeared to have had problems with structured programming in the community in the past, and referred to a Correctional Services report on file containing the following:

- Between July 1993 and March 1994, Mr. White’s probation officer noted that he was struggling with life in the community, not responding well, and resisting the rules imposed on him;
- In April 1994, Mr. White entered a head injury program but had problems with alcohol and cannabis use, was rejected from a detoxification program after one day, and was charged with assaulting another resident, resulting in a 30-day jail term.

[22] The Director concluded that Mr. White remains a danger to the public, and that this risk was unlikely to diminish over his lifetime. The Director was not satisfied that counsel’s proposed plan for treatment pursuant to a CTO would adequately safeguard the community in either the short or long term.

[23] The Director acknowledged counsel's submission that protection of the public must include people in Jamaica. However, she concluded that her mandate comes from the *Immigration and Refugee Protection Act, SC. 2001, c 27, [IRPA]* (see Annex "A" for statutory references) whose objectives include protecting the health and safety of Canadians. There is no parallel commitment to protect the health and safety of persons outside of Canada.

(b) *Humanitarian and Compassionate Factors*

[24] The Director considered four distinct factors:

(i) Establishment

[25] The Director noted that Mr. White had been living continuously in Canada for about 26 years. She noted that prior to his accident he had been attending high school, had been doing well academically, and had excelled at athletics.

[26] However, since 1991, there was very little to indicate any positive involvement by Mr. White in the community. He had finished grade 11, and had worked part-time as a shelf-stocker, cleaner and labourer, but he had not lived in the community since 1998. There were no particular social workers or doctors consistently involved in his care over the years. Most of the letters in support of Mr. White described his pre-accident character, and were dated no later than 2002.

[27] Nonetheless, the Director concluded that, given the length of time spent in Canada, Mr. White's connection to Canada was greater than to anywhere else.

(ii) Family in Canada and Jamaica

[28] The Director noted that two family members in Canada were "engaged" in Mr. White's care: his father and sister, with whom he is in nearly daily contact via telephone. Counsel asserted that Mr. White had "no one" in Jamaica.

[29] The Director acknowledged that Mr. White's father had suffered a great deal since his son's accident and, being 65 and retired, it would be difficult for him to return to Jamaica to care for his son. However, the Director disputed counsel's assertion that Mr. White's father was "entitled" to assist his son in Canada. The Director noted that Mr. White was no longer a permanent resident of Canada, and his father must be aware that a deportation order has been outstanding against his son since 1999.

[30] The Director noted that the separation of family members would be an unfortunate consequence of removal. However, due to Mr. White's incarceration and detention, he has not been part of his father's or sister's everyday life, other than by telephone. The Director observed that this hardship could be alleviated by visits to Jamaica on a temporary or indeterminate basis. Still, the Director concluded that this was the most compelling humanitarian factor in Mr. White's favour.

(iii) Victim of a Car Accident

[31] The Director noted that Mr. White's case was particularly sad given that his circumstances were irrevocably affected by being a passenger in a car accident. She observed that Mr. White's life before the accident was full of promise: he excelled both in academic and athletic activities.

[32] The Director noted that Mr. White's criminality stemmed from changes in his behaviour due to his brain injury and arose through no fault of his own. However, at the same time, Mr. White had not been found unfit to stand trial for the offences with which he was charged. Psychiatric reports indicated that he knows the difference between right and wrong, although his ability to control and foresee the consequences of his actions was limited.

[33] The Director acknowledged the tragedy of the situation for Mr. White and his family, but noted that his life was unlikely to be easy or pleasant regardless of where he resides. She agreed with counsel's submission that "the purpose of deportation is not to punish", but observed that the deportation order was issued, not for punishment, but because Mr. White had been found to be a danger to the public. The Director concluded that the fact that his criminality was due to an accident was a factor that weighed in his favour, and made the balancing of all the relevant factors difficult.

