Conseil canadien pour les réfugiés
Canadian Council for Refugees

Lives on Hold: Continuing limits of H&C

Barriers to permanent residence for moratoria country nationals

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A. Introduction

In mid-2021 a pattern has emerged of refusals of applications for humanitarian and compassionate (H&C) consideration from nationals of moratoria countries (i.e. countries to which Canada does not normally remove people, due to a Temporary Suspension of Removals (TSR) or an Administrative Deferral of Removals (ADR)). Statistics show an increase in numbers of H&C refusals for moratoria nationals (for example, 285 Haitians refused from January 2020 to February 2021, compared to 130 in 2019).[1]

These refusals are particularly concerning because, for most applicants from moratoria countries, H&C is the only possible avenue to permanent residence in Canada. Further, despite these negative H&C decisions, they will continue to live in Canada for the foreseeable future, since the Canadian government rightfully considers it unsafe to remove them to their countries of origin. And H&C applicants have typically already been living in Canada for several – often many – years.

The Canadian Council for Refugees has long advocated for access to permanent status for nationals of moratoria countries. Our 2005 report, Lives on Hold: Nationals of Moratoria Countries Living in Limbo, documented the harms for people affected and their families, as well as the costs to Canadian society. In 2006, we published Lives on Hold - the Limits of H&C, a report analyzing the shortcomings of the H&C process, which the government recommended as the avenue to escape limbo.

Following the 2006 report, some of the worst challenges in H&C decision-making seemed to recede for a while. However, there are recent indications that applicants may once again be facing unreasonable rejections.

This report therefore takes a look at patterns of problems in recent rejections of H&C applications from moratoria country nationals.

B. Importance of ensuring an avenue to permanent residence

People from moratoria countries without status in Canada do not face removal but live here in a kind of limbo. The impacts are dramatic and painful:

- they cannot reunite with family members outside Canada, even spouses and children
- they can apply for a work permit but it must be regularly renewed (for a fee)

[1] Similarly, from Jan 2020 to February 2021: 110 DRC refusals (up from 75 in 2019), 70 Iraqi refusals (up from 10 in 2019), 30 Afghan refusals (up from fewer than 5 in 2019), and 95 Somali refusals (up from 10 in 2019). Some of the increase may be due to an increased number of decisions being made.

- they have limited job prospects (since employers know that they lack status in Canada)
- they have no access to higher education (unless they can afford foreign student fees)
- they are ineligible for child benefits or subsidized daycare, even if they work and pay the same taxes as Canadians
- depending on provincial rules, they may have access only to emergency health care coverage
- they cannot travel outside Canada (for example, to reunite temporarily with loved ones in a third country, or to attend meetings as part of their job)
- they struggle with profound feelings of powerlessness and hopelessness.

Based on past experience, we can expect that most people in this situation will eventually become permanent residents. When a moratorium has been in place for a significant amount of time, Canadian government practice is to offer nationals already in the country an opportunity to apply for permanent residence when the moratorium is lifted, and a high percentage of applicants tend to be accepted. Most of the countries currently under a moratorium have been in this situation for many years, and there is little reason to think these moratoria will be lifted soon.[2]

Unfortunately, there are now increased numbers of moratoria country nationals who arrived in Canada seeking to make a refugee claim, but finding that they were denied the right to have their claim heard, as a result of a new ineligibility provision introduced as part of the Budget Bill in 2019.[3] The government argued that people denied access to the refugee claim process could have their need for protection reviewed in the Pre-Removal Risk Assessment. However, moratoria nationals do not face removal and thus do not have access to a Pre-Removal Risk Assessment. Thus, people who may well be refugees have no opportunity to be recognized as refugees, but exist in long-term limbo in Canada, with an H&C application usually the only avenue available to regularize their status.

It is in everyone's interests to provide early access to permanent residence for people who are likely to remain permanently in Canada, so that they can get on with their lives and contribute their full potential to Canadian society.

This general principle has been increasingly recognized during the pandemic as Canadian leaders have reached a better appreciation of the important contributions made by people with precarious or no status in Canada. The House of Commons Standing Committee on Citizenship and Immigration, for example, recommended:

- That Immigration, Refugees and Citizenship Canada develop a clear pathway for permanent residence for workers performing essential work during the pandemic period.

[2] A TSR is currently in place for Afghanistan, the Democratic Republic of Congo, and Iraq – imposed respectively 27, 24 and 18 years ago. An ADR is in place for Somalia (Middle Shabelle, Afgoye, and Mogadishu), the Gaza Strip, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, Burundi, Venezuela, and Haiti – for all but the last two, the ADR has been in place between 6 and 9 years. https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html

[3] See CCR, Anti-refugee provisions in Bill C-97 (Budget bill) - CIMM submission, May 2019, https://ccrweb.ca/sites/ccrweb.ca/files/bill-c-97-submission-final.pdf. Section 9 addresses the anticipated impact of the bill on nationals of moratoria countries.

