* **Residency: Permanent and Temporary**
  + Two categories: permanent and temporary
  + S.12: selection of permanent residents
  + Basic entry procedure: ‘foreign nationals’\* to apply before they come, obtain required documents, not be inadmissible, arrive at the border (s. 21 + reg 6)
  + rights of permanent residents: ss. 19(2) and 27
    - If you’re a citizen you can enter Canada always. PR has the right to enter Canada but can still be examined upon entry.
    - Citizens can work anywhere. PRs can work anywhere.
* **Reading the residency obligation – s. 28**
  + You have PR until it is taken away b/c of violation of residency obligations.
  + They stop ppl on their way back in if it looks like they can't possibly meet the residency reqs
  + 28(2)(c)- humanitarian and compassionate + BIC can justify retaining PR even if PR has violated residency obligations. 🡪discretion
* **Loss of PR status**: become citizen; breach residency obligations in s.28; enforce removal order; fraudulent refugee claim (s. 46)

**PR- Econ Class- Federal Skilled Worker CHECKLIST**

* **FSW is Econ Class of PR: basis of skilled work and being econ established in Canada (Rs.75)**
* **MI (s.14.1)**:
  + PhD [enrolled OR graduated within past 12 mo], OR
  + arranged employment offer
  + work experience in eligible occupation
* **Skilled Work Req + Min Reqs:**
  + 1 yr FT [or equivalent PT] work experience [paid] in past 10 yrs in NOC skill 0AB (Rs.75(2)(a)(b)+(3))
    - FT work = 30 hrs/week
  + Min lang req (Rs.75(2)(d)) and min ed req (Rs.75(2)(e)
* **Selection Criteria (Rs.76(1)) [min points req 67 (Rs.76(2))]:** 
  + Education (Rs.78) – Max 25 pts.
  + Language Proficiency (Eng or Fre) (Rs.79) – Max 28 pts.
  + Work experience (Rs. 80) – Max 15 pts.
  + Age(Rs. 81) – Max 12 pts.
  + Arranged Employment (Rs.82) – Max 10 pts.
  + Adaptability (Rs. 83) – Max 10 pts.
    - (lang/prev study/prev work of spouse/CL partner, prev work/study, arranged employment, relatives)
* **DETAIL: arranged employment (Rs.82)**
  + Not just any job offer, very specific criteria
    - Labour market opinion based work permit (high skilled, A, O, B only) valid at the time of application and time of visa issuance OR
    - Same as above but pursuant to an international agreement (NAFTA, GATT) OR
      * LMO not required for these then. Int’l agreements cover it.
    - Does not hold a work permit but has a permanent job offer APPROVED BY HRSDC (an LMO) OR
      * Labour market opinion needs to be attached to that job offer
    - Holds a non LMO, non NAFTA/GATT work permit AND has a job offer APPROVED BY HRSDC
  + LMO- tied specifically to an employer who has advertised the job to citizens and residents first and have shown they have the need for it and gov believes that they can't find anyone else so they are allowed to get a foreign national
* **Funds:** 
  + Need to have settlement funds unencumbered by obligations, unless you have arranged employment (Rs.76(1)(b)(i))
* **Substituted evaluation (reg 76(3), (4))**
  + Refuse PR even if you meet points
  + Grant PR even if you don’t meet points
  + Only applies to those 6 selection criteria
  + Formula and discretion
* **Accompanying fam members of FSW applicant**: can become PRs if they’re not inadmissible and FSW applicant becomes PR.
* **Appeal Rights for FSW:**
  + They don’t have recourse for IAD b/c they lack juris over econ class
  + They can either reapply or go to FC
    - Within 50 days of getting decision in Canada and 60 from outside Canada (Federal Courts Act)
  + **Standard of review**
    - Reasonableness for fact-based, discretionary decisions
      * Range of reasonable outcomes
      * Line from evi to conc
      * Judge can disagree with decision and still find it reasonable
      * Not role of court to substitute its own decision
    - Correctness for procedural fairness

**CASE LAW**

* **There is no obligation to consider making the substituted evaluation** (the stat lang is ‘may’) (***Grigaliunas)***
* ***Sharma*** 🡪 eg of Negative substituted evaluation for Work experience
* ***Shamsun Naher Chowdhury , FC*🡪 JR of officer’s decision granted; unreasonable for disallowing ed yrs**
  + Issue:
    - Giving applicant 22 points for her education as opposed to 25 and disregarding prev judgment
    - Second assessment of officer re: educational credentials at issue
    - Failure to provide opportunity to address concerns about education- PF
    - She had 15.5 yrs not 17 yrs of ed needed for 25 pts and she got 22
      * Her bcomm is 2 years at most
  + Analysis:
    - Concern around the assessment of applicant’s educational credentials
    - Officer had power to do de novo review of her ed but also had the duty to tell her officer was reducing the yrs granted
    - Officer’s decision lacks transparency and justification
      * Based on a website of some other Canadian website
      * Looks arbitrary then
      * The notation of 2001-2002 is when she started not duration of program so it’s unreasonable
  + standard of review
    - Reasonableness for determination and correctness (on the low end for fairness) for PF
* ***Liang and Gurung* 🡪 class actions re: retrospective MI**
  + No entitlement to get your application first considered
  + Court doesn’t really enforce timelines but once Minister gives his own policy, they want them to stick to it.
  + One class action succeeds; one dismissed.

**PR- Econ Class- Canadian Experience (CEC) Checklist**

* **CEC is Econ Class for getting PR- basis of becoming econ est in Canada and having experience in Canada**
* **MI:**
  + 12,000 total cap, and 200 cap on each B occupation.
  + You cannot use work experience in the following occupations to qualify:
    - Cooks (NOC 6322)
    - Food service supervisors (NOC 6311)
    - Administrative officers (NOC 1221)
    - Administrative assistants (NOC 1241)
    - Accounting technicians and bookkeepers (NOC 1311)
    - Retail sales supervisors (NOC 6211)
* **Requirements (Rs.87.1):**
  + 1 yr of FT [or equivalent PT] employment in NOC 0AB in Canada in 3 yrs before you apply
    - FT work = 30 hrs/week
    - If you're in work while in FT school, it doesn’t count for your work req.
  + Must have temp status/work permit while accruing work experience
  + Min. Lang reqs
  + Must not want to reside in Québec

**PR- Econ Class- Provincial Nominee Program (PNP) Checklist**

* **PNP is an Econ Class of getting PR- basis of province needing/nominating FN**
* **Reqs (Rs.87)**
  + must be named in a nomination certificate by prov and intend to reside in that province
  + CIC may still exercise substituted evaluation Rs.87(3) (***Wai)***
  + CIC still has to issue the visa
  + all applicants must show sufficient support funds (LICO)
    - based off of federal poverty line- low income cut offs
  + no unresolved refugee claims or other status issues
  + must have legal status
  + + PR reqs of the prov
* **How?**
  + s. 8: Minister may enter into agreements with provinces; PNP can be based ONLY on econ grounds
    - **Canada-BC Immigration Agreement**
  + s. 9: Prov can determine selection criteria which determine PR
* **BC PNP**
  + **Business immigration- applying as entrepreneur**
  + **Skills immigration- applying as worker**
* **Relevance to Temporary Resident Workers**
  + If someone has PNP nomination they can get open work permit (Rs.204)

**CASE LAW**

* ***Wai*** [hasn’t econ est in Canada for 2 yrs so officer thinks in spite of Manitoba PNP certificate he doesn’t meet reqs of the class]🡪 Substituted evaluations are meaningfully exercised and available to CIC in context of prov PNPs
  + **🡪 getting certificate is not enough to show applicant can become econ est in Canada**
* ***He*** [suspicious work experience; past employers hanging up/changing stories]🡪 eg of negative substituted evaluation for a provincial nominee
* ***Sran*** [Indian couple living in NZ; officer didn’t follow own policy re ed wife] 🡪 **Officers have discretion but they can't just ignore PNP and make things up and use one tool to make determinations about another tool.**

**PR- Econ Class- Investors 🡪 temporarily suspended & Start –Up Visas**

* **Rs. 90 (1) [Rs.90-96]**
  + Net worth $1.6 mil, invest 800k.
  + Temporarily suspended
  + (private partnership/approved business venture)
* “start up” visa now in place 🡪 $200,000 venture capital approved investment in a Canadian business

**PR- Econ Class- Entrepreneurs 🡪 temporarily suspended**

* **Rs. 97, 98**
  + must control at least 33.3 percent of a qualifying business
  + must actively manage the business and create one job
  + conditional permanent residence

**PR- Econ Class- Self-Employed Persons 🡪 rare**

* **Rs. 100-102, 88(1)**
  + significant contribution to specified economic/cultural/athletic activities in Canada
  + world-class athletes, artists, musicians, and farm managers (!)

**PR- NOT strict Econ Class- Live In Caregivers**

* **Est Live-in-Caregiver Class (Rs.110) to get into Canada and eventually become PR**
* **Requirements for Class**
  + Apply for work permit, and if needed temporary residence visa (Rs.111)
  + Requirements of work permit (Rs. 112)
    - Apply from outside Canada
    - Education- equivalent to high school
    - Training [6 months] OR experience [1 yr inc min. 6 moths w/ same employer]
    - Sufficient lang to comm. w/out supervision
    - Employment contract w/ future employer
* **Requirements for getting PR as LIC (Rs. 113)**
  + Submit application
  + Have temp residence
  + Have work permit for LIC (under Rs. 112)
  + entered on a work permit, and worked 2 years out of 4 (or 3900 hours in 22 months)
    - resided in private household + provided childcare/senior care/disability care
    - hours worked can be from more than one employer, but one at a time
    - 3900 hours cannot inc more than 390 hrs of overtime
  + they or their fam members aren’t subj to enforceable removal order/admissibility hearing/pending JR appeal results
  + didn’t come as LIC due to misrepresentation
* Fam member of applicant in LIC class can get PR if applicant inc them in application at the time it was made (Rs.114)
  + Fam member becomes PR if not inadmissible and applicant becomes PR (Rs.114)

**PR- Family Class Checklist**

* **Family Class is for getting PR- basis of family reunification (Rs.116)**
* A citizen or PR can **sponsor** a **defined family member** (s.13(1)).
* **Rs.117(1)- FN is member of family class if: 🡪** [relationship to sponsor]
  + 117(1) (a) spouse (marriage), CL partner, conjugal partner
  + 117(1) (b) dependent child
  + 117(1) (c) mother or father
  + 117(1) (d) grandparent
  + 117(1)(f) person whose parents are dead; under 18yrs; not a spouse/CL partner
    - (i) a child of the sponsor's mother or father, [brother, sister] [sponsor’s parents are dead]
    - (ii) a child of a child of the sponsor's mother or father, or [niece, nephew] [sponsor’s brother/sister dead]
    - (iii) a child of the sponsor's child; [grandchild] [sponsor’s child dead]
    - 🡪 Orphaned sibling, niece or nephew, grandchildren under 18 yrs of sponsor
  + 117(1)(h) “Lonely Canadian”
    - PR or citizen who doesn’t have list of family here, or anyone else to sponsor, and wants to sponsor one relative
  + 117(1)(g)
    - Sponsor wants to adopt child under 18 yrs
* person must remain fam member at time of application & determination to get PR (Rs.121)
* Accompanying fam members of a member of the Family Class can become PR if they’re not inadmissible and applicant in Family Class becomes PR (Rs.122)

**Bad Faith & Excluded Relationships**

* **Two pronged test for ‘bad faith’ partnerships (Rs.4): genuineness + immigration purpose**
  + Adoption principles similar (Rs.4(2))
* New relationship w/ same sponsor after prev relationship w/ same sponsor to get status NOT allowed (Rs.4.1)
  + meant to capture A and B scheming together, so they break up and A becomes spouse of C and then sponsors B.
* **Excluded relationships (Rs. 4, 4.1, 5, and 117)**
  + Age- can’t be spouse or CL partner if under 16 (Rs.5, 117(9)(a))
  + Polygamy – can’t be spouse or CL partner of more than one person (Rs. 5, 117(9)(c))
  + CL polygamy—can’t be spouse or CL partner if separated from sponsor and CL partner of another person
  + Undertaking- applicant is not member of fam class if he is spouse/CL of sponsor, but sponsor has undertaking re: another spouse/CL/conjugal partner which is not discharged yet (Rs.117(9)(b))
  + **importance of declaring non-accompanying family members at time of application : the 117(9)(d) bar**
    - You cannot sponsor them and they will not be members of the family class which also mean you don’t get access to appeal right to IAD to consider humanitarian and compassionate grounds

**Key Defined Terms**

* **Family Member** Rs.1(3)
  + Spouse or CL partner
  + Dependent child of person or person’s spouse or CL partner
  + Dependent child of dependent child ref above
* **Common-law Partner** Rs.1(1)-(2)
  + Cohabiting together for period of one year in conjugal relationship
    - Guidance on ‘cohabit’ and ‘conjugal’ meaning (***Thornton***)
  + Considered CL partner if in conjugal relationship but unable to live together
* **Conjugal partner Rs.2**
  + FN residing outside Canada in conjugal relationship w/ sponsor for at least 1 yr
  + Case law for factors of conjugal relationship (***Thornton)***
* **Dependent child, Rs. 2**
  + Less than 22 yrs and NOT a spouse/CL partner
  + Over 22 yrs and FT student
  + Over 22 yrs and physically/mentally disabled.
* **Marriage, R s.2**
  + In respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law
* **Relative, Rs.2**
  + means a person who is related to another person by blood or adoption.

