



**Gathering Evidence for Humanitarian and  
Compassionate (H&C) Applications:**

**A Toolkit for Advocates Supporting Women  
Survivors of Gender-Based Violence**

(2018 Update)

## INTRODUCTION

### H&C Toolkit Goals

Humanitarian and Compassionate (H&C) applications can be overwhelming. This is because unlike other avenues of gaining permanent residency in Canada, the H&C application is open ended and discretionary. The more evidence you submit to make your case, the better. This is daunting. Where to begin? What kind of evidence do you need? How should the evidence be presented?

In 2015, the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)* considerably altered the law and guidelines governing H&C applications. This landmark decision has widened the interpretation of humanitarian and compassionate grounds. Since these changes have significant implications for applicants, it is important to update the H&C toolkit created by the Barbra Schlifer Commemorative Clinic (“the Clinic”), designed as a guide for advocates helping with the H&C applications of women who have survived gender-based violence.

This update alters and expands on the Clinic’s toolkit, keeping it in line with *Kanthasamy*. The kit is designed to help with the gathering of evidence that must be submitted along with H&C applications to Immigration, Refugees and Citizenship Canada (IRCC). It has been designed with advocates and service providers in mind. **Our goal is to help service providers to help H&C Applicants, by explaining what kind of evidence is necessary, and how to get it.** While this toolkit aims specifically to help women affected by violence, it explains what all claimants need for their H&C applications. We have provided a **checklist** of the kinds of evidence required for women-claimants who have experienced violence. This checklist is in no way exhaustive. Every H&C application is different, and no two applications will have the same exact evidence.

**A second goal of this project is to help women retain lawyers for their H&C Applications.** Gathering the evidence required for a solid H&C application is time consuming. If your client has been fortunate enough to retain a lawyer, the lawyer will still require her to obtain much of her evidence on her own. This toolkit will help her. If your client has been advised by a lawyer to make an H&C Application, but has not retained a lawyer, by obtaining many of the documents she will need for her application with the help of a community worker, she may have much better luck getting a Legal Aid Certificate, and retaining a lawyer from there.

### Understanding Legal Aid Ontario’s Coverage for H&C Applications

For the most part, LAO does not provide certificates for H&C Applications. There is an exception, however, for women who have experienced gender-based violence. This violence is usually in the form of domestic violence, but is not limited to such cases. If this exception applies to a woman, and she is granted an LAO certificate for legal representation for an H&C, the lawyer is paid for a total of sixteen hours. Sixteen hours is a small fraction of the time it actually takes to prepare an H&C Application. Once granted an LAO certificate, many women remain unable to find a lawyer who will agree to take on their case. This is because lawyers know that they need more time than they will get paid for. If, however, the woman has a pile of documents in hand when her search for a lawyer begins, we believe that she is more likely to find a lawyer to take on her case. It is important to note that the LAO certificate does not cover the application filing fees. These fees are payable to IRCC in the amount of \$550 per adult and \$150 per child. The applicant must pay these fees from their own funds

**Before We Begin—Some Important Assumptions We Are Making:**

1. The applicant has decided, based on legal advice, that she should apply for Permanent Resident status in Canada based on H&C considerations. Women should have legal advice regarding immigration applications. There have been recent changes to the legislation governing immigration and refugee matters in Canada.
2. The applicant has experienced violence, and this violence forms at least part of her basis for her application for H&C consideration.
3. If you are reading these materials, it is because you have participated in a training session on how to use the materials. Training is required to use these materials properly. For more information on how to receive this training if you have not done so, email: [legal@schliferclinic.com](mailto:legal@schliferclinic.com)

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## STAGES OF AN H&C APPLICATION

### What is an H&C application?

An H&C application is an application for permanent residence from within Canada. In general, foreign nationals must apply for permanent residence from their home country. Under section A25.1 of the *Immigration and Refugee Protection Act*, however, foreign nationals – individuals who are neither citizens nor permanent residents – can ask Immigration, Refugees and Citizenship Canada (IRCC) to make an exception to this rule based on humanitarian and compassionate (H&C) considerations.

*(The federal department that used to be called Citizenship and Immigration Canada (CIC) has been renamed Immigration, Refugees and Citizenship Canada (IRCC). Usage of the new name began after the new government took office in November, 2015. While the acronym 'CIC' continues to be used in some cases, particularly on older webpages and program guides, 'IRCC' is preferred in most official publications and communications.)*

### Stages of an H&C approval:

There are **two stages** of H&C approval:

1. **Stage 1:** Allowed to apply for permanent residence in Canada for humanitarian and compassionate reasons, and ("**approval in principle**")
  - Exempts applicant from the in-Canada eligibility criteria based on H&C considerations, so that application for permanent residence from within Canada can proceed
  - IRCC officials send letter informing applicant that:
    - The exemption has been granted
    - The applicant and his/her dependents must still meet any admissibility requirements for which they were not granted an exemption. (Otherwise, the application for permanent resident status may be refused at Stage 2).
  - IRCC officials will then begin processing the application for permanent residence (Stage 2).
2. **Stage 2:** Approved for permanent resident status in Canada
  - Allows the foreign national to become a permanent resident (subject to certain requirements [R72 (1)(b) and (c)], if these requirements were not specifically waived in the Stage 1 assessment.)
  - Puts into effect a stay of removal (R233) and allows applicant to apply for work permit [R207 (d) and /or study permit [R215 (g)].

## ELIGIBILITY FOR AN H&C APPLICATION

### Who is eligible for an H&C application?

A person can make an H&C application if s/he:

- Is a foreign national currently living in Canada;
- Needs an exemption from one or more requirements of the Immigration and Refugee Protection Act (IRPA) or Regulations in order to apply for permanent resident status within Canada;
- Believes humanitarian and compassionate consideration justifies granting the exemption(s) you need; and
- Is not eligible to apply for permanent resident status from within Canada in any of these classes:
  - Spouse or Common-Law Partner
  - Live-in Caregiver
  - Protected Person and Convention Refugees; and
  - Temporary Resident Permit Holder

### Who is ineligible for an H&C application?

A person cannot make an H&C application if s/he:

