Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION TO DETERMINE THE CONTENTS OF THE APPEAL BOOK OR TO ADDUCE FRESH EVIDENCE
REPLY OF THE RESPONDENT (APPLICANT)
CANADIAN TRANSPORTATION AGENCY

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Introduction

1. This is the reply of the Canadian Transportation Agency (Agency) with respect to its motion to determine the contents of the Appeal Book or, in the alternative, to adduce fresh evidence.

PART I – ISSUE

2. The issue is whether the Annotated Dispute Adjudication Rules ("Annotation") should be included in the Appeal Book or, in the alternative, whether it should be introduced as new evidence on appeal.

PART II – ARGUMENTS

3. The Appellant has raised several arguments with respect to the admissibility, validity, relevance and conclusiveness of the Annotation, as well as to its credibility and whether its inclusion in the appeal record raises public policy concerns and serves the interests of justice.

Whether the Annotation must be introduced by way of affidavit

4. In response to the Appellant's argument that the Annotation should be introduced by way of affidavit, the Agency's position is that, since the Annotation is an Agency document that is prominently displayed on the home page of its Government website and is available to any member of the public, evidence of its existence by way of affidavit is unnecessary.

5. With respect to the Appellant's specific concerns as to the purpose, authorship and approval of the document, the Agency points out that the purpose of the Annotation is explained in the Annotation itself, and that the Agency, like all administrative tribunals, is empowered to make soft law instruments like the Annotation without requiring express legal authority to do so. In its motion, the Agency cited this Honourable Court's statement that "an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation." The Agency therefore respectfully submits that

an affidavit relating to the purpose, authorship and approval of the Annotation in this case is unnecessary.

> *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2008] 1 FCR 385, at para. 56. Tab 9 of the Respondent's Motion Record

6. The Agency recognizes that the means by which a document like the Annotation should be properly placed before this Honourable Court on appeal has not been the subject of widespread case law. It is not clear, for example, that the Annotation could not be introduced in the Agency's Book of Authorities. The Agency's present motion is seeking to introduce the Annotation at an early stage of the appeal through the means made available in the *Federal Courts Rules*, SOR/98-106, namely through inclusion in the Appeal Book or as new evidence.

7. However, through its motion, the Agency is seeking not only to have the Annotation included as part of the appeal record in this case, but is also seeking clarity from this Honourable Court with respect to the proper means by which such a document should be placed before it.

8. The Agency acted on the understanding that an affidavit was not required to support a soft law instrument such as the Annotation. However, should this Honourable Court consider that the absence of an affidavit in support of the Annotation constitutes a defect in relation to the Agency's motion, the Agency is appending to the present reply an

Affidavit prepared in connection with the Annotation in order to remedy that defect.

Affidavit of Cathy Murphy sworn October 2, 2014.
Tab 3 of the Agency's Reply.

9. The Agency respectfully submits that this affidavit is being provided in direct response to the concerns raised by the Appellant in his response, namely that no affidavit was provided to introduce the document and attest to its authorship, purpose and approval. The Agency submits that the contents of the Affidavit strictly repeat the elements contained in its motion with respect to the purpose, authorship and approval for publication of the Annotation. The Affidavit does not introduce new factual allegations or evidence, but simply provides corroboration, by an affiant, of the information contained in the Agency's motion.

Validity and lack of official status of the Annotation

10. The Agency respectfully submits that the Annotation is not null or invalid merely because the *Canada Transportation Act*, S.C. 1996 c. 10, does not specifically grant guideline-making authority on the Chairperson of the Agency.

11. As mentioned above, the Agency, like any administrative tribunal, does not require statutory authority to develop soft law instruments like the Annotation.

12. The Agency therefore respectfully submits that, in spite of any questions that have been raised as to the authorship and validity of the document, the Annotation is a valid Agency

document by virtue of the legal principles relating to such instruments. In accordance with this Honourable Court's words, the Annotation is a soft law instrument that "communicate[s] prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's 'stakeholders' in particular."

> *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2008] 1 FCR 385, at para. 56. Tab 9 of the Respondent's Motion Record

13. In this context, the statement in the Annotation to the effect that it "has no official sanction" has two justifications: the first is the well-established principle that a soft law instrument must not fetter a decision-maker's discretion. In the Agency's view, official sanction by the members of the Agency would run the risk of making the Annotation appear to be binding or would constitute an unlawful fetter of their discretion.

> *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113 at paras. 53 & 54. Tab 2 of the Agency's Reply.

14. The second, as explained in the Agency's motion, is that the Annotation is intended to be an evergreen document to be updated regularly. This is also in keeping with the nature of soft law instruments, the purpose of which is to be adjusted based on a tribunal's evolving experience; in its motion, the Agency cited this Honourable Court's statement that "'soft law' instruments may be put in place relatively easily and adjusted in the light of day-to-day experience."

> *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2008] 1 FCR 385, at para. 56. Tab 9 of the Respondent's Motion Record

Relevance and conclusiveness of the Annotation

15. The Appellant submits that his appeal turns on the Dispute Adjudication Rules themselves and raises questions of law or jurisdiction. Accordingly, he argues that the Agency's intentions, as expressed in the Annotation, have no relevance to this appeal. In his view, the appeal turns on what the Dispute Adjudication Rules themselves do, can and should say.

16. The Agency respectfully submits that the Dispute Adjudication Rules themselves contain broad discretionary provisions. In particular, sections 5 and 6 read as follows:

> 5.(1) These Rules are to be interpreted in a manner that facilitates the most expeditious determination of every dispute proceeding, the optimal use of Agency and party resources and the promotion of justice.
>
> (2) Anything that may be done on request under these Rules may also be done by the Agency of its own initiative.
>
> 6. The Agency may, at the request of a person, dispense with compliance with or vary any rule at any time or grant other relief on any terms that will allow for the just determination of the issues.