**New Restrictions on Spouse/CL (Rs.72.1)**

* Combatting marriage fraud: Conditional PR for couples together less than 2 yrs and w/out children, where they must cohabit in “a legitimate relationship” for 2 yrs after getting PR, unless there is neglect or abuse, OR sponsor dies. [req- evi of compliance]
  + Neglect or abuse at hands of sponsor or any other person sponsor should be protecting PR applicant from and can be directed at applicant, children, sponsor, or any person living with them

**Admissibility**

* Inadmissibility applies but not in the same way
* For your spouse and dependent children, excessive strain on health services is NOT a ground for inadmissibility

**Appeal Rights**

* Sponsor can appeal to IAD if applicant’s application isn’t approved (s.63(1))

***\*\*SEE SPONSORSHIP SECTION!\*\* \*\*SEE CASE LAW SECTION!\*\****

**PR- Spouse or CL Partner in Canada Class**

* **Spouse or CL Partner in Canada Class is for getting PR- basis of family reunification.**
* **requirements for class membership (Rs.124)**
  + spouse or CL partner of sponsor and live together in Canada
  + have temporary resident status in Canada
  + are the subject of a sponsorship application
* Excluded Relationships: SAME RULES AS FAMILY CLASS (Rs.125 repeats them)
* Fam members and accompanying family members of applicant (Rs.128-129)
  + included in application, meets rules at 2 times, underlying application is approved, not inadmissible
* Sponsorship Undertaking for applicant and applicant’s accompanying fam members needed (Rs.127)
* If someone has sponsored a spouse inside Canada and that person is out of status, there will be no enforcement action on that person until the spousal sponsorship application has been considered
  + This is matter of public policy, not a legal right.
  + Also applies to the dependents of that sponsored person w/out status

**Appeal Rights**

* Sponsor CANNOT appeal to IAD if applicant’s application isn’t approved.

***\*\*SEE SPONSORSHIP SECTION!\*\* \*\*SEE CASE LAW SECTION!\*\****

**SPONSORSHIP Reqs [Family Class & Spouse/CL Partner in Canada Class]**

* **Requirements for Sponsorship (Rs.133)**
  + Meets **definition of a sponsor (Rs.130)**
    - Citizen or PR
    - Living in Canada
      * Exception: Citizen sponsoring partners/children, if you’ll be back when they are
    - Has filed a sponsorship application
    - Restriction: PR who was sponsored as spouse/CL/conj parent can’t sponsor spouse/CL/conjg partner for 5 yrs or until he is Citizen.
  + Intention to meet obligation
  + Not subject to a removal order
  + Not in detention
  + No convictions for sex offences or family violence (includes attempts, foreign convictions)
    - Ok if:
      * Offence in Canada- sponsor received pardon OR it’s been 5 yrs since end of sentence
      * Offence outside Canada- sponsor acquitted OR [it’s been 5 yrs since end of sentence AND rehabilitated]
  + No in default of any undertaking or support payments
  + No debt to Canada- i.e. if you are in default
  + Not bankrupt
  + Has minimum necessary income, EXCEPT if sponsoring partners or children
    - calculated according to Rs.134🡪 Low income cut-off
  + Not in receipt of social assistance for a reason other than disability
  + At time of application, and *continuously* until a decision is made.
* **Sponsorship Undertaking (Rs.131)**
  + enforceable promise made w/ Minister or a province to reimburse for any social assistance payment to the sponsored person for a certain period of time after they become PRs.
* **Duration of Sponsorship undertaking (Rs.132):** 
  + 3 yrs for spouse/partners/dep kids 22+
  + 10 yrs dep kids <22
  + 20 yrs for grand/dad/mum + their accompanying fam members
  + 10 yrs for everyone else.
* Sponsor (& co-signer) must enter an agreement (Rs.132(4))
* Until you’ve paid it back, you can’t sponsor anybody else

**CASE LAW- Family Class & Spouse/CL Partner in Canada Class**

***De Guzman v. Minister of C&I, 2005, FCA* 🡪 117(9)(d) provision bar to sponsoring fam members not declared when sponsor herself came to Canada**

**F**: P came to Canada w/ daughter and said P is unmarried and daughter’s only dependent; lied; P had 2 other sons in Philippines. Now after 8 yrs P is citizen and wants to sponsor the sons, but her application under family class fails pursuant to provision- ground that boys were not members of the family class b/c they hadn’t been examined for immigration purposes when P applied to come to Canada.

**I**: Is provisions invalid b/c it isn’t authorized bt relevant section of IRPA? Is provision invalid b/c it violates s.7 rights of P? Is provisions inconsistent w/ Canada’s int’l law obligations?

**D**/**R**: P’s appeal is dismissed. She cannot sponsor her 2 sons as part of family class.

* Sons are not members of the family class and so P cannot sponsor them in the family class.
* P’s lie about being unmarried was crucial to her visa application succeeding.
* P’s misreps about her sons and her marital status were not innocent.
* IRPA is framework legis: has core principles and objectives but admin of complex sys are left to regs and there is huge legis discretion
* Regulations are rarely struck down by courts who defer to discretion given by legis to make regs
* P- deterring applicant misreps is more about, and should be in the IRPA section about, inadmissibility, than selection, where it is; hence it’s an irrelevant factor given obj of IRPA for reuniting families
  + Court rejects argument.
  + Provision falls within broad lang of division which deals with family class and sponsorship
  + No evi that parl attached sig to divisions of IRPA
  + Undue admin rigidity to say sanction of not being able to sponsor non-examined family members from this division can’t be used, and only sanction of revoking citizenship from other division has to be used
* P- not allowing her to sponsor sons deprives P of making fundamental life choices (liberty) and gives her psychological harm (security of the person) so s.7 is violated.
  + Court rejects argument.
  + She made material misrep about sons to come to Canada for better life for herself and her daughter
  + Left them in Philippines for 8 years
  + Hasn’t shown evi of any hardship of psychological stress (has visited sons a couple of times and can go to them permanently if she wants)
  + Isn’t a refugee or in need of any protection
  + Provision (i.e. the state action) isn’t cause of her harm; she left sons voluntarily.
  + She could have applied under other compassionate and humanitarian provisions
* P- provision violates int’l human rights instruments
  + IRPA doesn’t list or set out int’l HR instruments it’s supposed to abide by
  + Provision could have explicitly said it is incorporating one and doesn’t (other provisions do)
  + Role of int’l law in the interpretation of domestic law: has been endorsed and expanded
  + Para 3(3)(f) doesn’t incorporate int’l HR instruments signed by Canada into IRPA, but directs that IRPA be construed and applied in manner that complies with them.
    - Signatory doesn’t mean Canada has implemented it in domestic law
    - Int’l HR instrument isn’t even a defined term
* Int’l HR instruments have a role to play; to see if effect of provision on them renders the whole of IRPA noncompliant; if yes, check authority in stat to see if there is clear legis intent for regs to make it non-compliant🡪 test
  + Integrity of family: provision is fine; doesn’t make IRPA noncompliant.
  + Best interests of the child: provision is fine; sons can apply on their own under other provisions
* **emphasizes int’l law aspect of the case**
* Decision returns to fact that these sons can come in a diff way through s.25 (H&C class)
  + Used by the court both to diffuse Charter argument and in analysis of whether the Act and reg scheme was rendered non-compliant by impugned provision

***Canada v. Mavi, 2011, SCC* 🡪 sponsorship undertakings**

**F**: Relatives who sponsored fam members for family class and signed undertakings are challenging provision which req them to pay back the gov for all the social services their sponsored fam members used.

**I**: undertakings in family class

**D**/**R**: Dispositions:

* **Canada and Ontario have a discretion under the IRPA and its Regulations to defer but not forgive debt after taking into account a sponsor’s submissions concerning the sponsor’s circumstances and those of his or her sponsored relatives.**
* Ontario did not improperly fetter its exercise of statutory discretion in adopting its policy. Its terms are consistent with the requirements of the statutory regime and met the legitimate procedural expectations of the respondent sponsors created by the text of their respective undertakings.
* **Canada and Ontario owe sponsors a duty of procedural fairness when enforcing sponsorship debt.**
* **The content of this duty of procedural fairness includes the following obligations:** 
  1. to notify a sponsor at his or her last known address of the claim;
  2. to afford the sponsor an opportunity within limited time to explain in writing his or her relevant personal and financial circumstances that are said to militate against immediate collection;
  3. to consider any relevant circumstances brought to its attention keeping in mind that the undertakings were the essential conditions precedent to allowing the sponsored immigrant to enter Canada in the first place;
  4. to notify the sponsor of the government’s decision;
  5. without the need to provide reasons.
* That the above requirements of procedural fairness were met in the cases of the eight respondent sponsors.

***Nijjar v. Minister of C&I* 🡪 eg of marriage NOT being found genuine**

**F**: Nijjar (appellant) sponsored Nijjar (applicant) as spouse but was refused. Appellant now has onus to prove marriage is legitimate and not just for immigration.

**I**: legitimacy of marriage

**D**/**R**: Applicant hasn’t discharged onus. Appeal dismissed.

* Officer had concerns:
  + that it took wife 4 years to sponsor husband, after withdrawing original sponsorship application.
    - She says it was due to family pressures b/c their two families were not on good terms.
  + That they didn’t have any direct contact and didn’t see each other for 4 yrs and 5 months
* Testimonies given undermined credibility of witnesses.
* Wife says they had reg contact but he learned about withdrawal of application from embassy- not consistent w/ genuine marriage
* No credible explanation for why they didn’t visit each other more often and why husband didn’t spend the money to get a cell phone for easier contact with wife during 4.5 years
* Family dispute doesn’t explain all this.

***Thornton v. Minister of Citizenship and Immigration, IAD* 🡪 relationship of same-sex couple NOT found to be conjugal relationship**

**F**: Appellant sponsored her girlfriend as a spouse/CL partner/conjugal partner in family class but was denied. Same sex couple from Philippines

**I**: Are they CL partners? Are they conjugal partners?

**D**/**R**: No. No. Appeal denied.

* Totality of evi doesn’t support either CL partner or conjugal partner.
  + Not married
  + Couldn’t openly date b/c of cultural restraints
  + Didn’t live together
  + Were apart for a long time
  + Appellant had another relationship after they broke up
    - Exclusivity then considered
* **Guidance of what cohabit means**: marriage like relationship characterized by financial interdependence, sexual relationship, common principal residence, mutual obligations to share running home responsibilities
* **Guidance on test for conjugal relationship**: approach must be flexible; consider shelter, personal and sexual behaviour, services, social activity, support, public identity, attitude towards children (***M v. H***), length of relationship
  + They are outside the framework that defines marriage and CL
* They note that the two have lives that are largely in ‘emo, physical and social independence’
  + Is that part of every relationship?

