Date: 20031209 Docket: IMM-1993-02 IMM-2386-03 Citation: 2003 FC 1430 BETWEEN:

Applicant

JOCELYN ADVIENTO

- and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent MARTINEAU J.:

REASONS FOR ORDER

[1] These reasons for order relate to two judicial review applications. First, by an application filed on May 1, 2002, and made under section 82.1 of the *Immigration Act*, R.S.C. 1985, c. I-2 (the Act), the applicant seeks judicial review of the decision of the removal officer dated May 2, 2002, but communicated to the applicant previously, wherein the removal officer indicated that the removal of the

applicant would not be deferred and that the deportation order would be executed. Second, by an application filed on April 3, 2003, and made under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the applicant seeks a declaration under section 24 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Constitution Act*, 1982 (U.K.), 1982, c. 11 (the Charter) that she ought not to be removed from Canada as her removal would constitute a violation of section 7 of the Charter.

FACTS

[2] The applicant has no family in Canada. Her entire family, including her son and daughter, are living in the Philippines. The

applicant came to Canada in July 1990 under the Foreign Domestic Program, now the Live-in Caregiver Program (the LCP program). She has been gainfully employed in Canada as a caregiver since her arrival. The applicant's last employment authorization expired on November 13, 1998. Nevertheless, she has continued to stay and work in Canada. She regularly sends money to the Philippines, to help support her two adolescents who attend private school.

[3] In 1994, the applicant was diagnosed with kidney failure. Unless she receives a kidney transplant, the applicant must continue to have dialysis for the rest of her life. Moreover, although dialysis treatment can remove wastes and excess water, medications are also needed to control the levels of these minerals and to replace hormones.

[4] Without dialysis, the applicant would die within seven to fourteen days. Two types of dialysis are used to treat the later stage of chronic renal insufficiency:

(a) In the case of hemodialysis, blood is withdrawn from the body by a machine and passes through an artificial kidney. Hemodialysis can be done in a dialysis unit (i.e. hospitals), in a self-care dialysis unit (i.e. certain community centres), or at home, provided the patient has acquired the necessary equipment and has been trained to operate it. Each hemodialysis treatment normally takes three to five hours. At least three treatments are required weekly.

(b) Peritoneal dialysis works on the same principle as hemodialysis, but the patient's blood is cleaned while still inside the patient's body rather than in a machine. The fluid enters the peritoneal cavity through a catheter which has to be surgically inserted in the patient's abdomen. Excess water and wastes pass through the peritoneum into the dialysis fluid. The fluid is then drained from the patient's body and discarded, and the process is repeated. There are different types of peritoneal dialysis. In continuous ambulatory peritoneal dialysis (CAPD), the patient

carries about two litres, or more, of dialysis fluid in the peritoneal cavity all the time. CAPD usually takes less than three weeks to learn. Four to five times a day, the patient does an exchange. It takes about 30 to 45 minutes to do each exchange. This procedure can

be performed at home or elsewhere. However, the patient is responsible for ordering the supplies needed and to store them in a location where they won't freeze.

[5] The applicant has been on self-care management for her kidney disease since April 17, 1994. She has a permanent catheter implanted in her stomach. She has been trained at the Home Periteoneal Dialysis Unit at the Toronto Hospital to do CAPD. She is totally self sufficient in the management of her CAPD treatments. This procedure allows her to live a virtually normal life without hindering her ability to work, to travel and to care for herself. The applicant's life is not endangered, provided she has access to the needed supplies and medications.

[6] In 1995, the applicant applied for permanent residence in Canada. No particular mention was then made of her medical condition. Indeed, in her application she states that she never had any serious disease or physical disorder (application dated March 1, 1995, answer to question 23-D, tribunal's record, page 231). Her application was refused on October 26, 1995, on the ground that her former husband, Mr. Fathe Majdha, a citizen of Israel, was under an effective removal order. The latter entered Canada on May 7, 1992, and had been refused as a refugee. Subsequently, the couple separated and their divorce became final in April 2000. Thus, the applicant did not meet the requirements under the LCP program. She was advised that her current employment authorization would expire on May 23, 1996. Therefore, she was required to leave Canada on or before that date. However, it appears that she was able subsequently to obtain a Minister's Permit.

[7] In March of 1996, while still together, the couple made an initial H & C application based on her medical condition and other compassionate grounds. Written submissions were made through counsel (then Arnold Bruner, Barrister and Solicitor). The latter submitted *inter alia* that the applicant had a guaranteed right to life, liberty and security of the person under section 7 of the Charter. It was alleged that the applicant's life depended on her being able to remain in Canada where she had access to CAPD treatments. In particular, it was submitted that CAPD was not available in the Philippines. Although hemodialysis was available in the Philippines, the costs were prohibitive (in the range of $9,000.00 monthly, as attested by a letter of Dr. Daniel R. Ynzon Jr. of the Kidney Foundation of the Philippines). Furthermore, it was also stressed that the applicant could function well with the aid of daily treatments of life-saving fluid. Accordingly, it was submitted that there was not a reasonable expectation that, as a result of her medical condition, her admission would cause excessive demands on health or social services in Canada.

[8] As a result of their application, the couple underwent a medical examination in September 1996. The applicant was found to be medically inadmissible under subparagraph 19(1)(a)(ii) of the Act because her admission to Canada would cause or might reasonably expected to cause excessive demands on health or social services. However, no immediate action was taken. The immigration officer responsible for the file was advised at that time that the applicant planned to make a trip to the Philippines at the end of November 1997. The stated purpose of

this trip was for medical reasons, as the applicant intended to obtain a kidney match. The applicant did in fact travel to the Philippines in December 1997, where she stayed for a whole month. There, she was able to continue to perform her daily CAPD treatments with the fluid supplies and medications she had brought from Canada. She experienced no problem in this regard.