- Is a Canadian citizen;
- Is a permanent resident;
- Has submitted an H&C application for which a decision has not been made;
- Has an outstanding refugee claim;
- Had a refugee claim that was rejected (including claims that were abandoned) within the last 12 months by either the Refugee Protection Division or the Refugee Appeal division of the IRB;
- Withdrew a refugee claim within the last 12 months, unless the claim was withdrawn before our hearing at the IRB;
- Note: This is known as the “12-month bar” There are exceptions to the 12-month bar. You may be excepted if:
  - You provide sufficient credible and objective evidence that there are children under 18 years of age who would be directly and adversely affected if you were removed from Canada (they do not need to be *your* children); or
  - You provide sufficient credible and objective evidence that you, or a failed refugee claimant included in your application, if returned to home country, would be subject to a risk to life caused by the inability of your country(ies) of nationality, or former habitual residence if you don’t have a nationality, to provide adequate health or medical care.”<sup>1</sup>
- Is inadmissible on the ground of:
  - Criminality,
  - Health grounds,

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<sup>1</sup> <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5291-humanitarian-compassionate-considerations.html> last updated Sep 20, 2017

- Financial reasons,
- Misrepresentation.
- Became a designated foreign national within the last 5 years or is a designated foreign national and has received a decision within the last 5 years for any of the following:
  - A refugee claim at the Refugee Protection Division, Immigration and Refugee Board (IRB)
  - An appeal to his/her rejected refugee claim (at the IRB's Refugee Appeal Division), or
  - An application for a Pre-removal Risk Assessment
  - Note: The Minister of Public safety advises individuals when they become a designated foreign national.

**Concurrent applications for H&C and renewal of temporary resident status**

If applying to renew his/her temporary resident status in Canada (student, visitor, worker, etc.) at the same time as applying for H&C, the applicant must not include the two applications in the same envelope. The applicant must pay for the applications separately and mail the temporary resident renewal application to the Case Processing Centre in Vegreville. H&C applications must be sent to the Backlog Reduction Office in Vancouver (BRO-V).

## LEGAL PRINCIPLES & IMPLICATIONS OF KANTHASAMY

Canada's *Immigration and Refugee Protection Act (IRPA)* and *Regulations (IRPR)* provide the legislative authority for the admissibility, eligibility and removal of non-citizens. Section 25(1) of the *IRPA* allows the Minister of Citizenship and Immigration or his delegates (immigration officers) the discretion to exempt applicants from the condition that permanent residency applications must be made outside of Canada, (and from most requirements of the *Act*) if the Minister (or immigration officer) is of the opinion that such relief is justified by humanitarian and compassionate considerations. **H&C consideration is not simply an alternative means of applying for permanent resident status in Canada— it is an exceptional measure.** *IRPA* s. 25(1) reads:

**Humanitarian and compassionate considerations — request of foreign national**

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

The rules for deciding whether sufficient H&C grounds exist to justify granting a. 25(1) relief during permanent residency applications developed from two schools of thought: the approach set out in *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), and the test established in **Ministerial Guidelines** (“the Guidelines”), set out in paragraphs 26 – 28 of IRCC manuals. *Chirwa*, which was the first case to discuss the meaning of H&C considerations, defined these considerations broadly as, “those facts, established by the evidence, which would excite in a reasonable man [*sic*] 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.”<sup>2</sup> The Guidelines, however, provide a more specific test; applicants must demonstrate either “**unusual and undeserved hardship**” – hardship not anticipated or addressed by the Act or its regulations – **or disproportionate hardship** – an unreasonable impact on the applicant due to their personal circumstances. The Ministerial Guidelines in section 5.11 provide a non-exhaustive list of factors that may be relevant to applying the “unusual and undeserved or disproportionate hardship” standard: Under *IRPA* ss. 25(1) and s. 25(1.1), the **best interest of any child** affected by the decision must also be considered.

Prior to 2015, the jurisprudence followed these two schools of thought, one casting the Guideline language as non-binding, descriptive and "co-extensive" with *Chirwa*, and the other approach, which rejected the *Chirwa* approach and instead elevated the Guideline test.<sup>3</sup> The “Guidelines’ approach was predominant, and immigration officers tended to narrowly interpret the “unusual and undeserved hardship or disproportionate hardship” standard.

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<sup>2</sup> *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 (CanLII)

<sup>3</sup> *Ibid* at para 31

In December 2015, the Supreme Court of Canada ("SCC") released *Kanthisamy v. Canada (Citizenship and Immigration)* 2015 SCC 61, a pivotal decision on how immigration Officers should evaluate cases in humanitarian and compassionate (H&C) applications.

**Kanthisamy Case Summary:**

Jeyakannan Kanthisamy ("K") was a Tamil teenager from Sri Lanka. In April 2010, when K was 16 years old, his parents arranged for him to travel to Canada after he was subjected to detention and questioning by the Sri Lankan army and police. Once in Canada, (after his refugee claim and application for a Pre-removal Risk Assessment were refused), he applied for humanitarian and compassionate relief under s. 25(1) of the *IRPA*. Using the test of "unusual and underserved or disproportionate hardship", the Immigration Officer rejected the application, deciding that:

- *On whether K's mental health would suffer if he returned to Sri Lanka:*
  - K's psychological report was insufficient evidence that his return to Sri Lanka would affect his mental health, since he did not show that he sought mental health treatment in Canada or that such treatment would be unavailable
  - Furthermore, since the psychologist did not witness the events on which the psychological report was based, the report was based mainly on hearsay and thus unreliable
- *On whether K would face discrimination if he returned to Sri Lanka:*
  - Since K's previous refugee application was denied, the factors on which he based the refugee application should be disregarded in considering possibility of discrimination (factors related to fear of persecution, torture, risk to life or cruel & unusual punishment on basis of race & nationality).
  - While K provided evidence that Tamils are discriminated against in Sri Lanka, onus is on the applicant to show the discrimination would affect him personally.

On judicial review, the Federal Court held that the Officer's decision had been reasonable and the Federal Court of Appeal agreed.

On appeal in the SCC, McLachlin C.J. in the majority judgment held that the Officer's decision was not reasonable for the following reasons:

- *On whether K's mental health would suffer if he returned to Sri Lanka:*
  - Once the Office accepted the finding of the psychological report (that K suffered from post-traumatic stress disorder), the Officer did not need to ask K to adduce further evidence of his psychological distress, or of whether he did / did not seek treatment, or whether there was any treatment available in Sri Lanka. The Officer unnecessarily focused on the lack of additional evidence and ignored the effect that removal from Canada would have on K's mental health.