17. The Agency's Dispute Adjudication Rules set out the most common procedures that arise in the course of proceedings before the Agency. In addition to these routine procedures, the Agency retains the discretion to vary the Dispute Adjudication Rules upon request or on its own initiative, discretion which is necessary to permit the Agency to handle more unusual cases and requests.

18. It is the Agency's position that the Dispute Adjudication Rules provide for these most common or routine procedures, but that other or additional procedures are not forbidden. The mechanism by which a party may seek such procedures is provided for in the Dispute Adjudication Rules through the making of a request or through the discretionary powers set out above.

19. The Agency respectfully submits that the Annotation is relevant and conclusive insofar as it communicates the way in which the Dispute Adjudication Rules' discretionary powers may be interpreted by the Agency. In this context, the procedures that are the subject of the Appellant's appeal, procedures which rarely arise before the Agency—requests for cross-examination or oral hearings and requests for an opportunity to respond to a request for leave to intervene—remain available through the Agency's Dispute Adjudication Rules and are explained further, along with the Agency's continued commitment to providing reasons, in the Annotation, as amended on or around August 22, 2014.

20. Although the Appellant argues that the case law cited by the Agency at paragraph 27 of its motion does not support the position that commentary on legislation has been used by reviewing or appellate courts in conducting their review of such legislation, the Agency maintains that, whatever the context or findings made in respect of such commentary, it is not uncommon that such documents have been included as part of the court record on review or appeal. Reviewing or appellate courts have found such commentary to be relevant in a number of different ways. The previous use of such commentary by

reviewing or appellate courts, coupled with the rarity of cases impugning the fairness of a rule in the abstract should, in the Agency's respectful submission, lead this Honourable Court to err on the side of caution at this early stage of the appeal in determining what might be relevant on the merits, and allow the Annotation to be placed before the Appeal Panel.

> *Advocacy Centre for Tenants Ontario v. The Landlord and Tenant Board,* [2013] O.J. No. 6175. Tab 4 of the Repsondent's Motion Record
>
> *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2008] 1 FCR 385, at para. 43. Tab 9 of the Respondent's Motion Record
>
> *Duale v. Canada (Minister of Citizenship and Immigration),* [2004] F.C.J. No. 178, at paras. 6 *ff.* Tab 7 of the Respondent's Motion Record.

Credibility, public policy considerations and the interests of justice

21. The Agency respectfully submits that reference to soft law instruments like the Annotation does not raise pubic policy concerns and is not contrary to the interests of justice.

22. The Appellant's specific concern that the Annotation is self-serving, that it is being used to thwart the present appeal and that amendments made to address the Appellant's concerns with respect to the Agency's procedures somehow affect the credibility of the Annotation, do not adequately recognize that the Annotation, like any soft law instrument, is designed to be adaptable.

23. Accordingly, the Agency respectfully submits that, far from calling into question the credibility of the document or rendering the timing of its amendment suspicious, the fact that the Annotation was amended to address the Appellant's concerns is consistent with the very purpose of a soft law instrument, which is to be flexible in light of the Agency's experience and responsive to the concerns of its stakeholders.

24. Accordingly, the Agency respectfully submits that the version of the Annotation as amended on or around August 22, 2014 is not lacking in credibility. Furthermore, its inclusion in the appeal record does not raise public policy concerns and it is not contrary to the interests of justice to include the version of the Annotation that was amended on or around August 22, 2014.

PART IV – ORDER SOUGHT

25. The Agency respectfully requests that the Annotation, as amended on or around August 22, 2014, be included in the Appeal Book or that, in the alternative, it be accepted as new evidence on appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. Dated at the City of Gatineau, in the Province of Quebec, this 2nd day of October, 2014.

Barbara Cuber
Counsel
Canadian Transportation Agency

LIST OF AUTHORITIES

Legislation

Advocacy Centre for Tenants Ontario v. The Landlord and Tenant Board, [2013] O.J. No. 6175.

Duale v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 178

Kanthasamy v. Canada (Citizenship and Immigration), 2014 FCA 113

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TAB 2

Kanthasamy v. Canada (Citizenship and Immigration), 2014 FCA 113 (CanLII)

Date: 2014-05-02 (Docket: A-272-13)
Other citations: 459 NR 367; [2014] FCJ No 472 (QL); [2014] ACF no 472
Citation: Kanthasamy v. Canada (Citizenship and Immigration), 2014 FCA 113 (CanLII), <http://canlii.ca/t/g6t78> retrieved on 2014-10-02

Date: 20140502

Docket:
A-272-13

Citation: 2014 FCA 113

CORAM: **BLAIS C.J.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

JEYAKANNAN KANTHASAMY

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on November 4, 2013.

Judgment delivered at Ottawa, Ontario, on May 2, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BLAIS J.A.
SHARLOW J.A.

Date: 20140502

Docket: A-272-13

Citation: 2014 FCA 113

CORAM: **BLAIS C.J.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

JEYAKANNAN KANTHASAMY

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

[1] Mr. Kanthasamy appeals from the judgment of the Federal Court (*per* Justice Kane): 2013 FC 802 (CanLII). The Federal Court dismissed his application for judicial review from the Minister's denial of his application for humanitarian and compassionate relief under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[2] This Court heard Mr. Kanthasamy's appeal together with the appeal in *Lemus et al. v. Canada (Minister of Citizenship and Immigration)*, file no. A-510-12: 2014 FCA 114 (CanLII). Central to both appeals is a common issue, the interpretation of subsection 25(1) of the Act, as amended by the *Balanced Refugee Reform Act*, S.C. 2010, c. 8, section 4. That amendment added new subsection 25 (1.3).

[3] These reasons determine the common issue and affect both appeals. Accordingly, I direct that a copy of these reasons be sent to counsel in this case and to counsel in the *Lemus* appeal. These reasons should also be placed in the *Lemus* appeal file.