[9] In the winter of 1998, the immigration officer requested supplementary information with respect to the accessibility of medicine services in the Philippines. Valerie Hindle MD, senior medical officer in Manila, advised the immigration officer that renal transplants and hemodialysis were readily available in the Philippines at the cost of $5 555.00 US to $6 666.00 US for a renal transplant and $111.00 US per session for hemodialysis. On June 11, 1998, the immigration officer, N. Sharma, determined that there were insufficient humanitarian and compassionate considerations to warrant an exemption from subsection 9(1) of the Act, which allows the applicant's application for permanent residence to be processed from within Canada. By letter dated July 27, 1998, the applicant was advised that her H & C application was dismissed, that a report had been made pursuant to section 27 of the Act and that, as a result of this report, a Direction for an inquiry had been issued. The applicant purportedly was never made aware of this refusal until January of 1999, when she applied for an extension of her work permit who had already expired.

[10] In March of 1999, there was a change of counsel, when the applicant chose to be represented by immigration consultants O'Brien Carpenter and King. As a result of their intervention in the applicant's file, a second H & C application was submitted in March of 2000. Again, counsel raised the applicant's medical condition as a compassionate ground. While this second H & C application was still under study, an effective removal order was issued on June 9, 2000. Call-in notices for interviews at the Greater Toronto Enforcement Centre, first on July 19 and then on July 26, 2000, were sent to the applicant. Each time, she failed to appear.

[11] The applicant's second H & C application was refused on January 9, 2002. Before rendering her decision, an update of the information on the accessibility of health services in the Philippines was made by the immigration officer. In view of the information obtained in this regard, the immigration officer

determined that the applicant had access to proper health facilities in the Philippines, and more particularly that the CAPD treatment was available throughout the Island of Luzon (notably in the city of Dagupan) where the applicant is originally from. It was also noted that the governmental funding was available for the treatment. If a patient is unable to pay, there is subsidized service resulting in minimal cost or no cost at all. The applicant filed a leave application to judicially review this negative decision. However, she did not pursue the application.

[12] On February 19, 2002, the applicant was scheduled for an interview in Toronto with a removal officer, Ms. Sindi Pannu. She failed to appear. A review of the applicant's file reveals that she has a record of non-compliance with a running total of no less than four separate failures to appear (twice for inquiry and twice for pre-removal interviews). A review of the file also indicates that the applicant has had seven changes of her home address. Finally, she has continued to work illegally in

Canada and has made no preparation whatsoever to leave Canada. A warrant for the applicant's arrest was issued accordingly.

[13] Again, the applicant changed counsel this time to Lorne Waldman, Barrister and Solicitor. A third H & C application was made on her behalf in March 2002. The applicant now blames her former counsel for not having refuted the evidence upon which the immigration officer made her negative assessment in January 2002. In October 2001 counsel was specifically given the opportunity to response to said evidence within 30 days.

[14] In the meantime, the applicant was arrested on May 1, 2002. While she was detained, applicant's new counsel asked the removal officer to defer her removal until after the determination of her most recent H & C application. Despite the fact that the applicant's two previous H & C applications had been dismissed, the applicant's new counsel submitted to the removal officer that she

should consider the applicant's new documentary evidence, which showed that the applicant would not be likely to receive adequate dialysis treatments in the Philippines.

[15] In particular, reference was made to Dr. Tan's e-mail dated February 15, 2002 which reads as follows:

Dear Ms. Greenspoon,

I am not too confident of her getting financial support for peritoneal dialysis. For hemodialysis two possible sources. Firstly, the Philippine Charity sweepstakes Organization offers monetary assistance for about eight treatments every 6 to 12 months. Philhealth (formerly Medicare) supports about 45 treatments per year. However, since she has been away from this country for years, I'm not sure if she will qualify. Anyway, patients like her can't survive for long on less than once a week hemodialysis and would need added funding for at least twice a week treatments. And we have not factored in medication, hospitalization etc. expenses.

[16] However, the removal officer did not find this "new" evidence conclusive. After a review of the Field Operating Support System (FOSS) and the available information on file, considering that Citizenship and Immigration Canada (CIC) has an obligation under section 48 of the Act to enforce removal orders as soon as reasonably practicable, the removal officer determined on May 1, 2002, that a deferral of the execution of the removal order was not appropriate.

[17] An application for judicial review of this negative decision was made on the same day, and a stay granted on May 3, 2002 by MacKay J. This judicial application was ready to be heard in Toronto last April 2003. However, upon applicant's request and with counsel consent, I adjourned same in order to permit the applicant to bring a separate application seeking *inter alia* a

declaration pursuant to subsection 24(1) of the Charter that she has the right under section 7 of the Charter to remain in Canada. This resulted in further delays.

ISSUES **[18]** These proceedings raise the following issues:

A) What is the standard of review applicable when reviewing a removal officer's decision not to defer removal?

B) Did the removal officer failed to exercise her discretion, ignored relevant evidence or otherwise acted contrary to law?

C) In the present case, is this the proper forum in which to raise a Charter argument?

D) In any event, are the applicant's section 7 Charter rights engaged in the present circumstances?

ANALYSIS

A) What is the standard of review applicable when reviewing a removal officer's decision not to defer removal?