(iv) Hardship of returning to Jamaica

[34] The Director acknowledged the voluminous country condition documentation adduced by counsel. She considered three hardship factors: (1) lack of medical facilities for persons requiring

the same care as Mr. White; (2) stigma and violence against the mentally ill; and (3) lack of family support in Jamaica.

[35] The Director considered letters submitted by Dr. Morgan, Director – Mental Health and Substance Abuse Unit, Ministry Health and Environment, Jamaica. Dr. Morgan wrote, among other things, that:

- Admissions to the single mental hospital are restricted to short-term admissions for the acutely mentally ill;
- Most persons with chronic mental illnesses are treated in the community under family supervision, and receive voluntary treatment in community clinics;
- There are no high security wards suitable for long-term placement of criminal offenders;
- Mr. White is likely to end up homeless, and could become a victim of abuse and stigmatization;
- There are no specific public sector facilities available for persons with brain injuries who pose a risk to society; and

- There are no specific private sector facilities either, although there are several residential nursing homes that are limited in their capacity to handle a person with a brain injury requiring constant supervision and who pose a security risk.

[36] The Director noted that while Dr. Morgan believed that private nursing homes would be unlikely to have a high security ward, the most recent letter from Dr. Cameron of the STU indicated that Mr. White would require a “group home” rather than a higher security facility. The Director also noted that Dr. Morgan was a representative of the Jamaican government, and that her knowledge of private-sector facilities might not be extensive.

[37] The Director concluded that, given Dr. Morgan’s comments and Mr. White’s financial resources, there was no evidence before her explaining why he could not arrange for specialized care, either within a nursing home or within his own residence. The Director stated that this could include the hiring of a full-time psychiatric nurse.

[38] The Director then reviewed an extensive package of documentary evidence concerning the situation of the chronically mentally ill in Jamaica. From this, the Director concluded that community-based treatment is available for the chronically mentally ill in Jamaica. She noted that programming available in Canada was likely to be better-suited to Mr. White’s needs and that any solution in Jamaica was likely to fall short of what he could receive in Canada. However, she was satisfied that the differential in treatment would not be so detrimental to Mr. White’s well-being as to be the determinative factor in this case.

[39] Regarding the stigma and violence inflicted on the mentally ill in Jamaica, the Director reviewed a number of articles submitted by counsel. She noted that one study observed that views of the mentally ill in Jamaica were comparable to those in highly developed countries. She then noted that a PRRA officer had addressed these same alleged risks to Mr. White in a 2006 decision and concluded that they were not well-founded. The Federal Court denied him leave to seek judicial review of that decision. The Director found that the risks to Mr. White would arise only if he left a situation of supervised care, and so were speculative. Accordingly, the Director concluded that the problems of stigma and violence were unlikely to affect Mr. White personally if he were removed to Jamaica.

[40] The Director then considered Mr. White's lack of family support in Jamaica. She noted that the main concern was that he had no contact with his extended family, so there was no one in that country to supervise his care. The Director concluded that the financial resources available to Mr. White should be adequate to hire a full-time nurse, with an additional night-time assistant, either within a private residence or a nursing home. She noted that any potential problems with such an arrangement – Mr. White wandering off, or having a caregiver quit – were speculative. The same problems could occur in Canada. She concluded that while Jamaica may not have the same resources as Canada, it does offer community-based psychiatric care and the possibility of hospitalization for acute problems.

[41] The Director concluded that if Mr. White returned to Jamaica he would face a period of adjustment. He was fortunate to have family members interested in his health and welfare who appeared willing to assist him if he returned to Jamaica.

(c) *Balancing*

[42] The Director acknowledged that Mr. White's injury led him to display a pattern of behaviour which would endanger the Canadian public. This was an important consideration linked directly to his inadmissibility to Canada for serious criminality.

[43] The Director concluded that suitable care arrangements could be made for Mr. White in Jamaica. She noted that the differential availability of care and programming in Jamaica was a factor weighing in his favour. However, she concluded that any hardship to Mr. White would not be so significant as to overcome the danger he represents to the Canadian public.