- That Immigration, Refugees and Citizenship Canada develop programs similar to the Guardian Angel program, especially considering the inclusion of foreign workers who contributed during the COVID-19 pandemic, regardless of status.[4]

C. Methodology

For this analysis, we reviewed 11 negative decisions of H&C applications by moratoria nationals, of which 6 are covered in this report. Our goal was to identify any patterns of problematic reasoning that might compromise decision-making in cases of moratoria country nationals more generally.

It should be noted that we do not comment on whether the applications analyzed should have been accepted.

We also emphasize that we are aware that this is not necessarily a representative sample of negative decisions. We cannot comment on how widespread the problems identified below may be. However, the problems we identified were found in many of the decisions we reviewed, and thus strongly suggest patterns of improper reasoning that merit attention.

D. Analysis

1. Treatment of TSR/ADR

a. TSR/ADR Issue 1: Failure to View a TSR/ADR as an Inability to Return Home

What the IRCC Guidelines Say

Operational instructions and guidelines clearly indicate that the presence of a TSR represents an "inability to leave Canada due to circumstances beyond the applicant's control":

> Positive H&C consideration may be warranted when the period of inability to leave Canada due to circumstances beyond the applicant's control is of considerable duration and when there is evidence of a significant degree of establishment in Canada. [emphasis added]
>
> **What is meant by circumstances beyond the applicant's control**
>
> **Circumstances beyond the applicant's control**
>
> The applicant's home country was subject to a temporary suspension of removals (TSR) (R230).[5]

[4] Report 5 - Immigration in the Time of Covid-19: Issues and Challenges, presented to the House: Thursday, May 13, 2021

[5] IRCC provides guidance that its H&C decision-makers are expected to follow. https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-establishment-canada.html

What the Federal Court Has Said

Ahmadzai v. Canada (Citizenship and Immigration), 2018 FC 725 (CanLII),

> Moreover, in my view it was illogical and unintelligible for the Officer, on the one hand, to acknowledge that conditions in Afghanistan were "less than favourable" and that the country is currently subject to a Temporary Suspension of Removals; yet, on the other hand, determine that the Applicant could return to Afghanistan and apply for a permanent resident visa in the normal manner. The fact of the matter is that the Applicant has faced, and for the foreseeable future will face, a prolonged inability to return to Afghanistan because of the adverse country conditions there. (emphasis added)

Lauture v. Canada (Citizenship and Immigration), 2015 FC 336 (CanLII),

> [42] I turn to the fourth error in the decision, and that was with respect to the Officer's failure to consider the implications of the fact there was, and remains, a temporary suspension of removals to Haiti. This implies that the conditions are sufficiently dire or unstable that Canada will not removal nationals to that country.
>
> [43] It is unclear, in my mind, how the Officer rationalized her conclusion that there would be no undue burden in applying from Haiti when Canada, by its own policy decision, has determined it is unsafe or unfair to return individuals to that very country. In this regard, I adopt the analysis of Justice Keith Boswell in *Maroukel v Canada (Citizenship and Immigration)*, 2015 FC 83 at para 32, in the context of a refused H&C application in respect of Syria:
>
> > *In my view, it also was unreasonable for the Officer, on the one hand, to conclude that country conditions in Syria are "dangerous" and then, on the other, to ignore the direct negative impact such conditions would have upon the Applicants since it "is not comfortable for anyone who lives there".* (emphases added).

Case Example 1: Return to Syria considered a viable option for reunification with children

The applicant was a Syrian woman with three minor children still in Syria, which is under a suspension of removals. The officer acknowledges the importance of reunification with the three children, but treats a return to Syria as a viable option, because the applicant has not shown sufficient evidence of how she would be personally affected by country conditions:

> Given the history of the country and its politics, I acknowledge that there are some unfavourable situations that could present themselves for the applicant in Syria. In addition, I note that the principal applicant has not lived there since 2012 so there will be a period of adjustment in terms of re-integration. On the other hand, I found that many of the issues raised by the applicant are not sufficiently supported with documentation or explained in terms of their probable impact on her specifically. Therefore, the weight I can grant to this factor falls at the modest end of the scale.[6]

[6] Text underlined here and in the subsequent case examples is our emphasis.

It should be noted that the officer states in the decision that the woman's spouse has received a positive PRRA decision. This means that he has Protected Person status and has thus demonstrated a personalized risk in Syria. Therefore, the officer is additionally implying that separation from her spouse is an acceptable option in order for the applicant to be reunited with her children in Syria. Thus, even apart from the issue of the suspension of removals, the officer finds it acceptable for the applicant to be made to choose between her spouse and her three children, and for the children to be denied reunification with their father – a very troubling proposition indeed. We will return to this case example in the section on **Best Interests of the Child**, below.

Case Example 2 - Young Applicant must "Prove" Inability to Return to DRC:

The applicant arrived in Canada as an unaccompanied minor at age 17, along with her then 12-year-old brother, and had lived in Canada for 10 years at the time of the H&C decision. The officer places the onus on her to "prove" that she tried to – or can't – return home.