- Psychological reports will necessarily (for the most part) be based on hearsay; only rarely will a mental health professional witness the events for which a patient seeks professional assistance. Requiring mental health professionals to have personally witnessed the events is unrealistic and would result in an absence of significant evidence.
- *On whether K would face discrimination if he returned to Sri Lanka:*
  - The evidence adduced under previous refugee proceedings (and other previous proceedings under ss. 96 and 97) is admissible in H&C applications. However, this evidence must be assessed through the lens of the subsection 25(1) test, and Officers should not undertake another refugee or risk assessment or merely substitute the previous refugee decision in place of their own H&C decision.
  - The applicant does not have to provide direct evidence that the discrimination would affect him/her personally; such a requirement would undermine the “humanitarian purpose of s. 25(1) [and] it reflects an anemic view of discrimination that this Court largely eschewed decades ago”.<sup>4</sup> Discrimination can be inferred where an applicant shows that he/she is a member of a group that is discriminated against. Discrimination for the purpose of H&C applications “could manifest in isolated incidents or permeate systemically”, and even a “series of discriminatory events that do not give rise to persecution must be considered cumulatively”.<sup>5</sup>

The SCC in *Kanthasamy* summarized its criticism of the Officer’s decision as follows: “In this case, the Officer failed to consider K’s circumstances as a whole and took an unduly narrow approach to the assessment of his circumstances. The Officer failed to give sufficiently serious consideration to K’s youth, his mental health, and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessing each factor to see whether it represented hardship that was “unusual and undeserved or disproportionate”. The Officer’s literal obedience to those words, which do not appear anywhere in s. 25(1), rather than looking at K’s circumstances as a whole, led her to see each of them as a distinct legal test, rather than as words designed to help reify the equitable purpose of the provision. This had the effect of improperly restricting her discretion, rendering her decision unreasonable.”<sup>6</sup>

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<sup>4</sup> *Ibid* at para 54.

<sup>5</sup> *Ibid* at para 53.

<sup>6</sup> *Ibid* at headnote.

**Chart: Comparison of H&C Assessments Before and After Kanthasamy**

<b>Before Kanthasamy</b>	<b>Post – Kanthasamy</b>
<p><b><u>Hardship</u></b></p> <p>Officers limited their analysis to hardship that met the threshold of "unusual and undeserved" or "disproportionate", even though these terms are not found in the <i>Immigration and Refugee Protection Act</i> ("IRPA") or Regulations. Officers also assessed "unusual &amp; undeserved or disproportionate hardship" criteria strictly, treating the forms of hardship as 3 thresholds for relief that each must be met by applicants.</p> <p>Applicants were routinely refused H&amp;C relief when the hardship they faced in their country was universally felt by everyone living in that country. As a result, even if the conditions in a particular country were deplorable, the applicants were being refused because the hardship felt too broadly by others living there.</p>	<p><b><u>Hardship</u></b></p> <p>There is no hardship "test" for applicants under subsection 25(1); however, the determination of whether there are sufficient grounds to justify granting an H&amp;C request will generally include an assessment of hardship. Thus, hardship is still an important consideration in determining whether sufficient H&amp;C considerations exist to justify granting an exemption and/or permanent resident status.</p> <p>"Unusual and undeserved or disproportionate hardship" factors are descriptive; they do not create three new thresholds for relief. Rather, officers must analyze <u>all</u> relevant factors holistically to determine whether there are sufficient H&amp;C considerations to warrant approval.</p> <p>(In many cases, hardship will arise as a result of the requirement in section 11 that foreign nationals apply for a permanent resident visa before entering Canada. In other words, a decision maker would consider the extent to which the applicant, given their particular circumstances, would face hardship if they had to leave Canada in order to apply for permanent residence abroad. Although there will inevitably be some hardship associated with being required to leave Canada, this alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under subsection 25(1))</p>
<p><b><u>Best Interests of Child</u></b></p> <p>When the applicant was a child (person &lt; 18), the test was whether the child would suffer hardship if removed from Canada and a general consideration of the best interests of the child.</p> <p>Also, when the applicant was not a child, Officers still considered the best interests of any child affected by the application.</p> <p>Officers were not required to go beyond stating that they had taken children's best interests into account.</p> <p>Officers often considered the best needs of the child as a separate assessment from the other H&amp;C criteria.</p>	<p><b><u>Best Interests of Child</u></b></p> <p>The test for officers when assessing children (applicants &lt; 18) is less focused on hardship, but rather, is focused on what their best interests are. Also, when the applicant is not a child, Officers must also consider the best interests of any child affected by the application.</p> <p>Immigration Officers must go beyond simply stating that the children's interests were taken into account. Rather, the interests of children must be "well identified and defined" and examined "with a great deal of attention" in light of all the circumstances.</p> <p>Officers must turn their minds to how his status <i>as a child</i> affected the evaluation of the other evidence raised in his application.</p>

<p><b><u>Establishment in Canada</u></b></p> <p>Establishment in Canada was assessed in isolation from other H&amp;C criteria rather than as part of a holistic assessment of H&amp;C considerations.</p>	<p><b><u>Establishment in Canada</u></b></p> <p>A person who became established in Canada during their childhood/teenage years will be more severely affected if removed from Canada.</p>
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### CURRENT H&C TEST (SUMMARY)

The applicant must establish on a *balance of probabilities* that there are sufficient humanitarian and compassionate reasons to allow his/her application from within Canada. Officers making H&C determinations must weigh all factors before them. However, they generally focus on three H&C reasons:

- 1) Hardship
- 2) Best interests of Child
- 3) Establishment in Canada

#### 1) **Hardship**

Applicants should establish that if they are removed from Canada, s/he will face either unusual and undeserved hardship” (hardship not anticipated or addressed by the Act or its regulations, and is beyond applicant’s control) or disproportionate hardship (hardship that would have an unreasonable impact on the applicant due to his/her personal circumstances)

- The Guidelines set out non-exhaustive factors relevant to unusual & undeserved//disproportionate hardship (in s. 5.11):
  - Establishment in Canada;
  - Ties to Canada;
  - Best interests of any children affected by their application;
  - Factors in their country of origin (includes but not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in [ss. 96 and 97]);
  - 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 [ss. 96 and 97]. [Emphasis added.]
- The words “unusual & undeserved or disproportionate” are instructive, not determinative. They do not create three new thresholds for relief; they merely provide assistance to the immigration officer and fetter the immigration officer’s discretion to consider factors other than those listed in the Guidelines.