[44] Regarding establishment, while this was a consideration in Mr. White's favour, the Director also noted that there was little recent evidence of the support he received prior to the accident. Further, he had not experienced consistency in terms of his professional care providers.

[45] The Director noted that the most significant factor in his favour was the further physical distance that would be created between him and his family. If he returned to Jamaica, he could still contact his family by phone, but it would be complicated and expensive to arrange visits. Mr. White's father could relocate to Jamaica, but this was not a certainty. Even if Mr. White were to remain in Canada, he would probably never live with his family members again anyway.

[46] The Director concluded that the danger that Mr. White posed to the public was real and frightening. After giving due consideration to his special needs, the Director stated that the interests



of protecting the Canadian public took precedence over whatever hardship Mr. White might face in relocating to Jamaica.

[47] The Director noted that, as opposed to the two earlier decisions made by PRRA officers that had been overturned on judicial review, she was charged with answering a slightly different question. Rather than determining if the requirement to obtain a permanent resident visa from outside of Canada would cause “an unusual, underserved or disproportionate hardship”, the Director had to determine if there were sufficient H&C grounds to warrant the granting of an exemption to Mr. White’s inadmissibility based on serious criminality. This determination required a balancing of the nature of the criminality and the prospects for Mr. White’s rehabilitation against H&C factors.

[48] The Director also made clear that she had taken into consideration the guidance provided by Justice Elizabeth Heneghan and Justice Michael Kelen in the two prior judicial reviews (*White (Litigation Guardian of) v Canada (Minister of Citizenship and Immigration)*, 2008 FC 896; *White (Litigation Guardian of) v Canada (Minister of Citizenship and Immigration)*, 2010 FC 206).

[49] Finally, the Director considered Mr. White’s request for a TRP as an alternative to an exemption on H&C grounds. She concluded that a TRP was inappropriate in this case. She characterized it as a “wait and see” approach, in which the parties could wait to see if Mr. White re-offended or not. She found this would be at the expense of others. The Director concluded that, even if Mr. White were to remain crime-free for five years (the lifespan of a TRP), given that his problems are permanent with no significant potential for rehabilitation, a relapse was likely to occur beyond the five-year mark.

[50] For these reasons, the Director concluded that she was satisfied that a waiver of criminal inadmissibility was not warranted.

### III. Was the Director's Decision Unreasonable?

[51] Mr. White contends that the Director applied the wrong test in assessing his application. He acknowledges that he bears the onus of establishing that the discretion set out in s 25 of IRPA should be exercised in his favour. However, he submits that he presented sufficient evidence to support the exercise of discretion in his favour, and the Director erred by failing to consider all relevant evidence and factors.

[52] Mr. White also maintains that the Director assessed the evidence unreasonably. He claims that the Director ignored evidence and drew unreasonable inferences based on speculation in reaching her decision, as follows:

- When she concluded that Mr. White could be treated in a private nursing home in Jamaica, the Director ignored Mr. White's real need for a secure and controlled health care placement. The Director misinterpreted Dr. Cameron's evidence as amounting to a conclusion that Mr. White did not need a high security placement, and could live in a "group home";

- The Director's conclusion that a privately constructed plan would work for Mr. White in Jamaica ignores the evidence that such a plan would not work even in Canada, as well as Dr. Morgan's letter indicating that care of this type is unavailable in Jamaica;
- The Director's conclusion that a community health care scheme is available to the mentally disabled in Jamaica was based on a misunderstanding of Dr. Morgan's evidence. In fact, such a scheme would put Mr. White in danger;
- The Director misunderstood Mr. White's needs when she concluded that he could simply hire nursing staff in Jamaica and keep in touch with his family by telephone;
- By relying on the 2006 PRRA decision, the Director ignored the fact that she was required to consider hardship and the broader risks faced by Mr. White; and
- In concluding that a TRP would not allow for sufficient control over Mr. White, the Director ignored evidence that he would be in a specialized secure placement.