[19] In order to properly review the removal officer's decision we must first determine the appropriate standard of review to be applied. There is somewhat of a controversy in assessing the proper standard of review since subsection 18.1(4) of the *Federal Court Act*, R.S.C., 1985, c. F-7 sets out the specific grounds that an applicant must establish in order to succeed on an application for judicial review. It prescribes as follows:

(4) The Trial Division may grant relie f under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted b eyond its jurisdiction or refused to ex ercise its jurisdiction;

(b) failed to observe a principle of nat ural justice, procedural

fairness or oth er procedure that it was required by la w to observe;

(c) erred in law in making a decision or an order, whether or not the error a ppears on the face of the record;

(d) based its decision or order on an e rroneous finding of fact that it made i n a perverse or capricious manner or without regard for the material before it;

4) Les mesures prévues au paragraph e (3) sont prises par la Section de pre mière instance si elle est convaincue que l'office fédéral, selon le cas_:

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justi ce naturelle ou d'équité procédurale o u toute autre procédure qu'il était léga lement tenu de respecter;

c) a rendu une décision ou une ordon nance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordon nance fondée sur une conclusion de f ait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des élé ments don't il dispose;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was co ntrary to law.

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

[20] In choosing to enumerate six distinct grounds of review Parliament, has deliberately opted for a rather formalistic approach to judicial review where the focus is primarily connected to the

particular nature or gravity of the error alleged by an applicant.

[21] While an erroneous finding of fact made by a tribunal is not *per se* excluded from judicial scrutiny, it only becomes a reviewable error within the ambit of paragraph 18.1(4)(d) if the applicant is able to satisfy the Court that it has been made "in a perverse or capricious manner or without regard for the material before the tribunal". As we can see, the use in paragraph 18.1(4)(d) of the *Federal Court Act* of such adjectives as "perverse" and "capricious" suggest that Parliament has already set out the appropriate standard of review with respect to findings of fact made by a tribunal.

[22] In *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39 (CanLII), [2003] F.C.J. No. 108 at para. 14 (F.C.A.) (QL), Décary J.A. notes that "[the] standard of review (...) laid down in s. 18.1(4)(d) of the *Federal Court Act* (...) is defined in the other jurisdictions by the phrase "patently unreasonable"". Should less deference be given to questions of jurisdiction or law, or mixed law and fact?

[23] I note that the words "perverse" or capricious" which appear in the wording of section 18.1(4)(d) do not appear in the other subparagraphs of paragraph 18.1(4). From a formalistic perspective, questions of law and jurisdiction would generally be reviewed on a "correctness" standard, while mixed questions of law and fact would be reviewed on a "reasonable *simpliciter*" standard.

[24] When a review application raises specific grounds of review under paragraph 18.1(4) of the *Federal Court Act*, one may then wonder if it is really necessary for the Court to always rely on the pragmatic and functional approach in order to determine the appropriate standard of review. I am cognizant of the fact that in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII) at para. 21, McLachlin C.J., for the Court,

stated that "the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach". The "pragmatic and functional approach" was first applied in *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, and was later applied in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982. I am also cognizant of the fact that in *Pushpanathan, supra*, judicial review was conducted under the *Federal Court Act*.

[25] That being said, a more recent pronouncement of the Supreme Court has cast doubt over the use of the pragmatic and functional approach in cases where precise standards of judicial review have been provided by statute. In *R. v. Owen*, 2003 SCC 33 (CanLII), the Court was concerned with the reversal by the Court of Appeal of Ontario of a decision rendered by Ontario Review Board. The Review Board had concluded that the respondent, Owen, constituted a significant danger to the safety of the public and ordered his continued detention at a psychiatric hospital. At the Court of Appeal, the Crown sought to bolster the Board's decision with fresh affidavit evidence which alleged that, since the date of the Board hearing, the respondent had punched another patient, threatened to kill yet another patient, and was found in possession of prohibited drugs. The Court of Appeal declined to admit the fresh evidence, proceeded to review the Board's order based on the evidence available at the original hearing, set aside the Board's order as unreasonable, and directed that the respondent be absolutely discharged. The Supreme Court (Arbour J. dissenting) allowed the appeal and held that the Review Board's order was not unreasonable and should be reinstated.

[26] Binnie J. who wrote for the majority of the Court explained that it was not necessary in the case of the Review Board to use the "functional and pragmatic test" since Parliament has spelled out in section 672.78 of the Criminal Code the standard of review that is to be applied. He then concluded that the wording used in

paragraph 672.78(1)(a) corresponds with what the courts call the standard of review of reasonabless *simpliciter*.

[27] In particular, at paragraphs 31, 32 and 33, Binnie J. stated:

The appellant submitted an extensive analysis of the Court's administrative law jurisprudence applying the "functional and pragmatic test" to establish the appropriate standard of review from U.E.S. local 298 v. Bibeault, 1998 CanLII 30 (QC TDP), [1998] 2 S.C.R. 1048, at p. 1087 (emphasis deleted), to Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249, 2002 SCC 11 (CanLII). However, in the case of these review boards, Parliament has spelled out in the Criminal Code the precise standard of judicial review, namely that the court may set aside an order of the review board only where it is of the opinion that:

(a) the decision is unreasonable or cannot be supported by the evidence; or,

(b) the decision is based on a wrong decision on a question of law unless no substantial wrong or miscarriage of justice has occurred); or,

(c) there was a miscarriage of justice. (Cr. C., s. 672.78)

It must be kept in mind that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation": Bibeault, at p. 1087. Where Parliament has shown its intent in the sort of express language found in s. 672.78 Cr. C. then, absent any constitutional challenge, that is the standard of review that is to be applied.

The first branch of the test corresponds with what the courts call the standard of review of reasonableness simpliciter, i.e., the Court

of Appeal should ask itself whether the Board's risk assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination: Canada (Director of Investigation and Research) v. Southam Inc., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 56, Law Society of New Brunsiwck v. Ryan, 2003 SCC 20 (CanLII), and Dr. Q v. The College of Physicians and Surgeons of British Columbia, 2003 SCC 19 (CanLII). If the Board's decision is such that it could reasonably be the subject of disagreement among Board members properly informed of the facts and instructed on the applicable law, the court should in general decline to intervene.