- There will inevitably be some hardship associated with being required to leave Canada, this alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds

## 2) Best Interests of the Child

The immigration Officer must take “into account the best interests of a child directly affected”.  
(Applies to all children under 18 years of age)

Decision makers must consider factors relating to a child’s emotional, social, cultural and physical welfare. These factors (set out in the Guidelines) may include, but are not limited to:

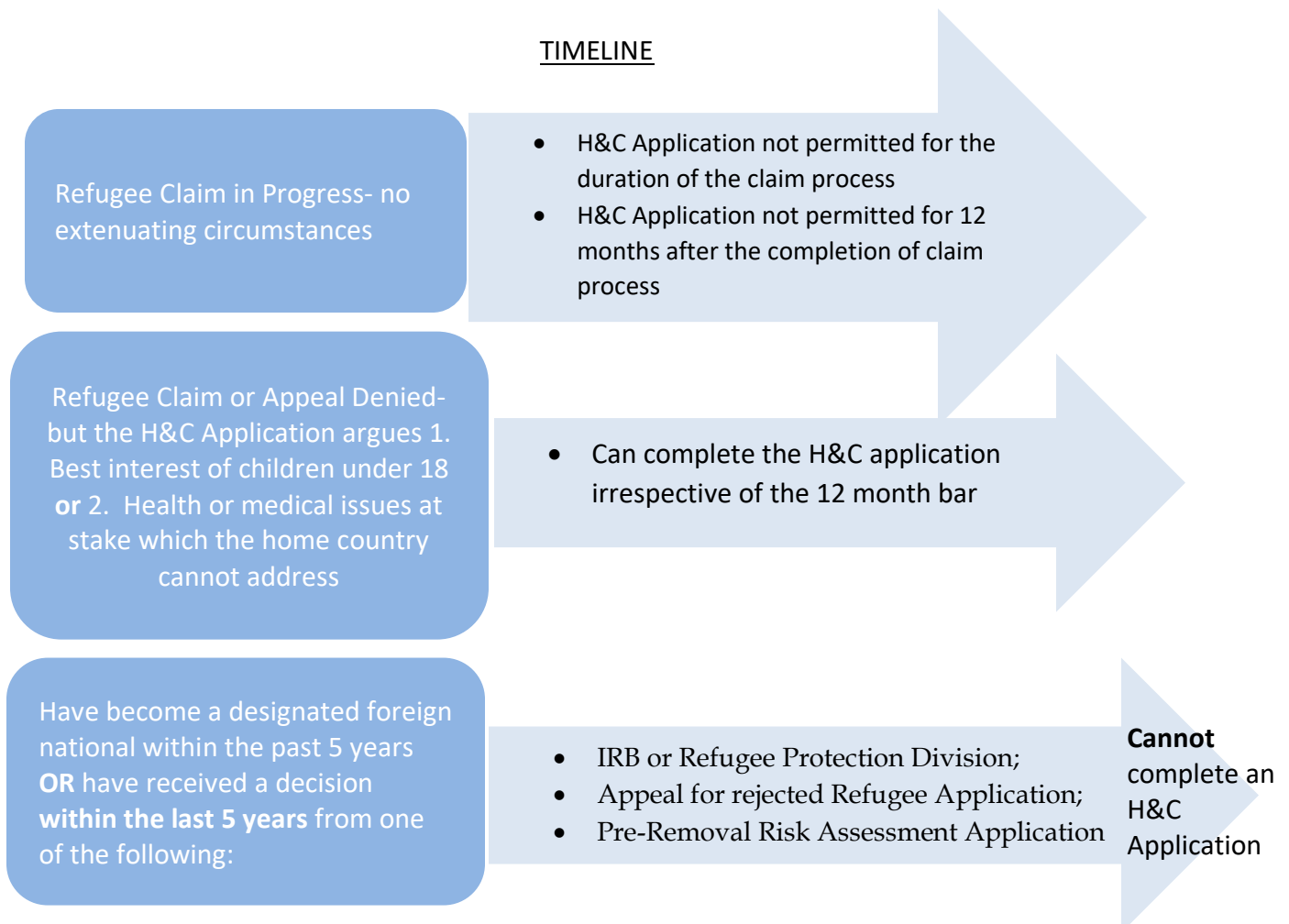
- Age of the child;
  - Level of dependency between the child and the [H&C] applicant or the child and their sponsor;
  - Degree of the child’s establishment in Canada;
  - Child’s links to the country in relation to which the [humanitarian and compassionate] assessment is being considered;
  - Conditions of that country and the potential impact on the child;
  - Medical issues or special needs the child may have;
  - Impact to the child’s education; and
  - Matters related to the child’s gender.
  - Applies to children whether they live in Canada or elsewhere
- An H&C determination will be unreasonable if the interests of children affected by the decision are not sufficiently considered. This means decision-makers must do more than simply *state* that the interests of a child have been taken into account; those interests must be “well identified and defined” and examined “with a great deal of attention” in light of all the evidence.
  - If the applicant is a child:
    - “Unusual & undeserved hardship” is presumptively inapplicable to hardship assessment (since children will rarely, if ever, deserve hardship)
    - Best interests of applicant must be treated as a significant factor in the analysis
    - Best interests of applicant must also influence the manner in which the child’s other circumstances are evaluated
    - Circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief
  - Courts have consistently held that the younger a child is, then the lower the impact of a parent’s removal will generally be.

## 3) Establishment in Canada

Being well established or settled in Canada increases an Applicant's chances of success.  
To show that s/he is established, a person’s application could refer to such things as:

- How long s/he has lived in Canada
  - Why s/he has been living in Canada
  - His/her work history in Canada
  - His/her level of education
  - His/her skills and training
  - Volunteer work done in Canada
  - His/her ability to speak English or French
  - Any children born in Canada
  - Family members here who are willing and able to help him/her
  - Any assets or savings s/he has in Canada
- An Applicant who received social assistance should explain why s/he needed it
  - An Applicant who became established in Canada during their childhood /teenage years will be more severely affected if removed from Canada

*Overall, immigration officers making H&C determinations have discretion to holistically determine whether there are sufficient H&C grounds to warrant approval. Immigration, Refugees and Citizenship Canada cannot bind them to an overly rigid standard.*



## POST-KANTHASAMY CASELAW

As of February 5, 2018 there were 213 cases decided by the Supreme Court, Federal Court (including Appeals) and IRB-IAD which cited *Kanthasamy*.<sup>7</sup> Below are a few decisions that show how the *Kanthasamy* principles are being applied (most address the best interests of the child):