***Abiola-Okanlawon v. Minister of C&I* 🡪 relationship NOT found to be CL relationship**

**F**: Appellant applied for his spouse and daughter, but officer determined the applicant didn’t meet def of CL spouse and didn’t qualify as fam member

**I**: Does she meet def of CL partner?

**D**/**R**: No. Appeal dismissed.

* They claim they were CL spouses for 10 yrs in Nigeria and ever since
* Have 6 kids together
* Use of non exhaustive factors in ***M v. H*** for conjugal “marriage-like” relationship
* Period in Nigeria: yes, CL partners (cultural celebration recog union, cohabited, lived together)
* Then applicant left to the US; clear break; appellant had relationship and child w/ another woman
* Money given to applicant by appellant: panel sees it more as child support
* Also, he didn’t apply for her earlier; evi they weren’t in relationship then

***Mabhena v. Minister of C&I* 🡪 H&C grants exception to rule barring sponsor from sponsoring another fam member when she owes on prev sponsorship undertaking**

**F**: Appellant’s application to sponsor her applicant husband was denied on grounds that she was in default re: prev sponsorship undertaking to her son.

**I**: Is there humanitarian and compassionate grounds given best interests of child to grant special relief?

**D**/**R**: Yes. Appeal allowed.

* When the obstacle to admissibility is removed by the time of hearing, there is a lower threshold for granting special relief
* Undertaking
  + Re her son from prev relationship; born in US; first pregnancy after being HIV+; sponsored him and brought him to Canada
  + She claims she didn’t know adding him as dependent to some of the social welfare programs she was using would have undertaking conseqs, but it is her responsibility to comply w/ immigration laws
  + She says she can pay the undertaking back w/ loans from friends and help from husband if he comes to Canada to work
  + Extraordinary situation: son was planned to be born in Canada in which case she wouldn’t need to do all this sponsorship stuff but med complications made ER and he had to be born in US, expenses were racked up as matter of necessity not choice 🡪 militate in favour of appeal
* No option for her and 3 children to go back to Nigeria: HIV hardship, no social acceptance
* Having her husband here would be comfort esp in her health condition; and to her children who speak w/ him 2-3 times per week 🡪 BIC militate in favour of appeal again.

**Temporary Residence- GENERAL CHECKLIST**

* **Classes**: Visitors, Students, Temporary Workers, Other Temporary Residents (eg TRP)
* **FN becomes a temporary resident if (s.22):** applied for status, met obligations, and not subject to a Ministerial declaration
  + **Declaration**: Even if someone is admissible and meet all reqs, the Minister can still issue declaration that they can’t get residence (s.22.1)
  + **Rights/restrictions**: Can remain; Must comply w/ all reqs and conditions (s.29)
* **Dual Intent is OK (s.22(2))**
  + Applicant can have intention to leave at the end of their temporary visa time but also have the intention of becoming a PR
  + intention for PR isn’t fatal to temporary visa application as long as officer is satisfied you will leave at end of visit.
* **Temporary Resident Visa**
  + FNs entering temporarily require a temporary resident visa unless exempt (Rs.7(1)-(2))
    - Applies to ALL temporary entries
    - Exceptions:
      * List of countries exempt from TRV requirement (Rs.190).
      * diplomats, transit only on flights, crew members etc.
* **Reqs [applicable to all temporary residents]:**
  + **Rs.179**: has a passport, will leave Canada at the end of authorized stay, not inadmissible, and not subject to a Ministerial declaration under s.22.1(1) (“for public policy reasons”)
  + **Rs.180**: must meet requirements when visa originally issued, and when entering Canada
  + **Rs.183**: must leave by end of authorized period (can be extended), must not work or study unless authorized, auth may be based on means of support, intention to stay, expiry of travel docs
  + **Rs.185**: Officer can impose conditions on length of stay, type of work, employer, location, type of study, educational institution, travel restrictions, medical examination, and reporting requirements.
    - If you are working, this will depend on your LMO and restrictions and etc
* **Extension and Implied Status**
  + If someone is a visitor, they can’t become a student or a worker from inside Canada. They can stay in Canada but their application can’t.
  + **Rs.215**: ***students may extend status form within Canada if*** they have study permit OR work permit already
  + **Rs.199**: ***workers may extend from within Canada if*** they have study permit or work permit.
  + **Rs.201/217: *renewal of work permit/study permit allowed for*** FN if they apply before permit expires and they have complied w/ all conditions
  + **“implied status”**: Rs.186(u)/189- may work/study without a permit if have applied for extension of work/study permit prior to expiry
* **Restoration:**application to restore status within 90 days of losing temporary resident status due to conditions in Rs.185 being breached (duration of stay, type of work or employer, type of study) (Rs.182)
  + NO IMPLIED STATUS during interim
    - could still be subj to enforcement during that period, i.e. can still be deported

**Appeal Options for all TR**

* No appeal to IAD
  + Stat authority ss.63-65 doesn’t cover this
* No tribunal to hear their appeals
* JR is available
* Most often ppl will try to re-apply

**TR- Visitor Class CHECKLIST**

* **Visitors est. as a class of TR (Rs.191); must comply with requirements set out in Part 9 (as above)**
* **Business visitors** – business activities without entering labour market (such as buying Canadian goods for a foreign business, receiving or giving training if production of goods or services only incidental, sales if not to the general public); can’t be getting paid in Canada/making profit in Canada (Rs. 187)
  + Don’t need work permit \*\*\****Anything remotely resembling work must have a work permit.***

**TR- Student Class CHECKLIST**

* **Students est. as a class of TR (Rs.210)**
* **FN cannot study without study permit (Rs.212)**
* FN must apply for study permit ***before*** entering Canada (Rs.213)
  + *Exceptions:*
  + Rs.214-may ONLY apply ***when*** entering Canada if a resident of few places (US, Greenland, St Pierre & Miquelon)
  + Rs.215- FN can apply for study permit ***after*** entering Canada if they have: study permit and applied within 90 days of its expiry; work permit; TRP; subj to unenforceable removal order
* need letter of admission form school unless family member of foreign national with existing WP, SP or TRP (Rs.219)
* **FN can study without permit**: diplo-kids and <6 mos (Rs.188)
* **Family members of FN**: can obtain study permit within Canada if the FN has work permit, study permit or TRP (Rs.215)
* need sufficient financial resources (Rs.220)
* **If FN fails to comply, or if unauthorized work or study,** cannot get new permit (Rs.221)
  + ***Unless***…
    - 6 months have elapsed since they stopped doing the unauthorized things, OR
    - not complying was only w/ Rs. 185(c) type of studies and institution, OR
    - they’ve since gotten TRP
* **study permit invalid:** on expiry or if removal order issued (Rs.222)

**TR- Worker Class CHECKLIST**

* **Workers est. as a class of TR (Rs.194), a.k.a Temporary Foreign Worker (TFW)**
  + Framework: Part 11; Rs.194-209
* **Work permit required for TFW (Rs.196)**
* If FN is exempt from temp resident visa, she can apply for work permit when entering Canada (Rs.198)
* FN can apply for work permit after entering, (Rs.199 gives reqs)
* **FN getting work permit =/= getting temp residence (Rs.202)**
* **Discretion:** Officer can refuse to grant authorization to work or revoke work permit on policy grounds in MI (s.30)
* **Usual formula is a temporary resident visa + a work permit**
* **Two types of work permits**: **open** and **closed**
  + **Open**- you can work for anyone; often comes up in working holiday permits, permits issued to spouses of ppl in Canada with LMO; permits given to those in middle of H&C; etc.
  + **Closed**- General rule is that you need LMO; employer must show they need you/haven’t found PR/Citizen for the job.
  + ***🡪 Closed work permits requiring LMO is the rule- Open is the exception. SEE BELOW!***
* **Work Permits (Rs.200) and Assessing offer of employment (Rs.203)**
* Typical process begins w/ employer:
  + Has already employed people in similar job, similar wages, similar conditions for 6 years prior to applying (Rs.203(1)(e)), AND
  + Has gone through the LMO process and obtained an opinion from HRSDC
* Reqs on the worker side:
  + Intends and is qualified to perform the work described
* **Labour Market Opinion/assessment process, Rs.203:**
  + Genuine job offer
    - Rs.200(5) factors in genuineness of work offer
      * Employer actively engaged in business in relation to which offer is made
      * Consistent w/ reasonabele employment needs of employer
      * Employer can reasonably fulfill term of employment offer
      * Past compliance of employer/person recruiting FN w/ prov fed regs
  + Likely to have a neutral or positive effect on Cdn job market (Rs.203(3))
  + Not inconsistent with any federal-provincial agreement
  + Meets live-in-caregiver requirements if relevant
  + Might qualify for an exemption from Rs.203(1)(e) ‘6 previous years’ req (dramatic change in economic conditions, force majoure etc) Rs.203(1.1)
* “**Closed” permits may be given WITHOUT requiring LMO**, but may still require a job offer (Rs.200)
  + Rs.204: work permits pursuant to international trade agreements (acronyms may vary) BUT NOT agricultural workers.
    - PNP applicants can obtain open WP under this section once they’ve received their certificate.
  + Rs.205: Significant social, cultural or economic benefit, related to research education/training or limited access to labour market, or religious or charitable work (INCLUDES POSTGRAD WP-OPEN)
    - Mini entrepreneur or rock star(self-employed) class.
* **“Open” work permits** – no labour market or employer restrictions – can work anywhere while on permit
  + Rs.207 :
    - live in caregivers ONCE they meet the class requirements
    - spouse/CL partner in Canada class once approved at first stage
    - protected person
    - H&C applicants after first stage approval
    - Fam member of anyone above
  + Rs.206 – no other means of support (refugee claimant or unenforceable removal order only)
  + Rs.208 – destitute students, TRP holders
    - Destitute due to circumstances beyond their control at the time of application to be student
  + Rs.205 – postgrad work permits, spouses of WP holders and students, etc, PNP first stage.
    - Also under bridging open work permit
* **Work without a permit**
  + business visitors (Rs.187)
  + on campus employment [FT student+student permit], religious leaders, sports participants, emergency service providers, civil aviation inspectors, and many other exceptions which generally do not have long-term labour market engagement (Rs.186)
* **Cumulative Duration:** You can’t work for more than 4 years prior to application for work permit (Rs.200(3)(g))
  + All work counts, but broad list of exceptions.
  + ***Exceptions***: agricultural workers (Rs.204); NOC 0A, but B is not 🡪 decided as a matter of policy (Rs.205); students who have become destitute (Rs.208), cultural stuff, necessary for self support
  + Policy Manual exemptions:
    - Any work by FN who’s FT student w/ student permit
    - LMO exempt jobs under:
      * International agreements [R204(a) and (b)]: e.g., NAFTA;
      * Canadian interests (R205);
      * Self-support (R206);
      * Humanitarian reasons (R208).
  + 🡪 Non LMO and open work permits basically

**CASE LAW**

***Li v. Minister of Citizenship & Immigration, 2012, FC* 🡪 JR granted on refusal of issuing work permit for temp work based on officer’s consideration of extraneous factors + lack of opportunity to respond to them by Applicant**

* Applicant had +LMO to become cook in Ontario restaurant; Chinese ancestry, living in India. LMO says that applicant needs oral and written lang skills. Application for temporary work permit is denied b/c officer says applicant didn’t meet necessary lang and work experience reqs.
* **Duty of PF might be diff for a worker than for a PR (content of PF in contextual- *Baker*)**
  + b/c the stakes are diff. skilled worker econ class can apply for PR whereas temp worker has to leave at end of permit.