(my emphasis)

[28] On this issue, Arbour J. notes that the language used in 672.8 of the *Criminal Code* is akin to the standard of patent unreasonabless, rather than reasonableness *simpliciter*. However, applying the pragmatic and functional approach, she concludes that a standard of patent unreasonableness would be unduly deferential and that reasonabless *simpliciter* is the proper one. Her reasoning is expressed in the following manner at paragraphs 87 and 88:

I agree that the applicable standard of review of the disposition by the Board is that of reasonableness simpliciter, largely for the reasons expressed by Binnie J. I would however point out that the use by Parliament of virtually identical language in ss. 672.78 and 686(1)(a)(I) creates the obvious anomaly that the same words in different sections of the same statute - the Criminal Code - mean something entirely different. While, as expressed by Binnie J, "unreasonable" in s. 672.78 means "unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination (para. 33), the same expression in s. 686 means that no reasonable trier of fact, properly instructed and acting judicially could have convicted (see R. v. Biniaris, 2000 SCC 15 (CanLII), [2000] 1 S.C.R. 381, at para. 36; R. v. Yebes,

1987 CanLII 17 (SCC), [1987] 2 S.C.R. 168, at p. 185). This, in my view, is akin to the standard of patent unreasonableness, rather than reasonableness simpliciter, as these standards are understood in administrative law.

In the end, despite this anomaly in Parliament's having used identical wording in different sections of the same statute to express different concepts, I am satisfied that the standard of review under s. 672.78 is that of reasonableness simpliciter. The similarity of language is deceptive in that there are important substantive differences between the two sections. In s. 686, an appellate court is reviewing the verdict of a court (composed of a judge alone or of a judge and jury) while under s. 672.78, the appellate review is that of a disposition by an administrative body. The difference is also well illustrated by the fact that the unreasonableness of a verdict is a question of law (Biniaris, supra) and when an appellate court concludes that a verdict of guilty is unreasonable, its only remedial power is to enter an acquittal. In contrast, in the case of appellate review under s. 672.78, in the face of an "unreasonable disposition", the Court of Appeal may allow the appeal and substitute its own disposition to that of the Board, or refer the matter back to it (s. 672.78(3)). For the reasons expressed by

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Binnie J., I agree that the functional and pragmatic approach must be applied to ascertain the applicable standard of review. Here, that approach indicates that a standard of patent unreasonableness would be unduly deferential to the Board and that reasonableness simpliciter is the proper one.

(my emphasis)

[29] Here, the determination made here by the removal officer is essentially factual. Pursuant to paragraph 18.1(4)(d) of the *Federal Court Act*, it should only be reviewed if it was made in a "perverse" or "capricious" manner or without regard for the material before the removal officer. As already mentioned, the strong words of this provision, "capricious" and "perverse", suggest that factual determinations be reviewed on a "patent unreasonableness" standard (*Harb*, *supra*, at para. 14 and *Owen*, *supra*, at para. 87). That being said, I accept that there is room for debate whether the standard of review could perhaps be "reasonable *simpliciter*", at least where it is alleged that a decision was made "without regard for the material before [the tribunal]" but as was recently pointed out by LeBel J. in his concurring opinion in *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, 2003 SCC 63 (CanLII) it has become more difficult in practice to distinguish these two standards. This has rendered the task of the reviewing judges even more complex especially if the Court is invited to review a factual finding (see in particular *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.), supra,* at paras. 100 to 134).

[30] In any event, until the issues recently raised in *Owen*,*supra*, and *C.U.P.E., supra,* above are clarified and revisited by the Supreme Court, I feel compelled to apply the "pragmatic and functional test" despite the facts that section 18.1(4) of the *Federal Court Act*, seems to set out the proper standard of review. In so doing, four contextual factors must be weighed. These are: the absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question-law, fact, or mixed law and fact.

[31] In the case at bar, the impugned decision made by the removal officer is not protected by a privative clause. The Act does not provide for any right of appeal of the removal officer's decision to defer or not defer the removal order. Moreover, pursuant to subsection 82.1(1) of the Act, an application for judicial review may be made with leave of a judge of this Court. As we have already noted, paragraph 18.1 (4) of the *Federal Court Act*, lists a broad range of reviewable errors.

[32] While the applicant's life or security may be directly endangered by the execution of the removal order, the removal officer had no special knowledge of the situation of the country in question with respect to the applicant's accessibility to health services and coverage or funding by a public insurance plan. In this regard, the removal officer is in the same situation as the reviewing Court. This commands less deference.

[33] There can be no question that a removal officer, under section 48 of the Act, has a certain discretion in discharging the statutory mandate to execute a removal order. However, there is a policy clearly expressed that a removal order

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should be executed "as soon as reasonably practicable". Thus, in accordance with the purpose of the Act and section 49 of the Act in particular, the discretion of the removal officer is clearly limited to considerations related to the timing of the enforcement of the removal order (*Simoes v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15668 (FC), [2000] F.C.J. No. 936 at para. 12 (T.D.) (QL)).

[34] That being said, the determination made by the removal officer heavily relies upon findings of fact. This clearly suggests that this Court should exercise more deference. As pointed out in *Dr. Q, supra*, at paragraph 34:

Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

[35] Therefore, in applying the pragmatic and functional test described in *Dr. Q, supra*, I conclude that the four factors lead to a standard of review of reasonableness *simpliciter*.

B) Did the removal officer failed to exercise her discretion, ignored relevant evidence or otherwise acted contrary to law?

[36] The applicant contends that the removal officer failed to exercise her discretion according to proper principles, that she ignored relevant evidence, or otherwise acted contrary to law. I find these allegations unfounded.

[37] It is well-established law that the discretion to defer a removal is very limited. It would be contrary to the purposes and objects to the Act to expand, by judicial declaration, a removal officer's limited discretion so as to mandate a "mini H & C" review prior to removal (*Davis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1628 at para. 4 (T.D.) (QL); *John v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 420 (CanLII), 2003 F.C.J. No. 583 (T.D.) (QL)). It is simply not sufficient to put the blame on applicant's former counsel.