[4] I would dismiss Mr. Kanthasamy's appeal. In my view, the Federal Court's interpretation of subsection 25(1), as amended, was substantially correct. Further, the Federal Court did not err in its choice or application of the standard of review.

A. The basic facts and the legislative scheme

[5] Before entering Canada, a person who is a foreign national, *i.e.*, not a Canadian citizen or a permanent resident, must apply to an officer for a visa or any other document required under the Regulations: subsection 11(1) of the Act. Under subsection 11(1), the visa or document may be issued if the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the Act.

[6] Some foreign nationals consider themselves unable to apply before entering Canada. Take, for example, those who flee from their countries of origin and arrive in Canada, claiming refugee status.

[7] This was the position in which Mr. Kanthasamy found himself. A 17 year old Tamil from the northern region of Sri Lanka, he arrived in Canada in 2010, claiming refugee protection under sections 96 and 97 of the Act. These sections provide as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[8] On February 18, 2011, the Immigration and Refugee Board denied Mr. Kanthasamy's claim for refugee protection, finding that the Sri Lankan authorities had taken measures to improve the situation of Tamils, and that Mr. Kanthasamy would not be at risk upon his return to Sri Lanka. The Federal Court denied his application for leave to judicially review that decision.

[9] The Act recognizes that it will be an intolerable hardship in some cases for denied refugee claimants to return to their countries of origin and apply for a visa.

[10] One of the ways the Act accommodates this situation is subsection 25(1) of the Act. In particular, under subsection 25(1), certain foreign nationals can apply for an exemption from the requirement that they seek a visa from outside of Canada. The Minister may grant this relief if he is of the opinion that the exemption is "justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[11] Subsection 25(1) of the Act provides as follows:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou

status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[12] As described at the outset of these reasons, subsection 25(1.3) has recently been added to section 25. It instructs the Minister that, in considering a subsection 25(1) request, he "may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national."

[13] Mr. Kanthasamy applied on humanitarian and compassionate grounds under section 25 for permission to apply in Canada for Canadian permanent resident status. As previously mentioned, Mr. Kanthasamy had already unsuccessfully claimed refugee status – the factors under section 96 and 97(1) had already been determined against him. In considering Mr. Kanthasamy's subsection 25(1) application, the Minister had to have regard to the instructions given by subsection 25(1.3). The meaning of subsection 25(1.3) and how it should be applied was in issue in Mr. Kanthasamy's case.

[14] An Officer acting for the Minister denied Mr. Kanthasamy's subsection 25 (1) application. Later, the Minister agreed to reconsider the matter. Another Officer decided the reconsideration.

[15] The Officer handled the reconsideration in two parts: a first part on April 25, 2012 and a second part on July 11, 2012. The second part took into account submissions from Mr. Kanthasamy that were not available before the first part. I shall refer to these two parts collectively as the "decision." Ultimately, the decision fell for review in the Federal Court and, on appeal, is now before us.

[16] In the reconsideration decision, the Officer rejected Mr. Kanthasamy's application for humanitarian and compassionate relief under subsection 25(1). The Officer interpreted subsection 25(1) as requiring Mr. Kanthasamy to show that if he were required to return to Sri Lanka to apply for permanent residence, he would personally and directly suffer hardship that was unusual and undeserved, or disproportionate.

[17] Mr. Kanthasamy applied for judicial review of the decision in the Federal Court. Among other things, he submitted that owing to new subsection 25(1.3) the Officer improperly excluded from consideration certain matters.

[18] The Federal Court reviewed the Officer's decision on the basis of reasonableness. It found the decision to be reasonable. In the course of its reasons, the Federal Court interpreted subsection 25(1.3) as requiring that the Officer consider all possible hardships that the applicant will personally, directly and negatively encounter, regardless of whether that evidence was previously considered in the refugee determination process.

[19] The Federal Court considered that subsection 25(1.3) introduced some uncertainty concerning what exactly is to be considered when dealing with applications for humanitarian and compassionate grounds under subsection 25(1) of the Act. Accordingly it certified the following question:

> What is the nature of the risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the *Balanced Refugee Reform Act*?

[20] Mr. Kanthasamy appeals to this Court.

B. Preliminary issues

(1) The jurisdiction of this Court to entertain this appeal

[21] The Minister submits that the question certified by the Federal Court is not proper because it is not dispositive of the appeal. The question presumes that the Officer in this case failed to assess allegations and evidence due to subsection 25 (1.3). But that was not the case. In the Minister's view, the Officer acknowledged all of the matters raised by Mr. Kanthasamy and assessed them through the lens of hardship.

[22] In my view, the certified question is proper.

[23] For the Federal Court to certify a question, there must be a serious question of general importance that transcends the interests of the parties to the litigation. The question must be dispositive of the matter. See, generally *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 (CanLII) at paragraphs 12-14; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 (CanLII) at paragraphs 11-12.

[24] Here, the question certified by the Federal Court raises the issue of the interpretation of subsection 25(1.3) of the Act, a recently-enacted provision that this Court has never interpreted. In the circumstances, this is a serious question of general importance that transcends the interests of the parties to the litigation. While the Federal Court happened to agree with the Officer's interpretation and application of the section, the question remains a live matter of public interest for this Court to consider. Depending upon this Court's interpretation of subsection 25 (1.3) of the Act, the Federal Court's judgment may or may not be sustained.

[25] The Minister also suggests that the parties did not seriously dispute the interpretation of subsection 25(1.3) of the Act and that Mr. Kanthasamy was really

just disputing the application of the subsection to the particular facts of this case, something that cannot be the subject of a certified question.

[26] I do not accept that characterization of Mr. Kanthasamy's submissions. His vigorous contestation of the application of section 25, including subsection 25(1.3) of the Act to the particular facts of his case is tantamount to a submission that the Officer and the Federal Court have adopted too strict an interpretation of the factors that can be considered under the subsection.