**TR- Temporary Resident Permit (TRP) CHECKLIST**

* **TRP: “Temporary Resident Permit” = a special “mini H&C” (s.24)**
  + **a foreign national who is inadmissible may be issued a permit if “justified in the circumstances”**
    - Compelling circumstances required.
  + may be cancelled at any time
* **TRP holders may become PRs after 3 years of TRP (health) or 5 years (any other grounds) (Rs.64)**
  + Must have no subsequent inadmissibility
  + On the basis of the Permit Holder Class (Rss.6, 65)
* designated foreign nationals ('irregular arrivals; per s.20.1(2)) cannot apply for 5 yrs from designation S.24(5)
* **TRP is not a TRV!** 
  + TRV: “Temporary Resident Visa” = 'gateway' visa required to enter Canada by FNs
  + TRP is residual category to give TR to applicants who are inadmissible or don’t satisfy reqs of Act

**PR- Humanitarian and Compassionate Considerations (H&C) Class**

* **FN can get PR even if she does not meet reqs of the Act- basis of humanitarian and compassionate considerations, inc best interests of any child directly affected (S. 25)**
  + Highly discretionary
    - H&C rulings are ‘…fact-dependent and policy-driven’(***Khosa***[57])
  + Written into both the capacity of the Minister and of the IRB
  + **Only if fees are paid (s.25(1.1))**
  + Minister can attune to **public policy considerations** in the absence of H&C factors (25.2)
* **You can apply from outside Canada (Rs.67) (minster may consider) and inside Canada (Rs.68) (Minister must consider)**
* **Minister can consider circumstances of FN on her own discretion [not if inadmissible on ss.34, 35, 37] + ONLY Minister can exempt fees on her own initiative (s.25.1)**
* **Excluded from making H&C applications (s.25):**
  + S.34, 35, 37 (int’lR/HR violations, security and org crim) grounds of inadmissibility
  + Reg and serious crim inadmissibility are fine
* **Rs.67(c) and Rs.68(c) family members of applicant must not be inadmissible**
* Rs 69-accompanying family members can be included and become PR if they’re not inadmissible and applicant gets PR
* **factors to argue [policy (eg. IP5 section 5.11) + case law]**
  + (+)
    - BIC- legis mandated to consider (s.25)
    - Undue, underserved, disproportionate hardship =/= persecution [severe sys breach of fundamental HR]
      * It has to be something beyond their control, disproportionate
      * The regular anticipated functioning of the act causing hardship is not going to cut it
    - Establishment
    - Ties to Canada
    - Availability of health treatment
    - Health condition
    - Discrimination
    - Inability (ie not their fault) to leave Canada has led to establishment; and/or
    - factors in their country of origin (inc but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not cover in 96/97)
    - family violence considerations;
    - consequences of the separation of relatives;
  + (-)
    - Inadmissibility [either bars H&C claim or is just bad]
      * (can’t make H&C claim)
    - If you’ve had failed refugee claim within 12 months, unless child or health at issue (s.25(1.2) & s.25(1.21)) [delay then]
    - Designated FN (List of irregular arrivals) cannot make H&C application right away [delay then]
  + any other relevant factor they wish to have considered not related to A96 and A97.
* **Failed H&C claim:**
  + Referred for further action
  + Basically means CIC is now aware of the person, may lead to removal order and enforcement action
  + Be aware then that if you make H&C and it is refused you can't just stay here

**CASE LAW**

***Baker***

* Baker made application for H&C to get exception for rule of having to apply from outside Canada
  + Evi of her H&C: info on her kids (4 Canadian citizens and 4 in Jamaica); psychiatric situation and how that would be dealt with in Jamaica
  + First decision maker denied it- no
    - Reasons of the officer are big part of this case
    - She’s mentally ill, has tons of kids, is low (domestic work), is going to be burden on our sysInitial officer wrote there were NO H&C factors aside from her children
* Unimplemented international law used as an interpretative source for statute, helps in understanding the nature of Canada’s humanitarian and compassionate tradition
* **Decision makers must be ‘alert, alive and sensitive’ to the best interests of any child affected by the decision, and must give the interest of any child ‘substantial weight’**
* There is req to provide reasons here to satisfy PF- reasons of the officer are sufficient here even though they are not perfect
* Issue of reasonable apprehension of bias: found in the reasons
  + Focus on her mental illness
  + Link btwn mental illness, domestic work and her children to being burden for the rest of her life
* **Content of the PF duty based on 5 relevant factors**
  1. the nature of the decision being made and process followed in making it;
  2. the nature of the statutory scheme and the term of the statute pursuant to which the body operates;
  3. the importance of the decision to the individual or individuals affected;
  4. the legitimate expectations of the person challenging the decision;
  5. the choices of procedure made by the agency itself.
* Failure to take into account best interests to the children
  + Draw on int’l law
* Application of reasonableness (recall this is before ***Dunsmuir***)
  + ‘somewhat probing’ standard
  + Humanitarian and compassionate must mean something [66] i.e. you have to consider them as meaningful things even though it is up to the discretion of the decision maker.
* Guidelines aren’t law but when they say what H&C factors have to be considered

***Caine, 2011, FC* 🡪 reasonableness standard defined; evi of est (NOT rewarding illegal stays); app of H&C**

* **Facts**
  + Entered Canada b/c of repeated rape by her fam members
  + Claimed she didn’t know about refugee process
  + Had 3 children in Canada and been here for long time
    - Primary caregiver for them
  + Officer- H&C isn’t met and the children won’t have the same experience as mother
    - There is evi of establishment which weirdly officer uses negatively to say, well she can est herself back home.
* **Evi of est**
  + Seen negatively and not to be rewarded
* **Reasonableness standard defined in two ways:**
  + **Justification, transparency and intelligibility**
  + **w/in a range of possible, acceptable, outcomes**
* H&C decisions are highly discretionary and ‘require significant deference’
* BIC are not determinative
* Hardship must be ‘undeserved or disproportionate’
* Negative effects not = to disproportionate hardship
* **Individuals must not be ‘rewarded’ for spending time in Canada w/o a legal right to be here**

***Sylvester* 🡪 JR granted on insufficient consideration of BIC and their conflation w/ hardship analysis in H&C app**

* Facts
  + Applicant was sexually and mentally abused by fam members in Grenada and escaped to Canada
  + She was raped in Canada but didn’t report for fear
  + She applied for H&C to get PR from within Canada
  + She had a son in Canada
  + Officer didn’t find there is enough est to be hardship and he found there would not be sig impact for the son the relocate to Grenada
    - b/c of lang and school resources available
* **Issue of analysis of BIC and the court was saying certain statements of officer suggested he wasn’t alert and alive to BIC**
  + Talking about parental choice which wasn’t really present
  + Not considering effect of moving child to Grenada who has never been there
* Also the officer seemed to be analyzing whether hardship on child is disproportionate underserved etc but he should only be taking BIC into account with other factors to then wholly determine unusual hardship
  + **Conflation of BIC and unusual, underserved and disproportionate hardship by officer**
* Note the range of evidence both presented and labeled ‘missing’
* R submits that ‘…there is no right or wrong answer to an H&C application’
* **Best interests analysis and undeserved, disproportionate hardship analysis ought not be merged**

***Abid* 🡪 eg of application of H&C under prev version of s.25 SEE BELOW UNDER CRIM INADMISSIBILITY!!**

**INADMISSIBILITY- Criminal Grounds- Checklist**

**s.36(1)- Serious Criminality**

* **applies to both FN and PR**
* **NO IAD (s.64(1)!**
* conviction of any offence under Act of Parliament where max is at least 10 years OR 6 months jail imposed OR
* conviction outside Canada for offence equivalent to one under an Act of Parliament with max term of at least 10 years OR
* “committing an act” outside Canada that is an offence where it was committed and where it would be equivalent to one under an Act of Parliament with max term of at least 10 years
* Contraventions Act and Youth act offences do not count for serious criminality

**s.36(2)- Criminality**

* **applies to FN ONLY**
* (a) conviction of any ONE offence under Act of Parliament which is punishable by way of indictment or two offences not arising from same act (may be summary) OR
  + Covers all hybrid offences which are all indictable for this
* (b) Conviction of an offence outside Canada that would be indictable offence in Canada, OR two offences not arising from same act that would be offences in Canada OR
* (c) “committing an act” outside Canada that is an offence where it was committed and where it would be equivalent to indictable offence
* (d) Committed “on entering Canada” prescribed offences (IRPR s. 19)
  + **closed list:** indictable offences Criminal Code, IRPA, Firearms Act, Customs Act, and Controlled Drugs and Substances Act. (Rs.19)
* ***s.36(3)- Provisions governing (1) and (2)***
  + **hybrid offences**-treated as indictable.
    - Doesn’t matter if Crown decided to treat it some other way. As long it is indictable, it’s covered.
  + **no inadmiss where acquittal or record suspension** 
    - Only way to deal with crim in Canada- if you committed offence in Canada is pardon
  + **“rehabilitation”** is possible for convictions or acts outside of Canada
  + **“committed an act”** – determined on balance of probabilities!
    - From policy manual ENF 02: should be used where the officer as “credible information” indicating the person committed an offence
    - use when charge but not tried
    - not to be used where charges dropped
    - where acquittal, discharge, or deferral issued
    - where record expunged or suspended.
    - significant discretion here
  + **no inadmiss for youth offences or Contraventions Act**
* ***What is an act of parl?*** 
  + federal laws only (note youth and contravention exceptions)
  + provincial offences do not attract inadmissibility
* ***Equivalency of offences****:* 
  + means they must have same essential elements (***Park***)
    - Court can compare wording of stats
    - Expert opinion is helpful but not needed
  + Is question of law 🡪 correctness standard of review (***Park***) \*\* Marsden prefers this.
  + Is factual question 🡪 reasonableness standard of review (***Abid***)
  + Equivalency can be determined 3 ways (***Abid***)
    1. Compare lang of 2 stat offences w/ expert evi of foreign law and see if essential elements are made out
    2. Examine evi adduced before adjudicator to see if evi is sufficient to est essential elements of offence in Canada
    3. Combo of 1 and 2

**s.37- Organized Criminality**

* **Applies to PR or FN**
* **If you are inadmissible, NO H&C! NO IAD (s.64(1)!**
* “on reasonable grounds” to have been a member of a group involved in a pattern of criminal activity, convicted or otherwise
* engaging in activities “such as” people smuggling, trafficking in persons, or money laundering.
* doesn’t apply to those themselves smuggled or trafficked.

**Deemed Rehabilitation [passage of time]- Rs.18**

**where one offence (outside Canada) as long as: Rs.18(2)(a)**

* -maximum is less than ten years (non-“serious”)
* -ten years have passed since sentence elapsed,
* -no indictable (hybrid) conviction in Canada,
* -no summary offence in last ten years or more than one before that,
* -no conviction of offence outside Canada
* -no conviction of more than one summary offence outside Canada in last ten years
* -no “committing an act”

**where two summary offences (outside Canada) as long as: R s.18(2)(b)**

* -five years have passed since sentence completed
* -no conviction in Canada of indictable (hybrid) offence
* -no offence in Canada or outside Canada in past 5 years except youth or contraventions
* -not more than one summary except youth or contraventions
* - has not “committed an act”

🡪 Note: since it has to be something that is punishable by max. 10 yrs, but if it is by 10 yrs+ it is serious criminality which means that deemed rehab is NOT available for serious criminality or for org crim.

**where “committed an act”: R 18(2)(c)**

* -max is less than ten years
* -ten years have passed since the day after commission of “offence”
* -no Canadian indictable convictions (hybrid)
* -no summary offence in last ten years or more than one before that,
* -no conviction of offence outside Canada
* -no conviction of more than one summary offence outside Canada in last ten years
* -no outside Canada indictable offence

**Exemption from inadmissibility R s.18.1**

-if only two or more summary offences, exempt from inadmissibility if five years have passed since day after completion of sentence.

- **“completion of sentence”** means all aspects of sentence (fines, community service, counseling etc.)

**Individual Rehabilitation [by application]**

* **s.36(3)(c)-if not “deemed” may still make rehab application**
* **Rs. 17: prescribed period is five years if no intervening offences**
* **note: only applies to criminality and serious criminality arising from convictions or “acts” outside of Canada, NOT organized or in-Canada**

***Ribic* Factors [determining inadmissibility for criminality]**

* Applied by IAD in ***Khosa***
* Applied by IAD and JR’d in ***Abdallah \*\*SEE UNDER REMOVAL ORDERS***
* ***Ribic*** factors.
  + Serious of the offence
  + Possibility of rehabilitation
  + Time and establishment in Canada
  + Family and community support
  + Consequences to the family of removal
  + Hardship in country of nationality

**\*\*\*\*\*Look at case law, esp *Khosa***

**CASE LAW**

***Park v. Canada* [drunk driving spouse] 🡪 eg of inadmissibility b/c of criminality**

**F**: Applicant found inadmissible b/c her spouse was convicted of drunken driving in South Korea pursuant to s.36(2)(b).

Applicant is Dr. doing research in hospital in Toronto- highly ed and valuable to Canada. Spouse is also Dr and professor in Seoul.