### **Lewis v. Canada (Public Safety and Emergency Preparedness) 2017 FCA 130<sup>8</sup>**

In this Federal Court of Appeal decision from last year, Justice Gleason clarifies that the best interests of the child are not paramount, but only a primary consideration in Humanitarian and Compassionate appeals and only when a request has been made under Section 25, where that analysis takes place. Justice Gleason does conclude that the sole custodial father's return to Guyana is not in the best interest of the child who is part Gwich'in. She points to the Immigration Enforcement Officer's assumption that the eight-year-old would be able to return to Canada on her own to continue her cultural connection with her maternal culture as "pure speculation".<sup>9</sup>

### **Gomez Valenzuela v. Canada (Citizenship and Immigration), 2016 FC 603<sup>10</sup>**

This case is a good example of how an Officer's assessment of the best interests of the child should now be conducted since *Kanthasamy*. Justice Diner wrote:

Visa officers may be presumed to know that applicants would benefit from life in Canada but this does not relieve them of the obligation to identify and examine the interests of any affected child with "significant attention" and care. The Officers, in focusing only on the positives of life in Ecuador and the negatives of life in Canada, did not conduct their examination with the necessary level of attention and care.

### **Semana v. Canada (Citizenship and Immigration), 2016 FC 1082<sup>11</sup>**

Ms. Semana was found inadmissible for misrepresentation, which she appealed based on H&C grounds. She received a negative H&C decision, which she judicially reviewed, arguing that the IAD improperly assessed the best interests of the child ("BIOC") factor, since it neglected to follow the three-step process for considering the children's best interests, as set out in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166. Justice Gascon disagreed and held that the IAD is required to be "alert, alive and sensitive" to the best interests of the children. Pursuant to *Baker* and *Kanthasamy*, the interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence". However, there is no specific formula required for a BIOC analysis; there is no "magic formula to be used by immigration officers in the exercise of their discretion". Justice Gascon further noted that in *Kanthasamy*, the SCC did not adopt the three-step approach laid out in that decision.

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<sup>7</sup> Judit Boer, "H&C Update Following the SCC *Kanthasamy* Decision" (2016), 4.1, Immigration Issues, 4.1.1 at 4.1.4, <https://www.cle.bc.ca/PracticePoints/HUM/16-HC-Update-Following-the-SCC-Kanthasamy-Decision.pdf>

<sup>8</sup> *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, 2017 CarswellNat 2764.

<sup>9</sup> *Ibid* at 90.

<sup>10</sup> *Gomez Valenzuela v. Canada (Citizenship and Immigration)*, 2016 FC 603 (CanLII), at para 26.

<sup>11</sup> *Semana v. Canada (Citizenship and Immigration)*, 2016 FC 1082 (CanLII)

**Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 SCR 76<sup>12</sup>**

This was a decision in which the SCC held that the best interests of the child are not determinative in the analysis. The SCC stated:

It follows that the legal principle of the “best interests of the child” may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child’s best interests. Society does not always deem it essential that the “best interests of the child” trump all other concerns in the administration of justice. The “best interests of the child”, while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice. (Emphasis added.)

Nevertheless, while the best interest of the child does not necessarily trump other factors for consideration, decision-makers must consider children’s best interest as an important factor, giving them substantial weight, being alert to them, and being sensitive to them.

**Cortez v. Canada (Citizenship and Immigration), 2016 FC 800<sup>13</sup>**

This case is another judicial review of a negative IAD decision on misrepresentation. Mr. Cortez argued that courts should presume that the actions of parents are indicative of the children’s best interests. Justice Diner said he could not agree that the default position in a BIOC analysis is that whatever the parents do in practice with or for the child is in the child’s best interest; rather, the decision maker can rely on its own assessment.

**Sutherland v. Canada (Citizenship and Immigration), 2016 FC<sup>14</sup>**

Ms. Sutherland judicially reviewed a negative decision of her H&C application. Psychological evidence showed that removing Ms. Sutherland from Canada and returning her to her home country would worsen her mental health problems. The court found that in these circumstances, it was not enough for the Officer to simply look at whether mental health care was available in her home country; the Officer had to expressly take into consideration “the effect of removal from Canada would be [on her] mental health”.

**Canada (Public Safety and Emergency Preparedness) v. Nizami, 2016 FC 1177<sup>15</sup>**

Justice Shore affirmed that the H&C exemption is an exceptional, discretionary remedy. As such, they should only be available for exceptional cases in order to avoid becoming an “alternative immigration stream” or an appeal mechanism.

**Li v. Canada (Public Safety and Emergency Preparedness), 2016 FC 451<sup>16</sup>**

Mr. Li appealed his removal order based on humanitarian and compassionate grounds and the best interests of his child, since his wife was pregnant at the time of the IAD hearing. The IAD

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<sup>12</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4 (CanLII), at para 10.

<sup>13</sup> *Cortez v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 725 (CanLII)

<sup>14</sup> *Sutherland v. Canada (Citizenship and Immigration)*, 2016 FC 1212 (CanLII)

<sup>15</sup> *Canada (Public Safety and Emergency Preparedness) v. Nizami*, 2016 FC 1177 (CanLII)

<sup>16</sup> *Li v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 (CanLII)

had stated the best interests of the child did not need to be considered since the child was not yet born (and therefore had no interests *per se*). Justice Shore held that the IAD should at least have considered the child's interest in being reunited with her family in Canada.

**Tabatadze v. Canada (Citizenship and Immigration), 2016 FC 24<sup>17</sup>**

This was a judicial review of an H&C decision. Justice Brown confirmed that professional health reports are of value to the extent that they contain health care-related evidence; they should not be rejected because they fail to name a claimant's assailant(s).