[38] This Court has already held that in deciding whether or not to defer removal, the officer is entitled to take into account a range of factors such as whether any required travel documents are missing, whether the applicant is subject to a court order requiring her presence in Canada or whether there is a health-related impediment to the applicant travelling. These are all factors which could result in removal being rescheduled (*Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614 (CanLII), [2003] F.C.J. No. 805 at para. 32 (T.D.) (QL)). Where the failure to defer will otherwise expose the applicant to the risk of death, extreme

sanction or inadequate treatment, deferral also appears warranted *(Wang v. Canada (Minister of Citizenship and Immigration)* (2001), 2001 FCT 148 (CanLII), 204 F.T.R. 5 at para. 48 (F.C.T.D.); *John v. Canada (Minister of Citizenship and Immigration)*, *supra*, at para. 14). It must be remembered that removal is usually the last step in what can be a very lengthy process. In the present

application, two assessments on the accessibility of health services have already been made.

[39] In *John, supra*, the applicant brought forward an application for judicial review of the decision of a removal officer where she refused to defer the applicant's removal from Canada. The applicant was a citizen of St. Vincent and sought a deferral of her removal from Canada on the basis that her Canadian born daughter required medication which was not available in St. Vincent or which would be too costly. The applicant had previously made an unsuccessful application on humanitarian and compassionate ground. In evaluating the removal officer's discretion, Snider J. points out that the discretion of a removal officer was addressed by McKeown J. in *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1307 (CanLII), [2001] F.C.J. No. 1802 (T.D.) (QL), where he held that the powers of the officer are not analogous to those of an adjudicator.

[40] At paragraphs 18 and 19, Mc Keown J. explained his reasoning as follows:

I do not agree with counsel for the applicant's submission that the discretion granted to a removals officer under the present Immigration Act is as broad as that which had once been granted to an immigration adjudicator by subsection 27(3) and related provisions of the Immigration Act, 1976, S.C. 1976-77, c. 52, as amended. As such, the decisions in Prassad, supra and Nesha, supra have little bearing upon the case before me.

In essence, the submissions of the applicant's counsel do not properly construe the system as set out in the present Immigration Act, i.e. the proper place for the full consideration of all of an applicant's H & C factors is before the H & C Officer, not the removals officer. In my view, the removals officer is entitled to rely on what the applicant's counsel determines to be the overriding factor warranting deferral. As such, counsel must be very selective about what he or she chooses to point out to a removals officer. I reiterate that the current Act does not give a removals officer the discretion to consider various H & C factors in determining whether or not to defer removal of the applicant from Canada.

(my emphasis)

[41] In light of the above, it is likely that there is no requirement that the removal officer consider H & C factors. Such a duty on the removal officer, where one already exists at the H & C application stage, would constitute unnecessary duplication. The removal officer did not have the expertise of a H & C officer and was under no obligation to review all the documents that were previously submitted by the applicant for the purposes of H & C assessment. Those were duly considered by the immigration officers who rendered negative decisions in 1998 and 2002. In the latter case, the applicant chose not to pursue her judicial review application. She preferred to make a third H & C application. This is not a case where an H & C application has been made in a timely basis but has yet to be resolved due to backlogs in the system.

[42] With respect to the present case, I note that the applicant had every opportunity to present her concerns at the H & C application stage. Nevertheless, the removal officer did read the materials

contained in the submissions of the applicant's counsel, including Dr. Tan's e-mail and article, and was fully cognizant of the fact that someone who suffers from renal failure would die if not treated. That being said, the substance of those allegations were already considered by the H & C officer and it was previously determined the applicant could access treatment. Therefore, the removal officer relied, among other things, on the findings of the H & C officer, which she was allowed to do (*Harry v. Canada (Minister of Citizenship and Immigration)* (2000), 2000 CanLII 16418 (FC), 195 F.T.R. 221 (T.D.); *Keppel v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1532 at para. 10 (T.D.) (QL)).

[43] The applicant also contends that her third application for H & C contains "new" information which was not previously considered. The "new information" referred to by counsel does not speak in my view to the applicant's personal situation but rather explains the general conditions of treatment in the Philippines for the average Filipino. This information could have been submitted many months before. Moreover, it was reasonably opened to the officer to question who Dr. Tan was as the e-mail was cut off and there was no mention as to his qualification as an expert in this area. That being said, besides the fact that Dr. Tan's e-mail postdate the second H & C decision, there is nothing really new brought by this letter. On the contrary, it corroborates the determinations previously made in 1998 and 2002 that the applicant can receive proper treatments for her renal condition in the Philippines.

[44] The applicant strictly raised her financial situation as a bar preventing her for having access in the Philippines to the needed supplies and medication. In this regard, the applicant had the burden of proving, on a balance of probabilities, by credible and reliable evidence, that she would likely be refused access. She has clearly failed to meet her burden of proving the costs of CAPD

treatments in the Philippines and that she would not be able to afford same. The applicant has never alleged to be an average Filipino nor has she substantiated by first hand sources that she will not qualify for any of the government programs including Philhealth or any of the social service funding available to her. Indeed, even Dr. Tan, on whose opinion the applicant relies heavily, was not sure whether or not the applicant would not qualify for subsidized treatment in the Philippines.

[45] I also find that the removal officer did not act contrary to law. It is important to take note that the applicant does not challenge the removal order against her, but the "decision" of Shari Fidlin, removal officer, refusing to defer her removal from Canada. The removal officer clearly had the power under the Act to refuse to defer the removal. Section 48 of the Act provides the following: "Subject to sections 49 and 50, a removal order shall be executed as soon as reasonably practicable". Sections 49 and 50 deal with statutory stays of execution in certain defined circumstances; for instance, where an applicant has filed an appeal which has yet to

be heard and disposed of, or where there are other proceedings. None of those conditions are present here and therefore the latter sections do not apply.