**D**/**R**: Application dismissed. Officer’s decision stands.

* husband was arrested for drunken driving; dealt w/ administratively; paid fine
* officer: offence of drunken driving would be punishable by provisions of criminal code and get up to 5 years imprisonment, so it meet s.36(2)(b).
  + pursuant to s. 42, Dr. Park has an inadmissible fam member and so is herself inadmissible.
  + He will be rehabilitated by 2012, so resubmit by then if you want.
* **Determination of whether offence committed by FN is offence under Canadian act of parl is question of law**
  + Correctness standard 🡪 Note ***Abid*** is diff. Marsden prefers this.
* Equivalency of offences means they must have same essential elements
  + Court can compare wording of stats
  + Expert opinion is helpful but not needed
* Officer compared wording of offence under Korean law to CC w/out expert opinion as submitted by applicant
  + Both offences do not req a specific blood alcohol level to be est. as long as there is impairment, offence is made out.
* Officer didn’t err in law by comparing the words of offences and satisfying herself that essential elements of them were made out.
* They can resubmit in 2012, and in the meantime this may be suitable case for exercise of Ministerial discretion.

***Abid v. Canada* 🡪 [wire fraud] eg of finding applicant inadmissible b/c of serious criminality; eg of H&C; JR granted**

**F**: Abid and his family are applying for PR. He is principal applicant and has refugee protection after coming to Canada from US. He disclosed he was convicted and served sentence for wire fraud in US. Officer determined that it would be offence under CC for wire fraud of $5000 w/ prison term up to 14 yrs and applicant is inadmissible for serious criminality under s.36(1)(b). Applicant isn’t eligible for H&C exemption.

**D**/**R**: Application granted. Officer’s criminality analysis is fine but missed a possible ground for H&C. Sent for reconsideration only on H&C grounds.

*Criminal Inadmissibility*

* Determinations of equivalency are factual questions which attract deference
  + Reasonableness standard.
* **Equivalency can be determined 3 ways**
  1. Compare lang of 2 stat offences w/ expert evi of foreign law and see if essential elements are made out
  2. Examine evi adduced before adjudicator to see if evi is sufficient to est essential elements of offence in Canada
  3. Combo of 1 and 2
* There is overlap btwn US and CDN offences so officer’s decision is not unreasonable.
* Next step: did applicant commit what would fall under that area of overlap?
  + For CC offence, there needs to be actual defrauding (not just intent) in amount of $5000+
  + Officer must adduce this from evi before him
    - Evi of actual fraud and scheme being put in practice in US docs
    - Evi that one ‘chipped up phone’ cost $1000 and there was widespread fraud
    - 🡪 so, not unreasonable for officer to conc is was actual fraud and it was beyond $5000
* Abid made admission to Canadian officer when coming to Canada that he defrauded for $117 mil. He doesn’t properly deny it even though his immigration consultant says that’s absurd.
  + Not absurd- Officer isn’t saying $117 mil, but using that figure to support argument that it’s $5000+
* His low sentence of 5 months isn’t harsh but not enough w/out expert evi on Illinois sentencing to mean his offence wasn’t serious

*H&C Determination*

* Officer: positive factors of his length of stay in Canada for 7 yrs and his small children weighed against his criminality, no evi he’s giving for his claim of wanting to stay for crim rehabilitation and his children being under 10 and easily integrated elsewhere🡪 no H&C
* Officer made error conc that there are no H&C submissions. Applicant didn’t use lang of H&C but made clear H&C grounds when arguing he is now honest, hard working, family man w/out anything crim in his record for past 17 years
* Officer made errors:
  + ref to 2 children. Applicant’s submission clearly shows he has 4.
  + Didn’t deal with his crim conviction being 17 yrs ago
  + Didn’t deal with him being Convention refugee
  + Didn’t consider possibility of re-offending as per H&C guidelines on crim inadmissibility
* **Officer’s decision then is not reasonable.**

***Khosa v. Canada, SCC \*\*\*\** 🡪 inadmissibility; standard of review; breadth of IAD H&C juris**

**F**: race car driving; crim negligence causing death; sentence of 2yrs-1day (s.64(2)+67(1)(c)- so he could get access to IAD since at time it was 2 yrs not 6 months); factors mitigating moral culpability (young; no crim record; good rehab prospects)

IAD- not enough H&C grounds, issue removal order to India.

**D**/**R**: IAD decision within reasonable range considering ***Dunsmuir*** + CL; IAD decision restored.

* **All these factors are the *Ribic* factors.**
  + Serious of the offence
  + Possibility of rehabilitation
  + Time and establishment in Canada
  + Family and community support
  + Consequences to the family of removal
  + Hardship in country of nationality
* S.67 H&C consideration by IAD: high weight on Khosa not admitting he was racing reflecting lack of insight and seriousness of crime; overall weighs against him.
  + Dissenting member: review in 3 yrs; majority is considering irrelevant factors; rehab prospects and remorse + compliance w/ all sentencing conditions weighs in favour of granting H&C
* All judicial review standard legis must be read in background of CL around standards of review
  + Survey of case law leading to Dunsmuir decision
  + Deference as respect model
  + Role of s.18.1 Federal Courts Act: must be flexible to accommodate all types of ADMs.
* ***Dunsmuir* approach:**
  + Look at precedent for standard of review
  + If not clear, then consider:
    - Privative clause
      * Present; points to reasonableness
    - Purpose of IAD pursuant to enabling legis
      * Determining ton of diff appeals; points to reasonableness
    - Nature of question before IAD
      * Room for exception with H&C and broad discretion
    - Expertise of IAD in immigration policy
      * points to reasonableness
  + All factors point to reasonableness standard.
* **Applying reasonableness standard** 
  + Contextual
  + Reviewing court can’t reweigh evi
  + Khosa isn’t objecting to validity of removal order, but wanting discretionary special relief which is in discretion and expertise of IAD to confer.
  + IAD decision has considerations of multiple factors; factual disagreements over interpretation of Khosa’s remorse which shouldn’t be reweighed in a reviewing court
  + Falls within range of possible reasonable outcomes

***Dissent* (Fish J)**

* Fixation in IAD decision, ignoring weight of contradicting evi and focusing on Khosa not admitting racing
* He’s married now. IAD decision was 4 yrs after accident and it’s 4 yrs since. He has few relatives in India and has visited only once since he emigrated to Canada at 14.
* Record before IAD showed Khosa: had shown remorse, didn’t leave house other than for school, work, temple; took responsibility by offering to plead guilty to dangerous driving; has no other record; doesn’t drive even though he now can; has good reference from probation officer; complied w/ all sentencing conditions; 🡪 very unlikely to reoffend vs not admitting racing ‘so much being made out of so little’
* Incumbent on IAD to consider findings of crim court, even though they’re not binding
* St racing wasn’t even necessary element of his offence
* IAD conc that there isn’t sufficient evi that Khosa won’t be danger to public is incorrect and unreasonable
* Justification, transparency and intelligibility req for reasonableness which are lacking in IAD reasons

**INADMISSIBILITY- Inadmissibility of Family Member Grounds- Checklist**

* **FN is inadmissible if their accompanying family member is inadmissible, or if they are the family member of an inadmissible person (S.42)**
  + does not apply to protected persons
  + fam member means: spouse, CL partner, dependent child
* **R s.23-If the inadmissible fam member is non-accompanying to applicant FN, FN is inadmissible:**
  + If spouse, unless the relationship has broken down in law or fact
  + If dependent child of FN and either FN or accompanying fam member has care of that child, unless you do NOT have custody of the child or control over the child
  + You still have to declare them on the application

**INADMISSIBILITY- Health Grounds- Checklist**

* **s.38(1) FN is admissible on the basis of health grounds if:**
  + **(a) danger to public health**
  + **(b) danger to public safety**
  + **(c) excessive demand on health or social services**
    - family members exempted from 38(1)(c)on application for PR: spouse, CL partner, child (s.38(2))
      * Note: NO conjugal partner
    - If you're sponsoring spouse, child or CL partner or are refugee/protected, you can still be inadmissible on other health basis besides excessive demand.
* **Rs. 31, 32, 34**: officers must consider reports of physicians, nature of disease, info appearing on immigration medical exams, etc before deciding on public safety/health and excessive demand
* ***Who gets assessed?***
  + Principal applicant
  + Accompanying family members
  + Non accompanying family members [meet def of fam member + can be sponsored later]
* ***Who needs a medical exam? (Rs.30)***
  + Every FN applying for permanent residence,
  + work permits where protection of public health is essential,
  + renewals of TR for more than 6 months,
  + refugee claimants,
  + people living in Canada where there is a high disease incidence,
  + anyone that an officer or the Immigration division “has reasonable grounds to believe” may be inadmissible on health grounds.
* ***What is excessive demand? (Rs.1(1))***
  + anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years .... unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; *OR*
  + a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.
  + **NOTE**: PF req that officer write a ‘fairness letter’ to applicant who is found to be excessive demand and give applicant chance to show if they can pay for it or to dispute it
* ***What are health services? (Rs.1(1))***
  + “health services” means **any health services for which the** **majority of the funds are contributed by govs**, inc services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care.
* ***What are social services? (Rs.1(1))***
  + “social services” means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services...
    - (a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and
    - (b) **for which the majority of the funding,** inc funding that provides direct or indirect financial support to an assisted person**, is contributed by gov,** either directly or through publicly-funded agencies.
* ***How are temp and permanent residents different?***
  + TRs will often not require a medical exam unless they are flagged for some reason on entry
  + ALL PR applicants must take a medical exam
* **Health Inadmissibility (s.38) + Inadmissible Fam Member Inadmissibility (s.42)**
  + medical inadmissibility of an accompanying family member may cause inadmissibility of entire family, including principal applicant (Rs.72 [Obtaining Status])

**CASE LAW**

***Hilewitz and De Jong v. Canada, 2005, SCC* 🡪 financial resources of fams can be considered in inadmissibility due to excessive demand on social resources analysis**

* Well off families under investor and self employed
* Both had intellectually disabled children so they were refused for excessive demand on health and social services of Canada
* **Issue**: Whether financial resources/ability to pay should be considered in making determination on whether they would put excessive demand on health and social services in Canada and therefore their inadmissibility
* Hilewitz
  + Officer found child would req resources beyond the Canadian average, inc services such as special ed, vocational support/training, etc
  + Fam didn’t dispute findings but said they had never relied on any state funded support or assistance in South Africa
    - They had private school and had arranged for his employment etc
* De Jong
  + Child had developmental delays and would cause excessive demand on social services
  + Note that the social services argument is being made as opposed to the health services
  + FC- consider all circumstances of applicant inc financial
    - Officer who reconsidered turned them down again.
  + FCA- financial resources are not relevant
* SCC
  + Encumbrance to interpret the legislation in such a way that the very assets that qualify investors and self-employed individuals for admission to Canada can simultaneously be ignored in determining the admissibility of their disabled children”
* Hist of Canada’s view of immigrants with disabilities through its past legislation is exclusionary etc etc bad basically
* SCC- term “excessive demands” “is inherently evaluative and comparative” and that officers “must necessarily take into account both medical and non-medical factors, such as availability and cost of service along with ability and willingness of the family to pay for services
  + The medical inadmissibility provisions as cookie-cutter b/c all the other assumptions follow from a diagnosis and it doesn’t allow individualized considerations and treats all disabled applicant in an exclusionary manner
* ***Dissent*** 
  + Parl didn’t intend non-medical factors to be considered
  + If you look at whole sections
  + Health condition and non-medical grounds are diff
  + If they wanted financial resources to be considered it would be noted in the legislation
  + What would save this legislation even if it was problematic in some cases would be H&C
    - That is what H&C is for

***Cuarte v. Canada, 2010, FC*🡪 Officer failed to look at financial resources to deal w/ excessive demand of disabled child as req by *Hilewitz***

* **F**: Family coming through Sask PNP with developmentally disabled child. Upper middle class (less abnormal than ***Hilewitz***). Officer’s decision denying this family PR who qualified otherwise under PNP: Sask should have been notified by officer, officer insisted on mechanism for reimbursement of son’s ed costs, officer didn’t analyze son’s individual costs
  + fam provided evi of financial resources to the immigration officer after getting fairness letter which says, you're inadmissible and have 30 days to show us anything to counter that
  + officer’s response to this was to send it to dr who said it doesn’t change the medical evi and officer said they have to provide evi of formal mechanism for Sask gov to get that money from you.
* **Held:** officer’s decision is circular and falls short of individualized assessment req by Hilewitz
* officer failed to consider their ability to pay and financial resources
* req mechanism for repayment is going too far
* officer also didn’t look at individual case of son and his specific trajectory