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<sup>17</sup> *Tabatadze v. Canada (Citizenship and Immigration)*, 2016 FC 24 (CanLII)



H&C EVIDENCE CHECKLIST

Client Name \_\_\_\_\_  
 Nationality \_\_\_\_\_

Counsel name \_\_\_\_\_  
 Phone \_\_\_\_\_  
 Email \_\_\_\_\_

**I. Identity documents for the Applicant and dependents**

- |   |   |
|---|---|
| <input type="checkbox"/> Passports              | <input type="checkbox"/> Birth Certificates |
| <input type="checkbox"/> National Identity Card | <input type="checkbox"/> Other:             |

**II. Hardship if removed from Canada**

**Potential Violence /Abuse in Country of Nationality or Sponsorship Breakdown Due to Abuse**

- Police Records (e.g. occurrence reports, police notes, photos, recognizance of bail)
- Criminal Court Documents (e.g. subpoena, restraining order, probation order, sentencing/trial transcript) Letters
- from Victim/Witness Assistance Program
- Letter from VAW Shelter
- Letter or notes from doctor
- Letters from family
- Letters from friends/witnesses
- Hospital records
- Photos of injuries
- Assessment by psychologist/psychiatrist/therapist
- Letter from counsellor
- Family court documents
- Marriage or Divorce certificates
- Proof of sponsorship breakdown

**Health Concerns**

- Letter from doctor/hospital explaining diagnosis and medical care required
- Hospital records
- Prescriptions for medications
- Letter from medical professional in country of nationality or expert on unavailability of care

**Mental Health Concerns**

- Letter from doctor explaining diagnosis and care required
- Assessment by psychiatrist, psychologist, or therapist
- Letter from therapist/counsellor
- Prescriptions for medications
- Letter from expert or medical professional in country of nationality on unavailability of care

**Human Rights Concerns – include proof of the following if discrimination or ill treatment is a concern**

- Gender
- Race or Ethnicity
- Sexual Orientation
- Disability
- Religion
- Other attributes (e.g. gender identity, HIV status, age, marital status, free expression for writer/artist/actor)

**Lack of Family/Community Support in Country of Nationality**

- Letters from family and friends outside country of nationality
- Letters from family and friends in country of nationality
- Death certificates of family who would have otherwise been supportive to the Applicant

**Economic Concerns/Poverty**

- Proof of unemployment in country of nationality
- Proof of loss of spousal or child support if removed (e.g. letter from family lawyer)
- Letter from employer indicating hardship to employer if applicant removed

**Other Safety Concerns**

- Proof of unsafe conditions in country of nationality
- Other documents to prove hardship

### III. Establishment in Canada

#### Employment/Financial Security

- Pay stubs
- T4s
- Letter from employer
- Notice of assessment
- Bank statement
- Job offer
- Portfolio
- Remittances (money sent to support family members abroad)

#### Volunteer work

- Certificates
- Letter from organization

#### Family legally residing in Canada

- Support Letters (with proof of status) Photos of family with Applicant

#### Religious Community

- Letter from religious leader
- Letters from members of the religious community
- Photos of Applicant at place of worship

#### Community Support

- Letters from friends legally residing in Canada (with proof of status)
- Letters from neighborhood/school committees
- Letters from community members

#### Education/Training

- Letter from instructor
- Proof of enrollment/ registration, certificate of completion of program
- Transcripts/Report Cards

#### Miscellaneous

- Participation in sporting events, community programs Photos of client and dependents participating in community Deed/Rental Agreement

- Other documents to prove establishment in Canada**

#### IV. Best Interests of Any Children Directly Affected

##### Children of Applicant in Canada:

##### ***Establishment and general best interests***

- Letters from family legally residing in Canada
- Letters from the children
- Letters from children's friends
- Registration forms, certificates for after school activities
- Baptismal or other religious certificates
- Family Court Orders/Endorsements/Trial Decisions
- Letter from a children's aid society if already involved
- Photos of children with family or participating in community

##### ***Education***

- Canadian school report cards
- Letters of support from teachers, school administration, coaches
- School awards or certificates
- Selected schoolwork or artwork

##### ***Special Needs***

- Letters from doctors, specialists, or other health practitioners setting out special needs
- Letters from teachers/school administration setting out accommodation provided to child
- Assessments or Letters from Child Psychologist or Therapist
- Letter from expert in country of nationality on unavailability or inaccessibility of accommodation

##### ***Health or Mental Health concerns***

- Letters from doctors, specialists, or other health practitioners setting out health concerns
- Health/Hospital records
- Prescriptions for medications
- Letter from medical professional in country of nationality or expert on unavailability or inaccessibility of care or medications

##### ***Economic Concerns/Poverty***

- Proof of loss of child support if removed (e.g. letter from family lawyer)

##### ***Other Safety Concerns***

- Proof of unsafe conditions in country of nationality

***Human Rights Concerns – include proof of the following if discrimination or ill treatment is a concern***

- Gender
- Disability
- Ethnicity/ Race
- Religion
- Sex Orientation
- Other attributes (e.g. gender identity, HIV status, age, free expression for a writer, artist or activist)

***Separation from parent***

- Letters from family, friends, speaking to the parent-child bond
- Letter from other parent if Canadian resident with relationship to child and no safety concerns
- Letter from a children's aid society if already involved

***Children of Applicant outside Canada***

- Letters or declarations from the children
- Letters from family setting out why it is best for the children if their parent attains status in Canada

***Economic Concerns/Poverty***

- Proof of Remittances

***Safety concerns***

- Proof of unsafe conditions

***Human Rights Concerns – include proof of the following if discrimination or ill treatment is a concern***

- Gender Disability
- Ethnicity/ Race
- Religion
- Sexual Orientation
- Other attributes (e.g. gender identity, HIV status, age, free expression for a writer, artist or activist)

***Other children affected***

- Letters from children
- Letters from children's parents
- Photos of the Applicant and her dependents with the children

## V. Country Conditions Documents and Academic Articles

**Human rights reports, news articles, academic research, and expert reports about the following issues in the country of nationality**

- Violence against women and lack of protection and services
- Gender-based discrimination
- Unavailable or inaccessible health care
- Unavailable or inaccessible mental health care and stigma/discrimination on the basis of mental health
- Poor economic conditions
- Unavailable or inaccessible of specialized education/services and discrimination on the basis of special needs
- Deficient education or unavailable or inaccessible English language education
- Human rights issues, including discrimination due to any of the following, if relevant: sexual orientation, disability, ethnicity, race, religion, gender identity, HIV status, age, marital status, free expression etc.
- High rates of crime or other safety issues

**Academic articles, reports, and information about the following issues**

- Violence against women
- Other human rights, safety, or economic issues in the country of nationality
- Impacts of trauma
- Impact on children of witnessing violence
- Impact on children of separation from primary caregiver (if parent removed & child stays)
- Impact of family separation on children (siblings, other parent)