[53] Mr. White also alleges that the Director erred by drawing unreasonable inferences as follows:

- That there are private, experienced, affordable caregivers available in Jamaica that could provide him with 24/7 supervision and care;

- That Mr. White's father and sister might join him in Jamaica; and
- That it was merely speculative to suggest that Mr. White would experience stigmatization and abuse in Jamaica despite evidence of the special risk faced by the mentally disabled there. This conclusion was based on the Director's belief that this would only happen if Mr. White left supervised care, noting that this could happen in Canada, but ignoring the institutional controls in place in Canada.

[54] In response, the Minister submits that the onus was on Mr. White to show that an exemption was warranted. He did not provide sufficient evidence that his proposed plan of care would satisfactorily overcome the danger posed to the Canadian public, notwithstanding the role his father and sister would play in the execution of that plan. Protecting the Canadian public takes precedence over the hardship Mr. White would suffer if he returned to Jamaica.

[55] The Minister also submits that it was open to the Director to conclude that the information on Mr. White's plan of care in Canada failed to address the needs of the Canadian public to be protected from random, violent criminal acts. Mr. White actually conceded that he was dangerous and that rehabilitation was unlikely. The standard to be met to obtain an exemption from the requirement to apply for permanent residence from outside of Canada is high (*Katwaru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1277, at para 64) [*Katwaru*].

[56] Moreover, the Minister notes that there was insufficient evidence to show that Mr. White could not be cared for privately in Jamaica. The Director considered the evidence and concluded, with reference to Mr. White's financial resources, that there was no reason why it would not be possible to arrange for specialized care for Mr. White. The Minister submits that the Director acted reasonably in refusing Mr. White's request given that he had not established sufficient H&C grounds to overcome the danger he posed to the public (*Katwaru*, above, at para 69).

[57] The Minister also says that the Director's reasons make clear that she turned her mind to all of the material before her in concluding there were insufficient H&C factors to warrant an exemption. Mr. White simply failed to demonstrate sufficient rehabilitation for her to have any confidence that allowing him to obtain permanent residence would be an acceptable risk for the Canadian public to bear.

[58] In sum, the Minister submits that the Director applied the right test and considered all the relevant evidence relating to risk and hardship.

[59] Clearly, the onus fell on Mr. White to show that the factors supporting a decision in his favour outweighed the seriousness of the offence that led to the deportation order. There are cases where an applicant can show that the positive factors in his or her favour outweigh the seriousness of the offence. And, conversely, there may be situations where the seriousness of the offence, in itself, will outweigh the positive factors on which the applicant relies (*Katwaru*, above, at para 61). Ultimately, a decision on an H&C application depends on the weighing of the positive and negative factors. The security of Canadians is paramount (IRPA, s 3(2)(f)). The Supreme Court of Canada

has found that this objective is served by the removal of applicants with criminal records (*Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, at para 10; *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, at para 24).

[60] Here, there were obviously significant factors that weighed strongly in favour of a positive determination. The Director's lengthy reasons disclose that she struggled with the fact that the positive factors raised in this case were of a type "materially different from the types of factors routinely identified in H&C cases" (*Katwaru*, above, at para 63).

[61] The Director was obliged to consider and balance those positive factors against the fact that Mr. White was otherwise inadmissible to Canada for serious criminality, and represented a continuing, permanent danger to Canada.

[62] I agree with Mr. White that the Director made a number of errors that justify overturning her decision.

[63] First, the Director accepted that Mr. White's brain injury is permanent, and that he has reduced cognitive faculties, behavioural and mood problems, and recurrent bouts of psychosis. Moreover, he has no immediate family in Jamaica, and has not lived there since he was a child. It was unclear whether any of his family in Canada would be able or willing to accompany him to Jamaica to arrange for his care. Yet, despite these obvious obstacles, the Director concluded that, given Mr. White's financial resources, "it therefore appears reasonable to me that Mr. White's family should be able to make suitable care arrangements for him in Jamaica."