**INADMISSIBILITY- Security & Int’l/HR Violations Grounds- Checklist**

**Security (s.34)**

* **applies to both PR and FN; if found inadmissible, NO IAD, NO H&C!**
* **espionage against or contrary to Canada**
* **subversion against democratic gov’t ‘as they are understood in Canada’**
* **terrorism**
  + definition of ‘***terrorism’***: ***Suresh, SCC***
    - 2 elements est that org engaged in terrorism:
      * Org committed act whose intent was to cause death or bodily harm to civilians
      * Purpose was to intimidate pop or compel org/gov to do or not do something
    - Could inc innocent membership
* **danger to security**
* **“being a member” of an organization that is, has, or will engage in subversion or terrorism**
  + no def of ‘***member’*** 🡪 broad and flexible
  + Informal member or supporter can be member
  + Factors
    - Nature of involvement
    - Time
    - Degree of commitment to org and its objectives

**International/Human Rights Violations (s.35)**

* **applies to PR or FN; if found inadmissible, NO IAD, NO H&C!**
* **Crimes Against Humanity and War Crimes Act**: genocide, crime against humanity, war crime, attempts, including military leadership; ref to IL standards: committing an act outside Canada.
* **being a prescribed senior official** in a gov’t engaged/engages in terrorism, “gross HR violation”, genocide, crime against humanity etc.
  + ***prescribed list of senior officials*** Rs.16
    1. heads of state or government;
    2. members of the cabinet or governing council;
    3. senior advisors to persons described in paragraph (a) or (b);
    4. senior members of the public service;
    5. senior members of the military and of the intelligence and internal security services;
    6. ambassadors and senior diplomatic officials; and
    7. members of the judiciary.
* **person (not PR) pursuant to international sanctions.**

**Security Certificates**

* **Division 9: Certificates and Protection of Information**
* Procedures for when the gov has information it wants to protect
* Can be used in regard to 34, 35, 36(1) (serious crim), and 37
* Typically ss 34 and 35
* Can be used for both FN and PR (s. 77)
* **Process**
  + 2 ministers sign a certificate and refer it to the FC (s.77)
  + Judge determines if the certificate is ‘reasonable’ (s.78)
  + Judge looks at the secret information
  + Other proceedings stop, and appeals must follow the certified question rule
  + If a certificate is found to be reasonable, it is conclusive proof of inadmissibility and is a removal order in force immediately (s.80)
* **Detention under Security Certificate Scheme**
  + Detention is not required by the process (s.81), but it has never been used w/o detention
  + Detention Reviews are at 48 hours and then at 6 months
  + Release on conditions is also now formally recognized as part of the scheme (e.g. 82(4))
  + SCC has signalled that at some point indefinite detention would constitute a s. 12 Charter breach (***Charkaoui***)
* **How Person’s Interests are protected** 
  + Judge scrutinizes the claim that information must be keep secret
  + A summary of all information is released
  + Rules of evidence are relaxed to allow new information at any time and to allow evidence that would not be admissible in a criminal trial
  + A ‘special advocate’ is appointed
* **Role of Special Advocate** 
  + List of lawyers is established by the Minister of Justice, these lawyers are also paid by DOJ
  + Role is to protect the interests of the PR or FN (s.85.1)
  + May challenge Min’s claim that info needs to be kept secret AND the claim that the info being kept secret is relevant and reliable
  + NOT a solicitor client relationship (85.1(2))
  + Once the special advocate has seen the protected information, communication with the person is ONLY with the judge’s authorization and subject to any conditions the judge considers appropriate
* **Post-*Charkauoi* Changes**
  + Removal of distinctions between FN and PR
  + Detention is not mandatory
  + Special Advocate introduced
  + This procedure can be mirrored in other proceedings (admissibility hearing, det review, IAD appeal) which attract the special advocate or during judicial review, which may attract special advocate
* \*\*\*\*\*\*SEE ***Charkauoi*** and ***Agraira [esp for guidelines of danger to public]***\*\*\*\*\*\*

***Charkoui, SCC***

**F**: evidence upon which the certificate was issued is secret, disclosed neither to Charkaoui nor his lawyers. Charkaoui appealed his detention three times before being released on the fourth try in February 2005, having spent almost two years in jail. He was released under severely restrictive bail conditions. Charkaoui has never been charged or tried. The certificate has never undergone any judicial review; the Federal Court suspended its review process in March 2005, pending a new decision from the Minister of Immigration on Charkaoui's deportability (a decision which evaluates, inter alia, risk to Mr. Charkaoui)

All men are unremovable due to torture concerns.

**D**/**R**: Add special advocates to review of reasonableness of certificates (now s.77(2)) and detention review (now s.82), and give FNs and PRs the same rights to review of detention under (former) s.84(2).

***Holding:***

* IRPA unjustifiably violates s. 7 of the Charter by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person's interests.
* Some of the time limits in the provisions for continuing detention of a foreign national violate ss. 9 and 10(c) because they are arbitrary.
* S. 12 has not been shown to be violated since a meaningful detention review process offers relief against the possibility of indefinite detention.
* There is no breach of the s. 15 equality right.

***Notes:***

* Detention is incidental to removal: this is the context against which detention w/o trial is cast
* Judge in this role is sufficiently independent and impartial as not to breach s.7 [PF component]
  + For the case to be met, s.7 was breached b/c judge is still working alone and cannot fill the gap
  + So impartiality is breached on basis of case to be met not on impartiality of judges.
* Decision is appropriate based on both facts and law
* S.7- this is not minimal impairment b/c there are alternatives, where special advocate sys comes in.
  + The fact that ppl are deported is not s.7 issue, but rather the process by which determinations are made which affect people’s liberty
* ‘right to know the case against oneself’ is infringed and infringement is not justified under s.1
* Detention is not arbitrary, but the distinction between FNs and PRs is.
* Extended detention is not a Charter violation because of periodic review. This prevents it from being ‘indefinite’. There is always recourse to the courts and hope of release.
* Release on conditions is still a serious liberty restriction

***Agraira, FCA***

* **‘national interest’ is a question of law, reviewable on correctness standard**
* **Question of ‘detriment’ reviewable on a reasonableness standard**
* **Importance of the change in Minister responsible for this assessment:**
* **Separation of national interest from H&C factors**
* **National interest is linked to national security and public safety**
* **Guidelines cannot alter the law; guidelines would need to be promulgated by Min of PSEPC; guidelines are not the only relevant factors (Baker)**
* **S.34(2) [exception to security admissibility]is clearly intended to refer to exceptional circumstances only**
* **Min decision is reasonable because it was based on lack of credibility**

**F**: Agraira attempted to get PR status in Canada. In 2002, his application was denied pursuant to s.34(1)(f) because he was a member of the Libyan National Salvation Front (LNSF), which CIC classified as a terrorist organization. He applied for ministerial relief under s.34(2), but the Minister denied his application in 2009 because it was not in Canada’s national interest to admit an individual with sustained contact with a terrorist organization.

FC allowed the appeal for judicial review.

**D**/**R**: JR application dismissed. FC decision reversed.

* **Guidelines pose 5 questions:**
  1. Will applicant’s presence in Canada be offensive to Canadian public?
  2. Have all ties with the regime organization been completely severed?
  3. Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?
  4. Is there any indication that the applicant might be benefiting from previous membership in the regime organization?
  5. Has the person adopted the democratic values of Canadian society?
* Argument made was like Baker, we’re going to see if PF is done by looking at whether the officers are following the guidelines
* Court says this is diff from Baker- [60] b/c in Baker reasoning doesn’t justify it- function of the manual is to do something different here. Certified question was whether minister had to consider any specific factors, and ans is no, it’s just national security and public safety that are factors in legis.
* Minister’s decision was reasonable given that Agraira lacked credibility, presumably still had connections with the LNSF, and, therefore, did not satisfy the exceptional relief under s.34(2) of the IRPA.

**Immigration Detention- Checklist**

* **Responsibility for detention is with the CBSA.**
* **Arrest of PR or FN may be on the basis of a warrant issued by an officer (CBSA) s.55(1) OR w/out a warrant s.55(2)-(3)** 
  + Arrest w/ warrant on ground that PR/FN is inadmissible on reasonable grounds and danger to public OR flight risk/unlikely to appear to examination/removal hearing/admissibility hearing (s.55(1))
  + Arrest w/out warrant if officer wants to arrest and detain FN (minus protected person s.97) on reasonable grounds that they are inadmissible and danger to public, or unlikely to appear, or identity can't be est (s.55(2))
  + Arrest of FN or PR upon entering Canada if office has reasonable grounds that it’s needed for examination to be complete OR FN/PR is suspected of being inadmissible on grounds of crim, serious crim, org crim, security or violating Int’l/HR (s.55(3))
  + Mandatory detention for designated FNs (16+ yrs) s.55(3.1)
* ***FACTORS to consider***
  + **Flight risk, Rs.245**
    - Fugitive? Previous record of compliance? Involvement with smuggling or trafficking? Ties to community in Canada? Attempts to escape custody; vulnerability to being smuggled or trafficked
    - MUST consider s. 7 of the Charter, Minister must establish, on a balance of probabilities, that respondent is a danger to public, once a *prima facie* case has been made out, the person must lead some evidence or risk continued detention (***Thanabalasingham)***
  + **Danger to the public, Rs.246**
    - Previous ‘danger opinion’? Organized crime? Smuggling or trafficking? Nature of Cdn convictions? Foreign convictions or act?
  + **Identity not established, Rs.247**
    - Cooperation is key, possibility of documents forthcoming, destruction of documents, contradictory information or docs, forged documents, credibility over contradictory information
  + **Other factors on subsequent reviews**
    - Reasons for detention, length of time detained, likely end time, time that can be attributed to person’s own actions, alternative
* **Ppl who are not DFNs**- 48 hours, 7 days, then every 30 days their detention must be reviewed (s.57)
* **Ppl who are DFNs**- 14 days after detention, then every 6 months their detention must be reviewed (s.57.1)
  + Immigration Division specifically cannot review in advance of that period
  + Looks like security certificates
* **Detention Review/ Ending Detention:**
  + **Officer has discretion to release prior to hearing if reasons for detention no longer exist (s.56),** 
    - ***EXCEPT*** DFNs, who can only be released in the circumstances listed in s.56(2).
      * Final determination of their protection claim
      * They’re released by ID (s.58)
      * They’re released by Minister (s.58.1)
  + **Minister shall order release of DFN**, *UNLESS* Flight risk, unlikely to appear, minister needs to take steps to inquire about inadmissibility, identity hasn’t been but could be est (person no cooperating), identity hasn’t been est even if person is cooperating, Min is inquiring regarding ss. 34, 35 (s.58.1)
  + ID can release on conditions, unless danger to public/unlikely to appear/inadmissible etc (s.58)
  + ID cannot release DFNs if 58(1)(a), (c), and (e) [danger to public; inadmissible possibly grounds of security, reg/serious/org crim, int’l/HR violations; ID of DFN isn’t est]
  + **Deportation**
  + **🡪 Detention Review is sui generis proceeding:** results of past det reviews must be considered by current det review, but are not biding **(*Thanabalasingham*)**
* **Children**, who are not DFNs
  + S.60- detention of children is only a last resort and must consider BIC
  + ***Rs.249- factors to consider*** 
    - Alternative arrangements, time, contact with traffickers, detention conditions
* **Designated Foreign Nationals (DFN)**
  + S.20.1- designation for human smuggling or other irregular arrival
  + Courts not able to review this detention
  + Minister has additional powers
  + May be released if found to have protected status
  + Children: age of majority lower for this purpose

**CASE LAW**

***Canada v. Thanabalasingham, 2004, FCA***

**F**: Judicial review of detention review after approximately two years in custody. Arrested and detained for being a tamil member org in Toronto.

**I/D**/**R**: First FCA under this legislation - 2 key issues

(1) Is detention review a hearing *de novo*?