**Other relevant country conditions or academic articles:**

## VI. Summary of Basis for Application

<p style="text-align: center;"><b>Hardship if removed Domestic</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Violence/Abuse and/or Sponsorship Breakdown Due to Abuse Health Concerns</li> <li><input type="checkbox"/> Mental Health Concerns</li> <li><input type="checkbox"/> Human Rights concerns</li> <li><input type="checkbox"/> Lack of Family/Community Support</li> <li><input type="checkbox"/> Economic Concerns/Poverty</li> <li><input type="checkbox"/> Safety concerns</li> <li><input type="checkbox"/> Other:</li> </ul>	<p style="text-align: center;"><b>Establishment in Canada</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Employment/Finances</li> <li><input type="checkbox"/> Volunteer Work</li> <li><input type="checkbox"/> Family in Canada</li> <li><input type="checkbox"/> Religious Community</li> <li><input type="checkbox"/> Community Support</li> <li><input type="checkbox"/> Education</li> <li><input type="checkbox"/> Miscellaneous</li> <li><input type="checkbox"/> Other:</li> </ul>	<p style="text-align: center;"><b>Best Interests of Children</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Children of Applicant in Canada               <ul style="list-style-type: none"> <li><input type="checkbox"/> Establishment in Canada, General Best Interests</li> <li><input type="checkbox"/> Education</li> <li><input type="checkbox"/> Special Needs</li> <li><input type="checkbox"/> Health or Mental Health Concerns</li> <li><input type="checkbox"/> Economic Concerns/Poverty</li> <li><input type="checkbox"/> Safety Concerns</li> <li><input type="checkbox"/> Human Rights Concerns</li> <li><input type="checkbox"/> Separation from Parent</li> </ul> </li> <li><input type="checkbox"/> Children of Applicant outside Canada</li> <li><input type="checkbox"/> Other children affected</li> </ul>
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## H&C Support Letter Checklist

### All H&C support letters should include:

- Date
- Name, address, phone number
- Signature, and willingness to discuss reference, if needed
- Copy of photo identification (PR Card, Citizenship card, or passport)<sup>1</sup>
- Address the letter to “To Whom It May Concern” or to “Immigration, Refugees and Citizenship Canada”
- Your relationship to the applicant
- When and how you met the applicant
- Why it would be **very** difficult for the applicant to go back to her country of nationality
- Why the Applicant would make a good citizen or permanent resident of Canada. Include positive attributes and personal stories about the Applicant. Be as detailed and descriptive as possible
- Any other information that could be helpful.

### Also describe any of the following, if relevant:

- Any abuse you saw against the Applicant, including verbal (yelling, threatening), physical, sexual, or other forms of abuse, or jealous or controlling behaviours
  - Any injuries you saw on the Applicant from the abuse
  - Any information the Applicant told you about the abuse
  - The location of the abuser (if it is an issue)
  - Any recent threats the abuser has made against the Applicant that you witnessed
  - Why it would be best for the Applicant’s children to remain in Canada with the Applicant
  - How closely bonded the Applicant and the children are and how hard it would be for the children to separate from the Applicant
-

- If you are a **family member or close friend in Canada**, explain what support you provide to the Applicant, and why you could not continue to provide that support if the Applicant is forced to leave Canada
- For example, do you help out with the children when the Applicant needs it? Do you prepare meals for the Applicant?
- If you are a **family member or close friend in Canada**, describe how it would be hard for you and your children personally if the Applicant were removed from Canada
- How hard it would be for the Applicant's children if forced to leave Canada with their parent
- For example, would they have difficulty with language, school, health, finding a job, cultural integration, etc.
- If you are **from the applicant's country of nationality**, include information about the country that would make it hard for the Applicant and her children
- Some examples are high rates of violence against women and children, a lack of adequate services, widespread poverty or poor economic conditions, etc.
- If you are a **family member or friend in the country of nationality**, explain why you would be unable to help the Applicant to settle into the country if she were to return
- For example, explain if you are ill, live in a home that is too small, have a low income, have a disability, etc. If you are aware of conflict that the Applicant has had with other family members, please explain
- If the applicant tells you that she is trying to prove something about herself that you know is true, confirm that in your letter

- Your name and qualifications: education, experience (especially experience as a therapist), etc.
- If you belong to an organization, include information about the work of the organization
- A summary of what you will be giving your professional opinion on
- How you know the client: i.e. what work have you done with the client; how many times have you met, for how long, etc.
- Detailed background of what the client has disclosed
- Type of therapy the client is receiving
- Behavioral observations: how the client has presented throughout therapy. Describe the client's symptoms (i.e. nightmares, flashbacks, etc.)
- An opinion on the impact of the client's experiences on her functioning. If the client's experiences are consistent with trauma literature and your experience as a counsellor/therapist, describe. If the client exhibits symptoms of PTSD, describe
- An opinion on client's prognosis if compelled to return to a country where she has experienced the trauma described, and, if applicable, where she is still at risk
- Academic literature to back up observations and conclusions, if feasible
- Opinion on the credibility/veracity of the client: has her story been internally consistent over the course of therapy; has her behavioral and presentation been "consistent" with that of a trauma survivor? What are some of the hallmarks of "credibility" that the client demonstrates?
- Opinion on the client's prognosis if permitted to remain in Canada
- Any other information that could be helpful.
- Finally, do not give opinions outside your areas of expertise, other than what is common sense. Do not express an opinion on the merits of the immigration application, except to the extent that it is directly relevant to the assessment. For example, "permitting the applicant to remain in Canada provides the greatest likelihood of addressing underlying mental health issues" is an acceptable way to express support for the application.

## H&C Support Letter Checklist – Employers

All H&C support letters from employers should include:

- Company letterhead
- Date
- Address “To Whom It May Concern” or to “Immigration, Refugees and Citizenship Canada”
- Period of employment
- Salary
- Regular hours per week
- Assessment of the Applicant’s skills and work ethic
- Any difficulties you face in hiring qualified employees and hardship you would experience if the Applicant were removed from Canada
- Any other information that would support the Application--be as detailed and descriptive as possible



## Cautionary Notes

Keep in mind while you help clients gather evidence, that H&C applications are more complicated than many, probably most, immigration applications. This guide does not give you all the information and resources you need to file a complete H&C application. Rather, we focus on evidence gathering to support an H&C Applicant who has received legal advice and who has or will ultimately obtain legal counsel to represent her or review her application, whether at a clinic, on a private retainer, or on a Legal Aid Ontario Certificate. Because H&C applications are so complicated and require much legal advice and analysis, we strongly recommend that they be completed by lawyers. The following are some of the issues that come up with H&C Applications, but which are beyond the scope of our project.