[46] Here, the applicant was not asking the removal officer to reschedule the departure for a few days or weeks in order to permit her to make proper arrangements in Canada and in the Philippines in terms of bringing or securing access to the needed supplies and medications. In this regard, the evidence reveals that the applicant was able in 1997 to travel to the Philippines and stayed there for a whole month without experiencing any medical difficulties. Here, the applicant wanted the removal order to be stayed pending the determination of her third H & C application.

[47] In conclusion, the applicant has not established that there is a proper ground under subsection 18.1(4) of the *Federal Court Act*

to grant relief. I am not satisfied that the removal officer erred in law, based her decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before her, or that she acted in any other way that was contrary to law. Moreover, the removal officer's decision is not unreasonable. The removal officer did not fail to consider relevant factors in exercising her discretion. The removal officer's decision is based on the evidence. The reasons given by the removal officer clearly support the conclusion reached and they stand up to a somewhat probing examination. Therefore, this Court should not enter into a reassessment of the evidence nor substitute its opinion to that of the removal officer (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] S.C.J. No. 17 at para. 55).

C) In the present case, is this the proper forum in which to raise a Charter argument?

[48] In *Chieu v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1776 at para. 20 (F.C.A.) (QL), the Federal Court of Appeal states that when a person has concerns about the country of removal, there are four possible avenues: (1) voluntarily leaving the country to a place where they have no fear; (2) seeking judicial review; (3) commencing an H & C application; and (4) "arguably" make a Charter challenge. The Court further stated: "[w]hether any of these avenues are actually open in a particular case and whether or not they might succeed is not for this Court to decide here".

[49] The conditions precedent for the issuance of declaratory relief were set out by the Court of Appeal in *Montana Band of Indians v. Canada*, (1991), 120 N.R. 200 (C.A.). The Court of Appeal applied the test articulated in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Limited*, [1921] 2 A.C. 438: "the question must be a real and not theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say someone

presently existing who has a true interest to oppose the declaration sought." This test was adopted by the Supreme Court of Canada in *Canada v. Solosky*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821.

[50] The Supreme Court of Canada in *Kourtessis v. Minister of National Revenue*, 1993 CanLII 137 (SCC), [1993] 2 S.C.R. 53 at paragraph 96 states that a

court is justified in refusing to entertain a request for declaratory relief where another procedure is available or where the legislature intended that the other procedure should be followed:

The superior court's discretion to decline to exercise its jurisdiction on the basis set out in Mills and Smith, supra, is buttressed by the discretionary nature of declaratory relief by virtue of which the court can refuse to entertain such an action for a variety of reasons. The court is justified in refusing to entertain the action if there is another procedure available in which more effective relief can be obtained or the court decides that the legislature intended that the other procedure should be followed. See E. Borchard, Declaratory Judgments (2nd ed. 1941), at p. 303, and I. Zamir in The [page116] Declaratory Judgment (1962), at p. 226. See also City of Lethbridge v. Canadian Western Natural Gas, Light, Heat and Power Co., 1923 CanLII 23 (SCC), [1923] S.C.R. 652, at p. 659, and Terrasses Zarolega Inc. v. Régie des installations olympiques, 1981 CanLII 12 (SCC), [1981] 1 S.C.R. 94, at pp. 103 and 106.

(my emphasis)

[51] In the present case, the applicant failed to seek the judicial review of the negative H & C decision (Affidavit of Jocelyn Adviento, at para. 8). The applicant stated:

I filed a leave application to judicially review the negative humanitarian decision. However, I decided not to pursue it but instead, filed a new humanitarian application for landing from within Canada.

[52] The *Regulatory Impact Analysis Statement*, 2002/06/14 Canada Gazette, Part II, vol. 136, Extra at p. 251 indicated that Parliament authorizes the Minister to grant a foreign national an exemption from "any applicable criteria or obligation of this Act if the Minister is of the opinion that is justified by humanitarian or compassionate considerations". This indicates an intention to inject some flexibility in the operation and implementation of the Act. It also provides the Minister with a mechanism to ensure that section 7 of the Charter rights are not violated in the immigration context. In the present case, it must be remembered that removal is usually the very last step in what has often been a very lengthy process.

[53] Generally, the Courts are reluctant to decide cases on a constitutional ground where the dispute could otherwise be resolved (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, 1995 CanLII 86 (SCC), [1995] 2 S.C.R. 97 at para. 6-11; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 11).

[54] In the present case, the applicant chose to halt the judicial review of the procedure that was intended by Parliament to provide some flexibility in the application of certain requirements under the Act. As such, this Court was denied the opportunity to review the decision of the very official mandated by Parliament to make determinations concerning exemption from the Act, which is essentially the very relief that the applicant now seeks. In conclusion, it is inappropriate for the

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applicant to fail to exhaust the remedies that lie within the governing legislative scheme before turning to this Court for relief under the Charter.

[55] In the event that this conclusion is wrong, I will nevertheless

assess the applicant's section 7 arguments on its merits.

D) In any event, are the applicant's section 7 Charter rights engaged in the present circumstances?

[56] Section 7 of the Charter provides as follows: 7. Everyone has the right to life, liberty and security of the person and the right not to

be deprived thereof except in accordance with the principles of fundamental justice.

[57] In *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, Sopinka J. outlined at page 584 the following approach is to be taken in assessing an alleged violation of this section:

Section 7 involves two stages of analysis. The first is as to the values at stake with respect to the individual. The second is concerned with possible limitations of those values when considered in conformity with fundamental justice.

[58] In assessing the first aspect, we must do so by considering whether the applicant's section 7 Charter rights are engaged. In the event that there is a deprivation of right to life liberty or security of the person then we must determine whether the deprivation is contrary to the principles of fundamental justice.