* **Answer here is that a det review is almost a *sui generis* proceeding: not starting afresh, but nor does the earlier review conclusion receive deference, MUST consider previous decision, but come to a fresh conclusion every time.**
* It’s almost a factor to consider, it’s not really determinative.
* Treatment of prior decisions:
  + Det review decisions are fact based and req deference but aren’t binding
    - Should show clear reasons for departing from them
      * Either expressly why something has changed or implicit in the decision
* 🡪The way prior detention decisions should be dealt with: the standard
  + [13] must consider it. As long as it acknowledges it, it’s prob sufficient. Can’t have a cursory decision which doesn’t advert to the prior reasons.

(2) Who bears the burden of proof

* **MUST consider s. 7 of the Charter, Minister must establish, on a balance of probabilities, that respondent is a danger to public, once a *prima facie* case has been made out, the person must lead some evidence or risk continued detention.**
* Gov was arguing that when there is a prev detention decision, the detainee has burden to show there is new evi to disturb those finding.
  + Court rejects this.
  + It is minister’s responsibility.
  + There is potential for detention to last indefinitely so it engages s.7.
* Application to facts: Mr I gave proper consideration to prev decision
  + He saw a lot of inconsistencies and rejected the ‘common thread’ approach of finding them credible based on their number or how often they repeated a lie
  + Basically even where Mr I’s reasons could have been improved, they were so deficient to make a reviewable error and he considered everything he needed to consider.

***X (Re), 2009, IRB* 🡪 eg of cont’d detention being conc by ID on grounds of: danger to public and flight risk**

**F**: Mr X was detained b/c he was member of group which had crim ties in form of having reasonable grounds to believe it would, or had, engaged in terrorism- i.e. inadmissibility. So, he became ineligible to be referred to Refugee Protection Division and subj to removal order. He refused to sign travel doc application and now only impediment to his removal is issuance of travel docs by Iranian authorities.

Except at 2 occasions, immigration division has at all reviews of his detention held he is to be retained in detention b/c he would be risk to public and unlikely to appear for proceedings.

**I:** Should Mr X remain in detention?

**D**/**R**: Yes, he is both danger to public and flight risk and should remain in detention.

* Standard for detention based on danger to public ground: balance of probabilities that they are danger to public in present or future.
  + Application: yes, Mr X is willing to use illegitimate violence for his goals.
  + Based on his past involvement with X org, a letter to X and possession of meth recipe
  + X says he didn’t know the leader was going to use violence b/c that leader had always been against violence.
    - How could X not know about leader’s change of position when X held such a high position in org and was close to leader?
    - Or how could leader have such an extreme change in position w/out any signs/discussion?
    - 🡪 not credible explanation.
* Evi re: crystal meth
  + Seems random to re to terrorist ties
  + Relevant consideration in assessing whether someone is danger to public? Rs.246
    - Nothing about committing an act or planning to commit an act
    - Section seems to be more about convictions
  + Maybe it pertains to his credibility but it’s not as solid.
* Mr X is also unlikely to appear for a removal given he’s stated many times he would be tortured/killed in Iran and has made refugee claims in UAE and in Canada.
  + He escaped custody in Iran a great lengths
  + He’s refused to cooperate to get travel doc from Iran. Now he is cooperating but only b/c he found out Iranian authorities won’t issue him travel docs even though they recog his citizenship.
  + Has used false identities in multiple countries getting around
  + He is not credible.
* S.42- use of his refugee claims prev
  + Is this anticipated by the act?
  + S.31 of Refugee Convention
  + Rs.245 factors of flight risk- nothing about prev refugee applications
  + Not very legitimate for board
* [58] IRPA says ppl representing themselves as refugees can't be held responsible for doc irregularities b/c they may have to do that if they’re fleeing persecution
  + Board seems to be doing exactly this.
* Rs.248
  + Reasons for detention: danger to public and flight risk
  + Alternative: none
  + Length of detention/future detention: 3 yrs which is long, but minister is working w/ foreign affairs and Iranian authorities and anticipates resolution to travel doc situation, so not prob indefinite; and he gets regular detention reviews to consider developments throughout
  + Unexpected delays/lack of diligence: delays are b/c he refused to cooperate w/ CBSA for 2 yrs and now it’s not CBSA but Iranian authorities who aren’t willing to issue travel docs

**REMOVAL ORDERS & ENFORCEMENT- Checklist**

* **Report on inadmissibility, s. 44 [officer makes report, 2 things can happen]:**
  + ***If it is a PR***, they always get their case referred to ID, except when they have failed to comply w/ their residency obligations (s.44(2))
    - ID just determines their admissibility (s.45).
    - ID doesn’t do H&C.
  + ***If it is a FN***, they go to ID, unless they’re in ambit of list.
    - Usually FNs don’t get to go to ID, and just get a removal order.
    - Rs.228- long list of things (eg failure to get authorization/examination etc)
* **ID holds an admissibility hearing, s. 45**
* **Enforcement: s. 48**
  + **Enforceable** if it is has come into force (s.48)
    - ***comes into force*** on later of: date removal order is made/if no appeal; date appeal period expires/if appeal exists; date of final determination/if appeal is exercised (s.49)
  + Must be enforced as soon as reasonably practicable
    - Removal order that isn’t enforced becomes void (s.51)
  + **Statutory stays**, s.50: court, prison, IAD, Ministerial
    - IAD can stay removal order.
      * Often w/ PRs who have recourse to ID as appeal for their admissibility hearing.
      * PR can appeal to IAD inc H&C grounds.
    - Fed Court can stay removal order (judicial proceeding)
      * Eg while getting JR of (-) H&C decision
  + **S.52(2)** If removal order w/out appeal is set aside in JR, FN can return to Canada at Minister’s expense!

**Types of orders and consequences- Part 13 of Regs**

* **Less serious to most serious (3 types set out in Rs.223):**
* **Departure Order (Rs.224) 🡪 Go away, but you have some time to go away**
  + Must get a certificate of departure w/in 30 days or converts to deportation order
  + No need to get an ‘authorization’ to return
  + If you don’t leave, then it converts to deportation order.
* **Exclusion Order (Rs.225) 🡪 Go away, and don’t come back for a while**
  + Need written authorization to return for 1 year, or 2 years if s.40 [inadmissible for misrepresentation], but exemption for s. 42(b) [accompanying fam member of an inadmissible person]
  + For health inadmissibilities, financial inadmissibility, most misrepresentation, most IRPA breaches (Rs.229)
  + One of the biggest conseqs is that if they want to return to Canada during that period, they can only return to Canada if they get authorization (very discretionary).
  + Applied the same way to all classes.
* **Deportation Order (Rs.226) 🡪 Go away, and never come back [Gollum/smeagol convo]**
  + Requirement for written authorization endures
  + Exemption for s. 42(b) [accompanying fam member of an inadmissible person]
  + For all criminal inadmissibilities, misrepresentation that led to loss of citizenship (Rs.229), if it’s the 2nd time, if criminal offences in addition
  + Basically never come back unless you get authorization of Minister.
* *Removal orders usually extend to family members (227)*
* **kind of order issued 🡪 Circumstance (Rs.229)**
  + **deportation** order 🡪 inadmissible under s.34(1) on **security** grounds;
  + **deportation** order 🡪 inadmissible under s.35(1) on grounds of **violating human or international rights**;
  + **deportation** order 🡪 **PR** inadmissible under S.36(1) grounds of **serious criminality** OR a **FN** inadmissible s.36(1)(b) or (c) of the Act on grounds of **serious criminality**;
  + **deportation** order 🡪 inadmissible under s.36(2)(b), (c) or (d) on grounds of **criminality**;
  + **deportation** order 🡪 inadmissible under s.37(1) on grounds of **organized criminality**;
  + **exclusion** order 🡪 inadmissible under s.38(1) on **health** grounds, unless subsection (2) or (3) applies;
  + exclusion order 🡪 inadmissible under s.39 for financial reasons, unless subsection (2) or (3) applies;
  + exclusion order 🡪 inadmissible under s. 40(1)(a) or (b) for misrepresentation, unless s. (3) applies;
  + deportation order 🡪 inadmissible under s.40(1)(d) for misrepresentation;
  + exclusion order 🡪 inadmissible under s.41(a) for failing to comply with the requirement to appear for examination, unless ss. (2) or (3) applies;
  + departure order 🡪 inadmissible under s.41(b);
  + exclusion order 🡪 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;
  + exclusion order🡪 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
  + exclusion order 🡪 inadmissible under paragraph 41(a) of the Act for any other failure to comply with the Act, unless subsection (2) or (3) applies.

**Role of IAD in Appeals of Removal Orders**

* **s.63(2)** – person holding PR visa may appeal against removal order decisions (at examination or ID hearing)
* **s.63(3)** PR or protected person may appeal against removal order decisions (at examination or ID hearing)
* **s.63(4)** PR may appeal against decision on s.28 – residency obligation
  + You can go directly to IAD for H&C
* **s.63(5)** Minister may also appeal to IAD.
* **s.64(1)** review – no appeal for PRs with serious criminality
  + serious crim =if punished by 6 months or more [inc. pre-trial detention (***Jamil v. Canada 2005 FC 758***)]
* **s.67** – IAD can consider H&C (exemption in s. 65: may not consider H&C, *UNLESS* est that FN is member of fam class and sponsor is sponsor within meaning of Regs)
* **s.68** – IAD can stay removal orders including H&C but NOTE **68(4)** – if convicted of subsequent offence (36(1)) stay automatically cancelled.
  + If they stay, they can impose conditions and review it.
  + Short of subsequent offence, up to IAD.
* s.43 allows **ID to change hearing date/time** if not doing so would cause an injustice, but that’s injustice relating to procedural reqs of the hearing itself and not the substantive outcome of the hearing (*Fox*).
* IAD can reopen a claim in case of FN who hasn’t left and is appealing a removal order if it is satisfied that it failed to observe principles of natural justice. (S.71)

**Role of the Federal Court in Appeals of Removal Orders**

* **s. 50:** removal order stayed based on judicial proceeding where enforcement would contravene judicial order
* **s. 72:** judicial review possible for any matter, with leave – but appeal options must be exhausted first.
* timelines – must file JR application within 15 days of notice of decision if inside Canada, 60 days if outside Canada.
  + In practice, often two applications to FC – (1) JR application; (2) an 'urgent stay' application to stay removal order until JR can be heard (interlocutory).
* ***Everybody who can’t go to IAD, can go to FC.***
* ***Everybody who can go to IAD, has to go to IAD first before being able to go to FC.***

**CASE LAW**

***Chiarelli* 🡪 all of the underlying law has changed: read for the Charter challenge**

**🡪 Sovereign states can deport non-citizens.**

**🡪 Deportation in and of itself is not a s. 7 breach.**

**🡪 Deportation cannot be cruel and unusual punishment, hence cannot breach s.12, b/c it is not punishment**

**🡪 s.15 breach by deportation is not possible b/c s.6 draws distinction btwn citizens and non-citizens**

**🡪 Differential appeal rights are not a section 7 infringement because H&C considerations are discretionary, and beyond a ‘true’ appeal**

* Threshold question of whether deportation *per se* engages s. 7 need not be answered (p. 25) because there is no breach of fundamental principles of justice
* Section 7 interpreted in context, here the Court identifies the ‘immigration context’ for the first time (p. 26):
  + The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.
  + That informs context of POFJ when deciding s. 7
  + Citizen vs PR distinction is in the Charter (s.6)
  + Parl can then legis about who can come into Canada and stay
    - Non arbitrary choice to say PR who is convicted of offence w/ 5 yr sentence is not allowed to stay
    - Their conditions and offences may vary but they have one important thing in common: they’ve deliberately violated a condition of their stay in Canada
    - 🡪 so no breach of POFJ to give practical effect to end their stay in Canada
* S. 12 argument:
  + Deportation cannot be cruel and unusual punishment because it is not punishment (p. 28)
  + Deportation may be a ‘treatment’ but is not cruel and unusual because it is appropriate authorized by law:
  + The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency.  On the contrary it would tend to outrage such standards if individuals granted conditional entry into Canada were permitted, without consequence, to violate those conditions deliberately. (p. 29)
* A section 15 challenge is impossible because of section 6 (p.30)
  + Charter distinguishes btwn citizens and residents itself.
  + Limited to mobility
  + The distinction made on same basis that don’t have to do with mobility or deportation will be diff.
* Differential appeal rights are not a section 7 infringement because H&C considerations are discretionary, and beyond a ‘true’ appeal
  + There is right to appeal on question of law and fact and mixed fact and law
  + The right to appeal on these decisions is discretionary and up to parl. It is not full right of appeal.
  + The CL rule doesn’t req much and the content varies
  + He was given the opportunity to respond

***Idahosa v. Minister of Public Safety, 2009, FCA***

**🡪 custody order [banning removal of children from prov] obtained solely to prevent parent’s removal does NOT create a stat stay in accordance w/ s.50(a) IRPA [judicial proceeding]**

**F**: Appellant’s JR of refusal to defer her removal to Nigeria refused after failed refugee claim. H&C refused and Pre Removal Risk Assessment also refused. She has Canadian born children and got prov court order for their sole custody which prohibits removal of children from prov. Time lag btwn removal date and decision is ~2 yrs.