***Submitting an H&C makes the applicant more visible:*** Unlike making a refugee claim, filing an H&C Application does not provide the client with temporary status while it is in process. When an applicant files an H&C application, she is giving her address to IRCC. Thus, she is vulnerable to detention and removal from Canada after the H&C Application is submitted. She should be aware of the risks and only a lawyer can provide legal advice to her about whether it is best to initiate the application.

***Risk of removal while an H&C is in process and the options to stop removal:*** If removal proceedings are initiated while her H&C application is still in process, the applicant may seek from the enforcement officer a deferral of her removal until the H&C decision is made. If the deferral request is denied, a judicial review can be initiated and a stay motion can then be argued. Only a lawyer (or the applicant herself) has standing to argue a judicial review or stay in Federal Court.

***Work/Study authorization:*** Unlike a refugee claim, the client will not qualify for work or study authorization solely by virtue of filing an H&C Application. If the client is working or studying without authorization, she is technically in breach of immigration law and it could have an impact on the outcome of her application. At the same time, given that establishment in Canada is central to the H&C process, it is important that applicants be as self-sufficient as possible. These somewhat conflicting requirements are often ones on which the applicant will want specific legal advice.

***H&C Interviews:*** In a small minority of cases, H&C officers will call the client in for an interview prior to making a decision. Preparation for these interviews is beyond the scope of this project. Occasionally an officer will contact the client to ask for additional information; however, this is not always the case. Therefore, it is a best practice to ensure that all of the best evidence is submitted in the application and that updates are made if new information becomes available.

***Children's ages:*** The Convention on the Rights of the Child states, "a child means every human being below the age of eighteen years". Accordingly, in many cases, only children under the age of 18 will benefit from a "best interests of the child" ("BIOC") analysis, and older children will have their hardship assessed as an adult. However, in some cases (depending on the child's age, schooling, level of dependency on the parent, etc.) an argument can be made that an older child should benefit from a BIOC analysis. Since this may affect the evidence gathering process, a lawyer should canvass this issue.

**Eligibility for filing H&C – 12-month and 5 year bars:** Applicants who are refugee claimants will not be permitted to file H&C Applications simultaneously – there is no exception to this rule. Applicants are also not permitted to file H&C Applications within 12 months of a negative RPD or RAD decision (depending on the country of nationality) unless they fit into one of two exceptions. The client should receive legal advice on whether she fits into one of the exceptions prior to an H&C Application being submitted. Additionally, persons who have been declared “Designated Foreign Nationals” (DFN) are prevented from applying for H&C considerations, without exception, for a period of five years.

**H&C Application package must be complete:** It is imperative that an H&C application package be complete. This may sound obvious, but IRCC’s H&C Document Checklist can be confusing, and it is very easy to inadvertently leave out a required form or document. Incomplete applications will be returned to the applicant and sent to the back of the queue when resubmitted. However, this may not happen for several months, which could lead to processing delays that are highly prejudicial to the applicant. Incomplete H&C Forms, incorrect fees, and missing documents can lead to a returned application.

**H&C Application must be updated as soon as new evidence is available:** H&C Applications can be decided at any time. They can take 4 years to be decided or they can take a couple of months. There is no way to predict when the application will be decided, so the initial application should be complete when it is submitted, as set out above. However, an applicant’s situation can change dramatically in a relatively short period of time. In the past, the H&C officer would write to an applicant to solicit updates prior to a decision being made. This practice is no longer the norm and cannot be relied upon. As such, helpful or necessary updates (subject to the other cautions set out here) should be sent immediately after they become available.

**Address Updates:** If an Applicant moves while her H&C Application is in process, she is expected to update her address with immigration immediately. Again, the legal implications of doing so should be canvassed with the client by a lawyer.

**Applicant’s Statutory Declaration or Affidavit:** Every H&C Application should contain a sworn or affirmed document from the Applicant (and the Applicant’s older children who are included in the application). The contents of this declaration are very important to the H&C Application, but they go beyond the scope of this project.

**Applicant must review all evidence:** Mistakes are often made when documents are submitted without the applicant’s review. All documents should be reviewed with the client, with a competent interpreter if necessary, prior to being submitted.

## Cautionary notes

**Inadmissibility:** H&C Applications must deal with any “inadmissibility” that the applicant may have, including financial (A39), health (A38), criminal (A36), misrepresentation (A40), non-compliance with the act (A41), and vicarious inadmissibility (A42). These are issues that should be addressed with evidence and written submissions by legal counsel and are thus beyond the scope of this project.

**Country Conditions - National Documentation Packages:** Ensure that you are aware of documents listed in the Immigration and Refugee Board’s (IRB) National Documentation Packages, as the Officer is entitled to consult these documents without disclosing them to the Applicant. There could be information within these documents that directly contradicts your client’s arguments. If so, this information should be refuted with other evidence.

## Tips/Preparatory Steps

- Prepare a draft of H&C Forms (found at <http://www.cic.gc.ca/english/information/applications/handc.asp>)
- If the client has done any prior immigration applications or claims in Canada, request a copy of the client’s entire In-Canada File under the *Privacy Act* (instructions at <http://www.cic.gc.ca/english/department/atip/requests-personal.asp>). Ensure that the client receives a copy of this information.
- Once the application fee has been determined (<http://www.cic.gc.ca/english/information/applications/guides/5291ETOC.asp#5291E5>), canvas ways that the client can start to gather the money.
- Write notes about the history of abuse and potential hardship that the applicant has disclosed to you. With the client’s consent, this information may be helpful to the client’s counsel.
- Review IRCC’s H&C Document Checklist, available online with the H&C forms, with applicant and help her gather the necessary documents (e.g. passport sized photos, fee receipt, identity documents)
- Search women’s rights issues and general human rights issues in the Applicant’s country of nationality prior to your meeting to help direct your questioning.
- Explain to the client the limits of the confidentiality you can offer her prior to soliciting information from her (For example, duty to disclose to the *Children’s Aid Society*)
- Keep in mind when you’re helping the client gather evidence that “Establishment in Canada”, though it can be very directly and indirectly persuasive on an H&C Officer, is not good enough on its own to make a successful H&C Application. Establishment evidence should, as much as possible, have the dual purpose of supporting the client’s hardship argument.

### **Mail your application to:**

Immigration, Refugees and Citizenship Canada – Backlog Reduction Office  
#600 -605 Robson Street  
Vancouver, B.C.  
V6B 5J3