[27] The Minister, himself, has noted in paragraph 30 of his memorandum that Mr. Kanthasamy argues in this Court that Officers "should apply a broader test" under section 25 (including subsection 25(1.3)) than the "unusual and undeserved or disproportionate hardship" test. If Mr. Kanthasamy's view of these provisions is correct, the outcome of this appeal could be affected.

[28] In my view, then, the certified question is proper.

(2) The proper approach in an appeal from judicial review

[29] In an appeal from a judgment of the Federal Court dismissing an application for judicial review, this Court must consider two questions. Did the Federal Court choose the appropriate standard of review? If so, did it apply it properly? See *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) at paragraphs 45-47.

(3) What is the appropriate standard of review?

[30] In the past year, the Supreme Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) considered the standard of review of a visa officer's decision under the Act. This is analogous to the case at bar: there is no ground to distinguish what the Supreme Court said in *Agraira*. However, *Agraira* appears to depart inexplicably from earlier Supreme Court of Canada jurisprudence in one respect.

[31] A decision made under the Act is subject to judicial review only if leave is granted by the Federal Court (subsection 72(1) of the Act). The Federal Court's decision on the judicial review cannot be appealed unless the Federal Court certifies a serious question of general importance (paragraph 74(*d*) of the Act). This case, like *Agraira* has proceeded to this Court on the basis of a certified question from the Federal Court. In this case, as in *Agraira*, the certified question asks a question that requires an interpretation of a provision of the Act.

[32] This Court has consistently taken the view that where a certified question asks a question of statutory interpretation, this Court must provide the definitive interpretation without deferring to the administrative decision-maker. Then, this Court must assess whether there are grounds to set aside the outcome reached by the administrative decision-maker on the facts and the law. In a subsection 25(1) matter, that part of the decision – one involving fact-finding and factually-based exercises of discretion – is reviewed on the deferential standard of reasonableness.

[33] Until *Agraira*, the Supreme Court approached immigration matters in the same way. The Supreme Court assessed whether this Court correctly answered the stated question on statutory interpretation. See e.g., *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 (CanLII), [2005] 2 S.C.R. 706. Then it proceeded to assess, on the basis of the deferential reasonableness standard, whether there were grounds to set aside the outcome reached. On that part of the review, the Supreme Court has emphasized the need for "considerable deference [to] be accorded to immigration officers exercising the powers conferred by the legislation," given "the fact-specific nature of the inquiry, [subsection 25(1)'s] role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language": *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paragraph 62.

[34] In *Agraira*, the Supreme Court conducted reasonableness review on the administrative decision-maker's decision on the statutory interpretation issue, ignoring the fact that the case proceeded in this Court in response to a certified question from the Federal Court. It did not vet this Court's answer to the stated question.

[35] There is nothing in the Supreme Court's reasons in *Agraira* to explain this apparent change in approach. For that reason, until some clarification from the Supreme Court is received, it is my view that this Court should continue to follow its practice of providing the definitive answer to a certified question on a point of statutory interpretation. In reaching that conclusion, I note that the Supreme Court in *Agraira* did not say or suggest that this Court's practice was wrong.

[36] In this Court, providing the definitive answer to a certified question on a point of statutory interpretation is the functional equivalent of engaging in correctness review. But this is merely an artefact of having a certified question put to us. It is not a comment on the standard of review of Ministers' interpretations of statutory provisions generally.

[37] As for issues other than statutory interpretation, the Federal Court adopted reasonableness review on the outcome reached by the Officer on the record of evidence before her. In light of the comments made in *Agraira* on the standard of review for that sort of matter, I conclude that the Federal Court properly selected the standard of review.

(4) The main issues for this Court to analyze

[38] In light of the foregoing discussion, the issues to be analyzed are as follows:

(1) *The statutory interpretation issue.* What is the proper interpretation of section 25 and, in particular, recently-added subsection 25(1.3)? In particular, what is the nature of the risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the *Balanced Refugee Reform Act*?

(2) *Reasonableness review.* Was the outcome reached by the Officer on the record of evidence before her reasonable?

C. Analysis

(1) The statutory interpretation issue

[39] The main issue raised in the certified question is the interpretation of subsection 25(1.3). However, falling as it does within the humanitarian and compassionate relief section – subsection 25(1) – the meaning of subsection 25(1.3) cannot be considered without examining the meaning of section 25 more generally. And subsection 25(1), of course, must be seen in light of other related sections in the Act.

[40] Seen in the wider context of the Act, subsection 25(1) is an exceptional provision. In the words of the Supreme Court, "an application to the Minister under s. 114(2) [now subsection 25(1)] is essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the Act": *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84 at paragraph 64. Subsection 25(1) is not intended to be an alternative immigration stream or an appeal mechanism for failed asylum claimants.

[41] The Federal Court has repeatedly interpreted subsection 25(1) as requiring proof that the applicant will personally suffer unusual and undeserved, or disproportionate hardship arising from the application of what I have called the normal rule: see, e.g., *Singh v. Canada (Minister of Citizenship& Immigration)*, 2009 FC 11 (CanLII). The hardship must be something more than the usual consequences of leaving Canada and applying to immigrate through normal channels: *Rizvi v. Canada (Minister of Employment and Immigration)*, 2009 FC 463 (CanLII).

[42] As a general matter, the consequences are unusual and undeserved, or disproportionate hardship associated with leaving Canada, associated with arriving and staying in the foreign country, or both. Thus, the Federal Court has upheld Officers who have taken into account factors such as establishment in Canada, ties to Canada, the best interests of any affected children, medical inadequacies in the foreign country, discrimination in the foreign country that does not amount to persecution, and other serious hazards in the foreign country. As I shall explain, this is not a closed list of factors that Officers may have to consider in particular cases.