[64] This conclusion was unsupported by the evidence. Dr. Morgan explained that most persons with chronic mental illnesses in Jamaica are treated in the community under family supervision, and receive voluntary treatment in community clinics. Essentially, family members look after their relatives with mental illnesses. There was no evidence that private nurses were available in Jamaica to take the place of family members, or indicating how much a nurse would cost. There are private facilities, but none with the kind of security arrangements that Mr. White would require. Again, there was no evidence relating to the cost of these facilities.

[65] Second, the Director's conclusion that the type of care Mr. White required was available in Jamaica appears to have been based on a misunderstanding of Dr. Cameron's evidence. Dr. Cameron's belief that Mr. White could be safely discharged into the community was not unqualified. He pointed out that Mr. White is currently "housed in a four-room maximum secure diamond area with access if accompanied by staff to a common room shared with up to 24 other residents." He noted that Mr. White's condition had improved over recent months and, on that basis, it would be "quite realistic for Mr. White to be safely discharged to the community so long as there are proper supports in place." He had in mind a "supported housing residence (group home)" for "psychiatrically ill or brain injured patients" and made clear that finding that kind of facility was a "challenge."

[66] I agree with Mr. White that the Director's conclusion that he could simply go to a "group home" was inconsistent with reports about his need for a secure and controlled placement, and with

counsel's submissions about recent efforts to house him in a specialized type of setting. Clearly, Dr. Cameron had in mind a very special kind of community facility, difficult to find even in Canada.

[67] Third, the fact that Mr. White's subsequent criminality was caused entirely by the accident he was involved in, through no fault of his own and at a young age, was recognized by the Director as a tragedy, and his blameworthiness for his subsequent criminality was low. The Director concluded that "the fact that Mr. White's criminality is due to an accident and not because he has a bad character is a factor in his favour; it is the element of his case which makes the balancing of factors very difficult."

[68] Yet, despite identifying this consideration as "the factor" which complicated the balancing of all other factors, the Director did not mention this factor at all in the "Balancing" section of the analysis. While the Director demonstrated she was alive to this consideration, the reasons do not show how this consideration was actually weighed with and against the other relevant factors.

[69] I find that the errors in the treatment of this evidence led the Director to render an unreasonable decision. It did not fall within the range of defensible outcomes, based on the facts and the law.

#### IV. What is the Proper Remedy?



[70] This Court quashed two previous decisions in which Mr. White had been found not to suffer unusual, undeserved or disproportionate hardship in being removed from Canada. His application has now been refused again.

[71] Mr. White submits that s 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7, [Act] empowers me to order a decision-maker to “do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing.” Mr. White requests a “directed verdict” in the form of an order allowing him to remain in Canada as a permanent resident.

[72] The Minister says that the kind of declaration Mr. White seeks is inappropriate. First, the Minister notes that this remedy was not sought in Mr. White’s application for leave and judicial review. Second, the Minister submits that the Federal Court of Appeal has confirmed that the power to issue directions in the nature of a directed verdict is an exceptional one to be used only in the clearest of circumstances. The Minister maintains this is especially so if the effect of the directions were to confer permanent or temporary resident status, or to fetter the Minister’s discretion to determine if there are sufficient H&C grounds to warrant a waiver of inadmissibility for serious criminality (s 18.1(3)(a) and (b) of IRPA; *Rafuse v Canada (Minister of Citizenship and Immigration)* (2002), NR 385 (FCA); *Xie v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 286 (TD); *Turanskaya v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 254 (CA); *Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230, at para 5).

[73] I agree with the Minister that there are difficulties with Mr. White's requested remedy. First, it was not properly pleaded in his Notice of Application. Second, it would appear to be contrary to the nature of decisions under s 25 of IRPA, which are discretionary, fact-based determinations, requiring a significant degree of deference.

[74] On the other hand, however, Mr. White is quite right to point out that this is the third H&C decision which has come before the Federal Court and that these ongoing proceedings are likely hindering his ability to make permanent arrangements for his care, whether in Canada or in Jamaica. Some further direction from the Court is required.