[59] The applicant submits that she will not be able to afford the high cost of dialysis treatment in the Philippines. Further, the applicant indicates that there is uncertainty as to whether the applicant will be able to qualify for monetary assistance that is offered by Philhealth, as she has been away from the country for so many years. The applicant also submits that such monetary assistance to qualified persons only allows for about three hemodialysis treatment per month and the applicant needs three treatments per week in order to survive. The applicant relies

essentially on the same evidence that was presented to the removal officer.

[60] On the other hand, the respondent filed evidence before this Court relating to the Republic Act No. 7875 "An Act Instituting a National Health Insurance Program for all Filipinos and Establishing the Philippine Health Insurance Corporation for the Purpose". This Act was enacted on February 14, 1995. The guiding principles read as follows:

Article I. Guiding Principles

Sec. 2. Declaration of Principles and Policies. - Section 11, Article XIII of the 1987 Constitution of the Republic of the Philippines declares that the State shall adopt an integrated and comprehensive approach to health development which shall endeavor (sic) to make essential goods, health and other social services available to all the people at affordable cost. Priority for the needs of the underprivileged, sick, elderly, disabled, women, and children shall be recognized. Likewise, it shall be the policy of the State to provide free medical care to paupers.

...

[61] Respondent's evidence demonstrates that the National Health Insurance Program is supposed to provide health insurance coverage and ensure affordable, acceptable, available and accessible health care service for all citizens of the Philippines (section 5). Section 6 of the said Act deals with the coverage of the insurance program and states as follows:

Sec. 6. Coverage. - All citizens of the Philippines shall be covered by the National Health Insurance Program. In accordance with the principles of universality and compulsory coverage enunciated in Section 2(b) and 2(I) hereof, implementation of the Program shall, furthermore be gradual and phased in over a period of not more than fifteen years: Provided, that the Program shall not be made

compulsory in certain provinces and cities until the Corporation shall be able to ensure that members in such localities shall have reasonable access to adequate and acceptable health care services.

(my emphasis)

[62] Further, Section 1 of the Republic Act No. 8344, "An Act Prohibiting the Demand of Deposits or Advance Payments for the Confinement or Treatment of Patients in Hospitals and Medical Clinics in Certain Cases" states as follows:

Section 1. In emergency or serious cases, it shall be unlawful for any proprietor, president, director, manager or any other officer, and/or medical practitioner or employee or a hospital or medical clinic to request, solicit, demand or accept any deposit or any other form of advance payment as a prerequisite for confinement or medical treatment of a patient in such hospital or medical clinic or to refuse to administer medical treatment and support as dictated by good practice of medicine to prevent death or permanent disability: *Provided*, That by reason of inadequacy of the medical capabilities of the hospital or medical clinic, the attending physician may transfer the patient to a facility where the appropriate care can be given, after the patient or his next of kin consents to said transfer and after the receiving hospital or medical clinic agrees to the transfer: *Provided, however*, That when the patient is unconscious, incapable of giving consent and/or unaccompanied, the physician can transfer the patient even without his consent: *Provided, further*, That such transfer shall be done only after necessary emergency treatment and support have been administered to stabilize the patient and after it has been established that such transfer entails less risks than the patient's continued confinement: *Provided, furthermore*, That no hospital or clinic, after being informed of the medical indications for such transfer, shall refuse to receive the patient nor demand form the patient or his next of kin any deposit or advance payment: *Provided finally*, That strict compliance with the foregoing

procedure or transfer shall not be construed as a refusal made punishable by this Act.

(my emphasis)

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[63] In light of the above, the Republic Act No. 8344 gives a certain protection to people who are too poor to pay for emergency treatment, and ensures that the applicant will not be denied life-saving care because of the inability to pay for treatment up-front.

Continuous ambulatory peritoneal dialysis v. hemodialysis

[64] The applicant deposes that she requires three hemodialyis treatments per week and she further states that she will also need surgery in order to receive hemodialysis treatment as she is currently on peritoneal dialysis. The applicant further states that she has already undergone the procedure that allows her to receive CAPD, which is a self-care form of dialysis. Therefore, as long as the applicant has access to the requisite dialysis fluid, she can self-perform the dialysis that allows her to live (Affidavit of Jocelyn Adviento, Applicant's Record, p. 7; Affidavit of Angie Rehal, tab F, p. 3-13, 3-15). Hemodialyis, referred to by the applicant, is a different form of dialysis requiring the assistance of a machine that cleans the patient's blood outside of the body.

[65] The applicant filed no evidence that demonstrates that she would need surgery in order to receive hemodialysis treatment. Furthermore, there is no evidence that the applicant cannot continue to perform CAPD. The applicant relies on Dr. Tan's evidence in support of her claim that there is a lack of availability

of dialysis machines in Philippines. In fact, the National Kidney Transplant Institute states that ongoing CAPD as a form of dialysis is available in the Philippines (Affidavit of Angie Rehal, Tab S).

[66] In light of the above, the applicant has not shown that she requires or will eventually require hemodialysis. Consequently, the applicant's reference to the cost of P22 700 per month for hemodialysis treatment is irrelevant (letter of the Philippine ex-consul General, regarding the cost of hemodialysis).

[67] The applicant has failed to provide any evidence with respect to the cost of continuing to perform CAPD. As pointed out by the respondent, the Philippine National Drug Formulary at page 59 lists Peritoneal Dialysis Solution as a medication covered by the National Health Insurance Program (NHIP). According to PhilHealth Circulars No. 14 and 20 (s-2003), out patient services at free-standing dialysis clinics is now covered under the NHIP. This expansion of coverage has not been addressed by the applicant.