**I**: Does her custody order obtained solely to prevent parent’s removal create a stat stay in accordance w/ s.50(a) IRPA?

**D**/**R**: No it doesn’t and wasn’t intended by Parl. Appeal dismissed.

* Order was obtained by Ms I solely to prevent her removal, b/c there was no custody dispute in this case at all.
  + Officer who refused her order said removing her would not contravene the order (and hence s.50(a)) b/c the order didn’t req her to reside w/ her children.
  + FC held the same thing.
* Standard of review is correctness here.
  + Question law- other stat involved
  + Beyond expertise of officer
  + In spite of home stat interpretation
  + Counsel relied on Charter and int’l law- court says this also means it’s more correctness
    - But this is arguable- does every case that involve Charter or int’l law mean correctness
* Certified question is too broad b/c it there is absence of actual custody dispute.
* Ms I argues that custody of children involves care and physical control of them so if she can’t take them out of prov w/ her, then her custody order is contravened by her removal and so s.50(a) should kick in to stay her removal order
  + Minister:
    - no req for her to keep children in her care and control in order. Her choice to take/leave them.
    - Improper to grant these orders solely to stay removal orders
    - Even TJ who gave order said it wouldn’t be dealing w/ Ms. I’s immigration status.
* Interpretation of s.50(a):
  + Text suggests order is decision made in judicial proceeding and would be contravened by removal, but TJ’s note about not touching her immigration status points other way and this isn’t factor court is basisng its decision on any way.
  + Context counters Ms I’s argument in 4 ways:
    - Minister’s duty to execute removal orders ASAP contravened if orders obtained for sole purpose of delaying execution of removal orders stay those removals.
    - Best interests of children already considered both for H&C and PRRA.
    - She should have applied to stay removal until her 2nd H&C determination
    - Custody order is final. Minister shouldn’t have to go to court if 2nd H&C is denied to revoke it.
    - And It would encourage a parallel sys where courts issuing orders like this (which have no juris over deportation of non-nationals) would lead to conflicts
  + Balance of IRPA’s objectives support Minister’s narrower interpretation
* S.7 Charter
  + No argument about how s.50(a) contravenes POFJ- it doesn’t. she’s had multiple considerations inc BIC and is waiting for another H&C which she can get JR for.
  + ***Langer*** Case - deportation of parents of CDN born kids does not violates s.7 rights of parents or kids
  + Ms. I can ask court to revoke the non-removal of kids from prov order she herself got and take her kids w/ her; no state action stopping her from doing that.
* Int’l law doesn’t help Ms. I’s argument either.
* Still argument that s.50(a) could apply to stay removal order based on a judicial order b/c the ruling is narrowed to its specific circumstances.

***Fox v. Canada, 2009, FCA***

**F**: Appellant seeking stay of removal order until main application in his matter is determined. Fox was US citizen; came to Canada and got PR; convicted of importing 90k of cocaine; 7+ yrs in jail but got day parole and soon eligible for full parole. Officer issued inadmissibility report (serious crim s.36(a)🡪 typo in the case); sent to ID for admissibility hearing (s.44). F was released from prison into CBSA custody and hearing resumed w/ F being rep by his wife. His wife req adjournment to avoid provision which says that a person w/ day parole who is found inadmissible will lose day parole and become re-incarcerated until they get full parole. Adjournment was granted, so Minister appealed for JR, JR was granted.

**I**: Can Fox get stay, ie. Can ID adjourn hearing?

**D**/**R**: No, No basis for ID decision to adjourn.

* Fox must est: appeal raises serious issue; he’d suffer irreparable harm should motion not be granted; on balance of convenience, he’ll suffer greater harm from refusing stay than other party would from granting stay.
* Judge must take a hard look at the issue raised in the underlying application.
  + If appeal is granted, F won’t be incarcerated; if appeal is dismissed, he will be.
  + So court here can look at issue raised by Fox’s appeal.
* ID presiding over admissibility hearing over serious crim does NOT have juris to adjourn it based on H&C relief from re-incarceration that would result if person is found inadmissible
  + ID bound by law to hear matter w/out delay and determine admissibility
* **s.43 allows ID to change hearing date/time if not doing so would cause an injustice, but that’s injustice relating to procedural reqs of the hearing itself and not the substantive outcome of the hearing.**

***Abdallah v. Canada, 2010, FC* 🡪 eg of JR of ribic factors in seriues crim inadmissibility + removal order**

**F**: Applicant seeking JR of IAD decision to reverse a prev stay on removal order. 30 yrs old; PR w/ 17 yrs in Canada now facing removal to Lebanon. He has a ton of youth offences and adult offences and being found inadmissible by IRPB (for conviction of B&E w/ 10 yr max sentence-serious crim) and issued removal order. He requested stay of removal on H&C grounds; warranted for 3 yrs w/ conditions. Found to have poor character and in absence of proper H&C factors given stay only if he keeps from reoffending.

First review: added condition of reporting to counsel and re-emphasized condition of not offending.

**I**: Did IAD reach conc w/out regard to evi before it or in capricious manner?

**D**/**R**: Yes it did. IAD decision set aside. Remitted back to IAD to make another decision.

* Second review at issue: consideration of Ribic factors to see if A can stay in Canada.
  + Habitual criminal
  + Failed to stop crim activity (“flagrantly cont’d”) and report new charges to tribunal
  + Long time in Canada; close to fam
  + Tried to maintain FT employment but doesn’t “support his family” (?)
  + Hardship if moved to Lebanon
  + Inability to rehabilitate is more than (+) H&C factors
* Standard of review is reasonableness.
* IAD’s discretion is broad: both in determining what are H&C factors and their sufficiency
  + Inc all matters and evi considered prev by IAD
    - So, fact that convictions were for acts prev to hearings is irrelevant.
  + He was warned his stay was granted on the slimmest of margins and he should be very careful.
* IAD made 7 findings of fact that are wrong and hence not reasonablY open to IAD:
  + No serious offence needed for serious crim ground for inadmissibility (nothing w/ jail sentence of 6 months OR max possible jail sentence of at least 10 yrs)
  + “flagrantly reoffend” is patently unreasonable since he didn’t since last review
  + Not habitual crim since he stopped after hearing and only had one offence (giving false name to police officer which is act of fear not a habitual crim)
  + “gone on to be convicted of 6 offences” is factually wrong and capricious, since it’s just one (above)

***R v Alzehrani, 2009, OJ* 🡪 Eg of offences and sentences**

**F**: Both Mr A and Mr G convicted of human smuggling by getting ppl across border from US into Canada w/out papers. Both were organizers and suppliers of humans to be smuggled, not didn’t actually cross the borders. One man died in one of the smuggling attempts.

**I**: reasons for sentence.

**D**/**R**:--

* Facing $500,000 or 10 yrs in prison; Crown seeking 6-8 yrs for each.
* Aggravating factors
  + Bodily harm or death:
    - Mr A meets this for man who died when jet ski was drowned. But he also wasn’t on the water at the time to avert this accident. Conduct of smugglers present was egregious.
    - for Mr G it’s only luck that group of men locked in a truck were found after 24 hrs w/out food or water.
  + Association w/ crim org
    - Both A and G were involved w/ human smuggling as a business operation w/ diff levels and many workers, but it wasn’t est and permanent org w/ hierarchy or code of conduct.
  + Profit motive
    - Obv the point is that got paid
  + Humiliating or degrading treatment
    - Met but not to substantial degree
  + Both have prior crim records
* Mitigating factors/ personal circumstances
  + G has fam in US but he can't fo to US for criminality and has been deported to Albania from US before and will be subj to removal order after sentence in Canada too so only way to reunite w/ his fam is in Albania so nothing to support reducing his sentence.
  + Nothing really for A
* Parity of sentence is factor
* Objectives of sentencing and guiding principles
  + Things that rent factors
    - Rehabilitation
    - Specific deterrence
  + Most sig factor
    - General deterrence
    - Denunciation
    - Severe conseqs for national security, public safety, integrity of Canada’s borders
    - Can’t allow human smuggling to become profitable business operation in Canada
* Sentences
  + A: 4.5 yrs before time served adjustment
  + G: 4 yrs before time served adjustment

**APPEALS**

**Immigration Division (ID)**

* Deals w/ enforcement
* Two main things
  + Removal orders/detention reviews
  + Inadmissibility
* They review some, not all
* If someone wants to get in, and they’re inadmissible and/or they have removal order against them, some FNs will have appeal to ID
  + Rs.228 lists which FNs have recourse to ID

**Immigration Appeal Division (IAD)**

* S.22 and onwards of the act
* **Someone who failed residency reqs**
* **63(1) Sponsor may appeal if person sponsored is not issued a permanent resident via.**
* **63(2) FN w/ PR visa can appeal removal order.**
* **PR or protected person- s.63(3)- can appeal about removal orders against them (inadmissibility)**
  + They can also go to Immigration Division but think about IAD first
  + Exceptions to this, s. 64 unless it’s inadmissibility b/c of serious crim (punished by jail for 6 months or more) or int’l/HR rights, security, org criminality
* IAD can always consider H&C factors which are same factors you’d do for H&C considerations
  + Exception, if there’s been determination that person sponsored was not member of the fam class. It wouldn’t be in juris of IAD
* **64(1) Exception: no appeal if inadmissible for security, violating human or international rights, serious criminality or organized criminality.**
  + \*serious criminality – 6 months or if outside Canada, Canadian equivalent 10+ years max punishment.
* **64(2) Exception: no appeal if misrep, unless spouse or children**
* **64(3)- fam member who’s been refused, if it’s not your spouse, CL partner, or child, and it’s refused b/c of misrepresentation, you can’t get IAD appeal**
* **65(1) – For 63(1) and 63(2), IAD Cannot consider H&C unless person is member of family class, and sponsor is sponsor (see *Mabhena*).**
* **67(1) To grant an appeal IAD must be satisfied AT THE TIME OF APPEAL (i.e. de novo):**

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

(*b*) a principle of natural justice has not been observed; or

(*c*) H&C and best interests of the child justify the decision (not applicable when Minister appeals).

(2) Can substitute its own decision

* **70.(1)** An officer, in examining a permanent resident or a foreign national, is bound by the decision of the Immigration Appeal Division to allow an appeal in respect of the foreign national.
  + Doesn’t mean they can never make a negative decision though.

**Federal Court of Canada (FC)**

* Governed by the *Federal Courts Act*
* Devoted to immigration matters.
* Most IRPA matters are judicial reviews
* Judicial review is only possible with **leave of the court**
  + Leave process
    - Must exhaust all available appeals before coming to FC
    - Leave decisions are made very quickly
    - Leave rates are about 10-15%
* FC will use either reasonableness or correctness
  + They are not going to be making a new decision but just deciding if the tribunal one stands or not

**Federal Court of Appeal (FCA)**

* Certified question procedure:
  + No right of appeal to the Court of Appeal unless the Federal Court judge certifies that the cases raises a question of general importance
* Now we are very removed from the facts of the case
* Not much goes to the FCA b/c they get a lot of the same things over and over again

**SCC**

* With leave to appeal
* Not often at all

**Standard of review**

* Reasonableness
  + for fact-based, discretionary decisions
  + Range of reasonable outcomes
  + Line from evi to conc
  + Judge can disagree with decision and still find it reasonable
  + Not role of court to substitute its own decision
* Correctness for procedural fairness
  + Court will overturn decision if it was not correct, i.e. if it was not decision court would’ve reached.