[43] In adopting "unusual and undeserved, or disproportionate hardship" as the standard under subsection 25(1), on judicial review the Federal Court has generally adopted the interpretation the Minister has set out in his processing manual: Citizenship and Immigration (Canada), *Inland Processing Manual, Chapter IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*.

[44] Relevant portions of the Minister's processing manual are as follows:

5.10. The assessment of hardship

The assessment of hardship in an H&C application is a means by which CIC decision-makers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s).

The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on Subsection 25(1), which means that these terms are more than mere guidelines. [citation omitted]

In many cases the hardship test will revolve around the requirement in A11 to apply for a permanent residence visa before entering Canada. In other words, would it be a hardship for the applicant to leave Canada in order to apply abroad.

Applicants may, however, request exemptions from other requirements of the *Act* and *Regulations*. In such cases, the test is whether it would be a hardship for the applicant if the requested exemption is not granted.

Individual H&C factors put forward by the applicant should not be considered in isolation in a determination of the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant. Hardship must be unusual and undeserved or disproportionate as described below:

Unusual and undeserved Hardship	*Disproportionate hardship*
• The hardship faced by the applicant (if they were not granted the requested exemption) must be, in most cases, unusual. In other words, a hardship not anticipated or addressed by the *Act* or *Regulations*; and • The hardship faced by the applicant (if they were not granted the requested exemption) must be undeserved so in most cases, the result of circumstances beyond the person's control.	• Sufficient humanitarian and compassionate grounds may also exist in cases that do not meet the "unusual and undeserved" criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances.

5.11. Factors to consider in assessment of hardship

Subsection A25(1) provides the flexibility to grant exemptions to overcome the requirement of obtaining a permanent residence visa from abroad, to overcome class eligibility requirements and/or inadmissibilities, on humanitarian and compassionate grounds.

Officers must assess the hardship that would befall the applicant should the requested exemption not be granted.

Applicants may base their requests for H&C consideration on any number of factors including, but not limited to:

• establishment in Canada;

• ties to Canada;

• the best interests of any children affected by their application;

• factors in their country of origin (this includes but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in A96 and A97);

• health considerations;

• family violence considerations;

• consequences of the separation of relatives;

• inability to leave Canada has led to establishment; and/or

• any other relevant factor they wish to have considered not related to A96 and A97.

[45] I note that this Court and the Supreme Court have never confirmed the "unusual and undeserved, or disproportionate hardship" test adopted by the Federal Court under subsection 25(1), nor has it commented on the above-mentioned passages from the Minister's processing manual.

[46] This Court and the Supreme Court have set out the unusual and undeserved, or disproportionate hardship test, but only in the context of cases where the parties agreed on the test or the test was not seriously contested: see, *e.g.*, *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* at paragraph 17; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), [2002] 4 F.C. 358 at paragraph 23; *Hinzman v. Canada (Minister of Citizenship and*

Immigration), 2010 FCA 177 (CanLII) at paragraph 28; *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 (CanLII), [2003] 2 F.C. 555 at paragraphs 9 and 30.

[47] While in *Baker* the Supreme Court did not definitively rule on the meaning of subsection 25(1) in the case before it, it is fair to say that its reasoning in the case proceeded on the assumption that unusual and undeserved, or disproportionate hardship was the appropriate standard to be applied under subsection 25(1). Absent any further consideration by the Supreme Court, I find that that this is the appropriate standard to be applied under subsection 25(1). It expresses in a concise way the sort of exceptional considerations that would warrant the granting of such relief within the scheme of the Act.

[48] The Federal Court's cases underscore that unusual and undeserved, or disproportionate hardship must affect the applicant personally and directly. Applicants under subsection 25(1) must show a link between the evidence of hardship and their individual situations. It is not enough just to point to hardship without establishing that link: see, *e.g.*, *Lalane v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 (CanLII) at paragraph 1.

[49] This must be so. Subsection 25(1) requires that one "examine the circumstances concerning the foreign national" and the foreign national may get relief if "it is justified by humanitarian and compassionate considerations relating to the foreign national." Subsection 25(1.3) emphasizes that the examination under section 25 involves "elements related to the hardships that affect the foreign national."

[50] Before leaving the interpretation of subsection 25(1) of the Act, it is necessary to say a few words about the meaning of "unusual and undeserved, or disproportionate hardship." In my view, the decided cases show that the factors set out in section 5.11 of the processing manual, above, are a reasonable enumeration of the types of matters that an Officer must consider when assessing an application for humanitarian and compassionate relief under subsection 25(1) of the Act. They encompass the sorts of consequences that, depending on the particular facts of particular cases, might meet the high standard of hardship associated with leaving Canada, associated with arriving and staying in the foreign country, or both.

[51] That being said, I wish to caution against Officers applying the processing manual and, in particular, the factors listed in section 5.11 of the processing manual as if they describe a closed list of circumstances.

[52] The processing manual is an administrative guideline, nothing more. Administrative guidelines are desirable when dealing with a provision such as this, as they promote consistency in decision-making: *Hawthorne*, *supra*; *Eng v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 596 (CanLII). This manual goes some way toward shedding light on the meaning of "unusual and undeserved, or disproportionate hardship." Indeed, the Federal Court regularly upholds Officers' determinations that are based on a sensitive consideration of these factors that are live on the facts before them.

[53] However, the processing manual is not law: administrative policy statements are only a source of guidance and in no way amend the provisions of the Act or the Regulations (see *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2). It would be reviewable error for an Officer to see the processing manual as presenting a closed list of factors to consider and, in that way, to regard the processing manual, and not subsection 25(1), as the law. That would constitute an impermissible fettering of discretion: see, *e.g.*, *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 (CanLII). Such an approach might leave presently unforeseeable but deserving situations out in the cold.