[75] There is already an extensive evidentiary record in this case. Moreover, there are no disputes relating to Mr. White's criminality, the risk he poses, or his prospects for rehabilitation. The areas where there are serious disputes are those where the Director fell into error – Mr. White's treatment needs, the availability in Jamaica of facilities where those needs can be met, and the significance of the fact that Mr. White's condition is a product not of wilful criminality, but of a brain injury caused by a motor vehicle accident. The key areas that need to be re-evaluated, therefore, are the hardship to Mr. White if he returned to Jamaica, and the final balancing of the relevant factors.

#### V. Conclusion and Disposition

[76] While the Director embarked on the appropriate mode of analysis and identified the relevant factors, some of her conclusions were unsupported on the evidence. In addition, she did not appear to give any weight to what she herself considered to be the most complicating factor, Mr. White's

accident, in her analysis. Accordingly, I find that the Director's decision was unreasonable, in that it did not represent a defensible outcome based on the facts and the law.

[77] Therefore, I would allow this application for judicial review and order a reconsideration of Mr. White's application by a different decision-maker, with the following directions:

[78] On the reconsideration of Mr. White's application, the decision-maker must take account of the following important factors, in respect of the hardship he would experience if he returned to Jamaica and the overall balancing of factors:

- (i) Mr. White is unlikely to have significant, ongoing family support in Jamaica;
- (ii) The type of intensive, supervised and secure care Mr. White requires appears not to be available in Jamaica, either in public or private facilities (unless there is fresh evidence to the contrary); and
- (iii) Mr. White's condition and criminal history is the consequence of a tragic accident, for which he is entirely blameless, which took place on Canadian soil while he was a permanent resident of Canada, and which transpired at a time when his future seemed especially bright.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that**

1. The application for judicial review is allowed and is sent back for reconsideration by a new hearing officer, taking into account the following important factors in respect of the hardship that Mr. White would experience if he is returned to Jamaica, and the overall balancing of factors:

- (i) Mr. White is unlikely to have significant, ongoing family support in Jamaica;
- (ii) The type of intensive, supervised and secure care Mr. White requires appears not to be available in Jamaica, either in public or private facilities (unless there is fresh evidence to the contrary); and
- (iii) Mr. White’s condition and criminal history is the consequence of a tragic accident, for which he is entirely blameless, which took place on Canadian soil while he was a permanent resident of Canada, and which transpired at a time when his future seemed especially bright.

“James W. O’Reilly”

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Judge

## Annex “A”

*Immigration and Refugee Protection Act, SC 2001, c 27*

*Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27*

Humanitarian and compassionate considerations — request of foreign national

Séjour pour motif d’ordre humanitaire à la demande de l’étranger

**25.** (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

**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, sur demande d’un étranger se trouvant hors du Canada, 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.

*Federal Courts Act, RSC, 1985, c F-7*

*Loi sur les Cours fédérales, LRC (1985), ch F-7*

Application for judicial review

Demande de contrôle judiciaire

Powers of Federal Court

Pouvoirs de la Cour fédérale

**18.1** (3) On an application for judicial review, the Federal Court may

**18.1** (3) Sur présentation d’une demande de contrôle judiciaire, la Cour fédérale peut :

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

a) ordonner à l’office fédéral en cause d’accomplir tout acte qu’il a illégalement omis ou refusé d’accomplir ou dont il a retardé l’exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu’elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l’office fédéral.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5841-10

**STYLE OF CAUSE:** KITTS WHITE BY HIS LITIGATION GUARDIAN,  
JULINE WHITE  
v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION AND THE MINISTER OF PUBLIC  
SAFETY AND EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** May 3, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** September 2, 2011

**APPEARANCES:**

Barbara Jackman FOR THE APPLICANT

Kareena Wilding FOR THE RESPONDENTS

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Deputy Attorney General of Canada