Transplant

[68] Transplants may be from a living or non-living donor (Affidavit of Angie Rehal, tab F, p. 4-2 of the Living with Kidney Disease patient manual produced by the Kidney Foundation of Canada). The most suitable living donors are members of one's immediate family, such as siblings, children or parents. The applicant's immediate family lives in the Philippines. There is no evidence that one of them is not suitable for a match.

[69] There is no reason to think that the applicant might die while on a waiting list for a kidney donor, nor is there any evidence that the applicant has an immediate need for a kidney.

[70] As noted by Dr. Agnes D. Mejia, MD of the National Kidney Transplant Institute, the waiting list for a transplant operation at that facility, (the largest in the country), is very short for those who

have a match.

[71] Further, this Court notes that while the applicant has had assistance from Toronto Western Hospital in obtaining the operation necessary to allow her to perform CAPD, she is currently paying for some of her medication:

I am currently taking the following drugs: Norvase and Monopril for hypertension, Atarax for my allergies, Ranitidine for stomach, and Rocltrol for Vitamin D enhancement in order to control the calcium in the body. I pay for these medications in Canada myself and it costs me about $500 (sic) per month. I also take another important drug, Eprex for iron, however the Toronto Western Hospital provides that medication to me free of charge.

(my emphasis)

[72] It is not clear from the evidence before this Court what costs the applicant assumes every month in Canada. There is no question that the applicant is responsible for a portion of the costs of her medication. As such, there is no evidence that the hospital would absorb the cost of a transplant if it is required.

Financial ability

[73] The applicant submits in her affidavit that she would not be able to assume the costs of her medication in the Philippines. As an example, the applicant stated as follows with respect to the above mentioned medications:

I have spoken to my sister-in-law in the Philippines and she has inquired about the cost of the above medications in the Philippines. She told me that one table of Norvase costs (sic) P.66.25, Ranifidine - P32.25, and Rocaltrol P22.20. I take Norvase, Ranifidine, Monopril and Atarax one table per day. I take Rocaltrol - 4 tablets twice a day. I take Eprex which is an injection twice a week.

(my emphasis)

[74] The applicant in her affidavit assumes that she will not be able to afford the medical treatment that she needs. The applicant does not take into consideration the Philippine Legislation. On February 14, 1995, the Republic Act No. 7875, "An Act Instituting a National Health Insurance Program for all Filipinos and Establishing the Philippines Health Insurance Corporation for the Purpose" was passed. Its general objective includes providing all citizens of the Philippines with access to health services.

[75] Further, section 6 of the said Act states that all citizens of the Philippines shall be covered by the NHIP. Section 12 ensures that even where paying members

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fail to keep their contributions, coverage may still be permitted. Section 10 indicates that inpatient and outpatient care is covered, including prescription drugs.

[76] Despite all of the evidence filed by the applicant, there is no evidence that states that she is not enrolled in the NHIP now, or she could not be in the future. Instead, the applicant simply asserts that she is not certain that she will be able to qualify.

[77] Further, the Republic Act No. 8344, "An Act Prohibiting the Demand of Deposits or Advance Payments for the Confinement or Treatment of Patients in Hospitals in Certain Cases", protects people who are too poor to pay for emergency treatment, and ensures that the applicant will not be denied life-saving care because of the inability to pay for the treatment up-front.

[78] There is also confusion as to the applicant's personal financial situation. On the one hand, the applicant asserts that she is poor. She submits that she has insufficient funds to pay for her medical costs. On the other hand, the applicant submits that both of her

children have been enrolled in private school in the Philippines. The evidence indicates that private school fees are very high and that public education is free up to secondary schooling.

[79] On numerous occasions, the Supreme Court of Canada as reiterated that a Charter decision should not be made in a factual vacuum since doing so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of a solid factual foundation is essential to a proper consideration of Charter issues (*Danson v. Attorney General of Ontario*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086 at 1099; *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357 at 361-362; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 (CanLII), [2002] 2 S.C.R. 146 at para. 16).

[80] In conclusion, I find that the applicant did not provide this Court with a solid factual foundation in order to properly assess the Charter issue. In any event, when evaluating the evidence filed before the Court I find that the applicant has not satisfied the requisite evidentiary threshold to prove a violation of section 7 of the Charter. Therefore, the applicant cannot claim that the removal officer breached her Charter rights.

[81] Given my conclusion that the applicant's section 7 Charter rights are not engaged on the facts of this case, it is not necessary to address the issue of whether the decision to remove the applicant was done in accordance with fundamental justice.

CONCLUSION

[82] For the reasons above, orders dismissing both applications for judicial review and a declaration under section 24 of the Charter shall issue. The respondent has not convinced me that costs should be granted, and more particularly, that this case warrants that applicant's counsel be personally condemned to pay the costs in the case of the second application. In view of the fact that counsel

have not proposed any questions for certification and that this case depends mostly on factual determinations, no question shall be certified.

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QUEBEC, QUEBEC DECEMBER 9, 2003

FEDERAL COURTNAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1993-02 IMM-2386-03

STYLE OF CAUSE: JOCELYN ADVIENTO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Luc Martineau Judge

PLACE OF HEARING:

DATE OF HEARING:

REASONS FOR ORDER: MARTINEAU

TORONTO, ONTARIO NOVEMBER 5, 2003

THE HONOURABLE MR. JUSTICE

DATED: DECEMBER 9, 2003 **APPEARANCES:**MR. LORNE WALDMAN MS. KRASSINA KOSTADINOV

MR. MARCEL LAROUCHE MS. LISA HUTT **SOLICITORS OF RECORD:** WALDMAN & ASSOCIATES TORONTO, ONTARIO

MR. MORRIS ROSENBERG DEPUTY ATTORNEY GENERAL OF CANADA

FOR THE APPLICANT FOR THE RESPONDENT

FOR THE APPLICANT FOR THE RESPONDENT