[54] I adopt the following caution sounded in this very context by my colleague, Dawson J. (as she then was) in *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956 (CanLII) at paragraph 4:

> It is well settled law that policy guidelines are appropriate so long as they do not fetter the discretion of an individual officer. This is because the exercise of discretion implies the absence of a rule dictating the result in each case. Each case must be looked at individually, on its own merits. Guidelines are not to be regarded as being exhaustive or definitive. Guidelines are to be no more than a statement of general policy or a rough rule of thumb [citation omitted].

[55] Officers must always scrutinize the particular facts before them and consider whether the applicant is personally and directly suffering unusual and undeserved, or disproportionate hardship, regardless of whether the type of hardship is specifically mentioned in the processing manual.

[56] Mr. Kanthasamy submitted that the test under subsection 25(1) is broader than that set out above. He submitted that this Court should follow two authorities that adopted such an approach: *Yhap v. Canada (Minister of Employment and Immigration)*, [illegible]flex, [1990] 1 F.C. 722 (T.D.) and *Chirwa v. Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 338 (I.A.B.).

[57] I do not agree that the Federal Court in *Yhap*, read in whole, adopted a test different from that applied by the Federal Court in other cases. In *Yhap*, the Court held the scope of discretion was "wide," which undoubtedly it is (at page 739). It considered the processing manual to provide useful assistance to officers in the exercise of their discretion. It warned that the officers must not take the text of the processing manual and "consider it a limitation on the category of humanitarian and compassionate factors" (at page 741). It warned that the officers must direct their minds to the "humanitarian and compassionate circumstances" and "not to a set of criteria which constitute inflexible limitations on the discretion conferred by the Act." In the end, it applied the unusual and undeserved, or disproportionate hardship test.

[58] I do acknowledge that in *Yhap*, in isolated words not subsequently adopted, the Federal Court suggested that broader reasons of public policy might come to

bear. And in *Chirwa*, the Board suggested that compassionate considerations are "those facts established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another - so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*." In my view, however, these isolated words do not correctly express the test under subsection 25(1) of the Act.

[59] The Federal Court has repeatedly rejected such a broad interpretation of subsection 25(1): *Reis v. Canada (Citizenship and Immigration)*, 2012 FC 179 (CanLII); *Jung v Canada (Minister of Citizenship and Immigration)*, 2009 FC 678 (CanLII) and *Aoanan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 734 (CanLII).

[60] I agree with these more recent decisions of the Federal Court. The isolated words in *Yhap* and *Chirwa* take subsection 25(1) beyond permitting relief in situations of very significant hardship (as described above) to situations where one's subjective view of the equities is aroused. That goes beyond the role of subsection 25(1) within the scheme of the Act. It would take even broader words, such as "equitable and just," to import such an expansive standard into subsection 25(1) of the Act.

[61] For completeness, I would add that a finding that an applicant has established humanitarian and compassionate grounds under subsection 25(1) of the Act does not automatically mean that the applicant is entitled to relief. The Minister can refuse to allow the exception when he is of the view that public interest reasons shaped by "the general context of Canadian laws and policies on immigration," especially those set out in the section 3 of the Act, supersede humanitarian and compassionate reasons. See *Legault, supra* at paragraphs 17-18; *Pannu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356 (CanLII) at paragraph 29.

[62] Now I turn to subsection 25(1.3) of the Act.

[63] The *Balanced Refugee Reform Act, supra* added subsection 25(1.3) to the Act. This new subsection provides that an officer may not consider the factors that are taken into consideration under sections 96 and 97 of the Act, but must consider elements related to hardships:

25. (1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97 (1) but must consider elements related to the hardships that affect the foreign national.	**25.** (1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97 (1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[64] Counsel submits that subsection 25(1.3) has no application to subsection 25 (1) applications because the opening words of subsection 25(1) say "Subject to subsection (1.2)," not "subject to subsections (1.2) and (1.3)."

[65] This submission has no merit. Subsection (1) requires the Minister to consider requests when made. Subsection (1.2) acts as an exception to this, preventing the Minister from considering subsection 25(1) applications right at the outset in certain situations, for example where another subsection 25(1) application is pending. Subsection (1.3) supplements subsection 25(1) by guiding the officer on how an application should be assessed once the officer is considering the application.

[66] What then is the role of subsection 25(1.3)? In my view, it is not meant to change the overall standard of subsection 25(1) which, as we have seen, is to redress situations where the applicant will personally and directly suffer unusual and undeserved, or disproportionate hardship.

[67] Rather, on its express words, subsection 25(1.3) warns that the humanitarian and compassionate relief process is not to duplicate the processes under sections 96 and 97 of the Act. Subsection 25(1.3) goes no further than that.

[68] Applicants for humanitarian and compassionate relief under subsection 25 (1) have not met the thresholds for relief under sections 96 and 97 of the Act. They have not met the risk factors under those sections, namely the risk of persecution, torture, or cruel and unusual treatment or punishment upon removal in accordance with international conventions.

[69] Subsection 25(1.3) provides, in effect, that a humanitarian and compassionate relief application must not duplicate the processes under sections 96 and 97 of the Act, *i.e.*, assess the risk factors for the purposes of sections 96 and 97 of the Act.

[70] But this is not to say that the facts that were adduced in proceedings under sections 96 and 97 of the Act are irrelevant to a humanitarian and compassionate relief application. Far from it.

[71] While the facts may not have given the applicant relief under sections 96 or 97, they may nevertheless form part of a constellation of facts that give rise to humanitarian and compassionate grounds warranting relief under subsection 25(1).

[72] In submissions, the Minister accepted that this was so. She suggested that the same facts marshalled in support of relief sought under sections 96 and 97 are relevant to section 25 but they have to be seen in light of or, in her words, "through the lens" of the section 25 test, which is one of hardship.

[73] In my view, that is a useful way of describing what must happen under section 25 now that subsection 25(1.3) has been enacted – the evidence adduced in

previous proceedings under sections 96 and 97 along with whatever other evidence that applicant might wish to adduce is admissible in subsection 25(1) proceedings. Officers, however, must assess that evidence through the lens of the subsection 25 (1) test – is the applicant personally and directly suffering unusual and undeserved, or disproportionate hardship?

[74] The role of the officer, then, is to consider the facts presented through a lens of hardship, not to undertake another section 96 or 97 risk assessment or substitute his decision for the Refugee Protection Division's findings under sections 96 and 97. His task is not to perform the same assessment of risk as is conducted under sections 96 and 97. The officer is to look at facts relating to hardship, not factors relating to risk.

[75] Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3) but the facts underlying those factors may nevertheless be relevant insofar as they relate to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.

[76] It follows that I agree with Justice Hughes' comments in *Caliskan v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190 (CanLII) at paragraph 22:

> I conclude that the Guidelines got it right in construing how the amended provisions of section 25 of IRPA are to be interpreted. We are to abandon the old lingo and jurisprudence respecting personalized and generalized risk and focus upon the hardship to the individual. Included within the broader exercise in considering such hardship is consideration of "adverse country conditions that have a direct negative impact on the applicant."

[77] Before leaving this section of my reasons, I wish to address Mr. Kanthasamy's submission that subsection 25(1.3) must be interpreted in accordance with the values expressed in section 7 of the Charter. In my view, the above interpretation – which permits a consideration of the evidence through the lens of hardship – is consistent with Charter values. Those who suffer disproportionate hardship in their particular circumstances will be entitled to humanitarian and compassionate relief under section 25 of the Act.

[78] I would add that a refusal under section 25 to exempt applicants from the requirements of the Act does not take away rights. It does not refuse permanent residence to applicants. Rather, it means they will have to comply with the usual requirements of the Act and regulations, requirements that are constitutionally compliant.

(2) Reasonableness Review

[79] Are there any grounds to set aside the Officer's decision in this case? As mentioned above, the Federal Court properly found that the Officer's decision is subject to reasonableness review.

[80] After conducting reasonableness review, the Federal Court found that the Officer's decision passed muster. Our task is to assess whether that conclusion is correct.

[81] What does reasonableness mean? *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190 describes it as a range of outcomes that is acceptable and defensible on the facts and the law.

[82] In later jurisprudence, the Supreme Court said in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5 at paragraphs 17-19 and 23, the range of acceptable and defensible outcomes is "flexible," depends on "all relevant factors" and "varies with...the nature of the impugned administrative act" and "the particular type of decision making involved." In *Catalyst*, the range was rather broad, as the decision-maker had a "broad discretion" involving "an array of social, economic, political and other non-legal considerations."

[83] The idea of ranges of acceptable and defensible outcomes or margins of appreciation that broaden or narrow depending on the circumstances was recently reaffirmed in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII) at paragraphs 37-41. See also cases in this Court such as *Canada (Attorney General) v. Abraham*, 2012 FCA 266 (CanLII) at paragraphs 37-50, *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII) at paragraphs 13-14.

[84] Putting the words of *Baker* ("considerable deference") into the language of post-*Dunsmuir* standard of review jurisprudence, in many cases under subsection 25 (1) officers will have a broad range of acceptable and defensible outcomes available to them. This being said, owing to the importance of the matter to applicants under subsection 25(1), the court must be vigilant in ensuring that the outcome the officer reaches is truly within that range: *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 (CanLII).

[85] In my view, the Officer reached a decision that was defensible and acceptable on the facts before her. Several reasons support this conclusion.

[86] The Officer charged herself correctly on the law. In her first set of reasons, the Officer stated that in order to establish humanitarian and compassionate grounds Mr. Kanthasamy would have to show that his personal circumstances are such that the hardship of having to obtain a permanent visa from outside Canada in the normal manner would be unusual and undeserved, or disproportionate. The Officer noted the need to consider Mr. Kanthasamy's personalized risk, establishment in Canada and the best interest of the child.

[87] Mr. Kanthasamy identified a fear of returning to Sri Lanka because he is a young Tamil male from the northern region of the country.

[88] The Officer noted the presence of subsection 25(1.3). In her view, the fear identified by Mr. Kanthasamy pertained to fear of prosecution, torture, risk to life or cruel and unusual treatment or punishment on the basis of his race or nationality. In light of subsection 25(1.3), the Officer stated in her first set of reasons that she did not consider "the applicant's risk in this context," meaning in the context of whether he is a Convention refugee under section 96 or a person in need of protection under section 97(1). She repeated this in her second set of reasons. Given the interpretation of subsection 25(1.3) I have reached, above, this was an acceptable approach.

[89] However – again, consistently with the approach I have described above – the Officer did consider Mr. Kanthasamy's fear based on being a young Tamil male from the northern region of the country in the specific context of the subsection 25 (1) application, viewing it through the lens of hardship.

[90] Taking both sets of reasons together, the Officer considered a wide variety of evidence placed before her. The Officer considered Mr. Kanthasamy's letter of submissions, affidavit, a USDOS report regarding the treatment of Tamils in Sri Lanka, various letters, photographs, country documentation and a psychological assessment. Weighing all of this evidence, the Officer decided against granting Mr. Kanthasamy's section 25 application for several reasons.

[91] First, the Officer found that "insufficient evidence was presented to satisfy [her] that the applicant will be targeted by the security forces." The Officer identified areas where the evidence was lacking.

[92] Second, the Officer found in her first set of reasons that the targeting of young Tamil males was done for security reasons "on suspicion that those targeted are LTTE supporters or sympathizers," and that "measures [were] taken by the government to improve the security forces with respect to treatment of Tamils." In her second set of reasons, the Officer found that the security measures were taken "to preserve the best interests and security of the Sri Lankan nation as a whole" and "attempts have been made by the government to improve the situation regarding Tamils." In short, in her view, conditions in Sri Lanka for Tamils were improving.

[93] Third, Mr. Kanthasamy failed to "provide detailed information or evidence of discrimination he suffered while in Sri Lanka."

[94] Fourth, while Mr. Kanthasamy had established himself to some extent in Canada, he did not establish himself "to such a degree that return to Sri Lanka would amount to unusual and undeserved or disproportionate hardship." In saying this, the Officer took into account that Mr. Kanthasamy had been in Canada for some time and so some degree of establishment would be expected.

[95] Fifth, in considering Mr. Kanthasamy's best interests as a child at the time of the application, the Officer found that it would be in "his best interest to return to

Sri Lanka," where "he would...have the care and support of his immediate family members," and "no evidence has been provided to satisfy [her] that they will be unable or unwilling to assist or support him with reintegration into Sri Lankan society." He had spent the majority of his life in Sri Lanka and he had attended school there. The Officer noted that Mr. Kanthasamy had failed to satisfy her that "he would be unable to attend school or that he would be unable to obtain employment...upon his return to Sri Lanka."

[96] Sixth, in the second set of reasons the Officer examined the psychologist's report offered in support of Mr. Kanthasamy's application and acknowledged the medical expertise of the psychologist. However, the Officer assigned it little weight, noting that the details of past experiences of Mr. Kanthasamy in the psychologist's report were hearsay, were based on one interview, and did not appear in any of the other materials submitted. Overall, the Officer considered that "insufficient evidence was presented to satisfy [her] that the applicant will be targeted by the security forces." In a fairly detailed passage, the Officer concluded the following:

> Although [the psychologist's] diagnosis is or may be sound because in some parts it flows from the health professional's observations, the roots of the problem remain for the applicant to establish. The applicant may suffer from anxiety and distress for a number of reasons, and the [psychologist] is not in a position to say more than his conditions are consistent with their allegations: I accept the diagnosis however, the applicant has provided insufficient evidence that he has been or is currently in treatment regarding the aforementioned issues or that he could not obtain treatment if required in his native Sri Lanka or that in doing so it would amount to hardship that is unusual and undeserved or disproportionate.

[97] Mr. Kanthasamy took particular issue with the Officer's findings concerning the psychologist's report. No doubt, that report contained statements to which weight could have been given leading to a decision in Mr. Kanthasamy's favour. But that is not the test under reasonableness review. Under reasonableness review, the Officer is allowed to make acceptable and defensible assessments as to the significance and weight of the evidence.

[98] Here, the Officer found the evidence to be deserving of little weight. There is nothing in the record that would undercut the acceptability and defensibility of that conclusion.

[99] In conducting reasonableness review of factual findings such as these, it is not for this Court to reweigh the evidence. Rather, under reasonableness review, our quest is limited to finding irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction, such as a complete failure to engage in the fact-finding process, a failure to follow a clear statutory requirement when finding facts, the presence of illogic or irrationality in the fact-finding process, or the making of factual findings without any acceptable basis whatsoever: *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC), [1997] 1 S.C.R. 487

at paragraphs 44-45; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, 1990 CanLII 22 (SCC), [1990] 3 S.C.R. 644 at page 669.

[100] The Officer's decision does not suffer from any of these flaws. It is reasonable.

D. Disposition

[101] Therefore, I would answer the certified question as follows:

> What is the nature of the risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the *Balanced Refugee Reform Act*?
>
> Answer: Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3). However, the facts underlying those factors may nevertheless be relevant insofar as they related to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.

[102] Since the Officer's decision is reasonable, I would dismiss the appeal.

"David Stratas"
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-272-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE KANE DATED JULY 19, 2013, NO. IMM-7326-12	
STYLE OF CAUSE:	JEYAKANNAN KANTHASAMY v. THE

	MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 4, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BLAIS C.J. SHARLOW J.A.
DATED:	MAY 2, 2014

APPEARANCES:

Barbara Jackman	FOR THE APPELLANT
Alexis Singer Aledsandra Lipska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates Toronto, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

TAB 3

Court File No.:A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF MARY CATHARINE MURPHY
SWORN OCTOBER 3rd, 2014

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Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF MARY CATHARINE MURPHY
SWORN OCTOBER 3rd, 2014

I, Mary Catharine Murphy, resident of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am Secretary of the Canadian Transportation Agency ("the Agency") and, as such, have personal knowledge of the matters hereinafter deposed to.

2. On June 4th, 2014, the Agency published on its website the Annotated Dispute Adjudication Rules ("the Annotation").

3. The Annotation was designed, as its introduction states, as a companion document to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings),* SOR/2014-104 ("the Rules").

4. Its purpose, as its introduction states, is to provide explanations and clarifications of the

Rules which will be useful to those unfamiliar with the Agency and its processes.

5. The Annotation was prepared by Agency staff and approved for publication by the Chair and Chief Executive Officer of the Agency.

6. The Annotation was amended on August 22, 2014. Attached to the Respondent's Motion Record and marked as "Tab 11" is a copy of the Annotation as amended on August 22, 2014.

7. The amendments were prepared by Agency staff and approved for publication by the Chair and Chief Executive Officer of the Agency.

8. This Affidavit is made in support of the Motion by the Respondent, Canadian Transportation Agency, for an Order to determine the content of the Appeal Book or to include the Annotated Dispute Adjudication Rules as new evidence, and for no other or improper purpose.

DATED at the City of Gatineau, in the Province of Quebec, this 3rd day of October, 2014

SWORN BEFORE ME at the City of Gatineau, in the Province of Quebec, this 3rd day of October, 2014.

Commissioner of Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION TO DETERMINE THE CONTENTS OF THE APPEAL BOOK OR TO ADDUCE FRESH EVIDENCE REPLY OF THE RESPONDENT CANADIAN TRANSPORTATION AGENCY

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