> Elle écrit qu'elle a été incapable de quitter le Canada en raison de la suspension temporaire des renvois, «imposée» par le gouvernement canadien. Elle ne prouve pas qu'elle ait essayé de partir pour son pays et qu'elle en ait été empêchée ou gardée contre son gré. Elle devrait savoir qu'elle n'est nullement contrainte de rester au Canada et d'autres coreligionnaires, pas nombreux, il est vrai, sont revenus en RDC de leur propre chef. Donc, je ne peux convenir avec elle quand elle écrit que sa durée de séjour au Canada et son « incapacité » de retourner en RDC militent en faveur de la reconnaissance de son établissement au Canada.

In addition, if 10 years in Canada (with no indication of an imminent lifting of the TSR) for a person who arrived as an unaccompanied minor does not constitute "a significant degree of establishment" over a "considerable duration", the officer has set an extremely high bar for establishment.

Case Example 3: Return to DRC is a viable option, if you have family to support you

The applicant was an elderly woman from DRC. Despite the existence of a TSR, the officer placed the onus – and a significant evidentiary burden – on her to demonstrate that her family could not support her if she returned. (This text is from the decision on a request for reconsideration):

> De même, en ce qui concerne votre famille en RDC, j'ai noté dans ma décision que vous ne m'aviez pas présenté de détails ou de preuves concernant la raison pour laquelle votre famille ne pouvait pas vous soutenir. Je reconnais que vous fournissez maintenant plus de détails à propos de votre famille en RDC. Cependant, je souligne que vous me donniez peu de détails concernant les représailles contre votre mère, la situation actuelle de votre mère et de votre sœur et comment vous restez en contact avec votre mère (ou comment vous êtes devenu au courant de ces faits). Vous ne m'aviez pas présenté de preuves concernant ces allégations, comme une lettre de votre mère, de votre sœur, des bons samaritains ou de l'hospice où réside votre sœur.

Case Example 4: Return to Iraq is a viable option, if you have family to support you

Similar to the previous case example, in a decision involving an Iraqi couple with four children, the officer stated:

> While moving back to Iraq would constitute some form of upheaval for the applicants, they would be returning to a country in which a majority of their immediate family members and acquaintances still reside. The PA [principal applicant] has indicated that his mother still resides in Iraq as well as the co-applicant's parents and six other siblings. There is insufficient objective evidence in front of me that the family members and/or friends would be unwilling to assist the applicant's family in their resettlement and re-establishment upon their return to Iraq.

We will return to this case example in the following section as well as in the section on **Best Interests of the Child,** below.

b. TSR/ADR Issue 2: Refusal to Consider Hardship of Return Because of TSR/ADR

Some of the cases analyzed take a position directly opposite to that outlined in the section above: rather than arguing that the person could return to the country of origin, notwithstanding the TSR/ADR, they maintain that the conditions in the country of origin, though harsh, do not need to be considered, because the applicant is protected from removal there by the TSR/ADR.

What the IRCC Guidelines say:

> **Adverse country conditions**
>
> When an applicant submits information claiming that there are conditions in the country of origin that would result in hardship if they were not granted the exemption requested, decision makers must consider the conditions in that country and balance these factors into the hardship assessment. Adverse country conditions could include factors having a direct, negative impact on the applicant such as war, natural disasters, unfair treatment of minorities, political instability, lack of employment, widespread violence etc.

What the Federal Court has said:

> [T]he officer finds that the conditions prevailing in Yemen and the "extreme hardship" Mr.Bawazir would face there deserve "little weight" in the analysis. This was because Mr.Bawazir is not facing the threat of imminent, involuntary removal. However, the officer did not consider that Mr. Bawazir has no choice but to leave Canada for Yemen if he wishes to apply for permanent residence unless an exception is made for him. The officer erred in effectively dismissing a factor which is clearly relevant to the equitable underlying purpose of section 25(1) of the IRPA. (Emphasis added)

Case Example 5: **"Little Weight" Given to Adverse Conditions in Somalia:**

Contrary to the direction of the Federal Court, an officer gave little weight to conditions in Somalia on the grounds that the applicant would not currently be removed there.

> I recognize that the country conditions are presently unstable in Somalia. With that said, there is currently an Administrative Deferral of Removals, ADR, to certain regions in Somalia, including Middle Shabelle, Afgoye, and Mogadishu. The ADR is meant to be a temporary measure when immediate action is needed to temporarily defer removals in situations of humanitarian crisis. I note that the ADR would not be lifted until the situation in the listed regions in Somalia stabilizes. As the

applicant was originally from Mogadishu, he is currently barred from being removed there. Should the ADR be lifted, I note that he would be entitled to a Pre-Removal Risk Assessment and his risks in Somalia would be fully assessed at that time.

I have assigned little weight to the adverse country conditions in Somalia for the purpose of this application.

Case Example 4: Return to Iraq is Viable Option but Hardship is Irrelevant due to TSR

In the above-mentioned case of the Iraqi family, the officer states:

> Moreover, I note that there is a TSR to Iraq that has been in place since 2003 due to the poor conditions in Iraq. Because of this TSR, the applicants cannot be removed to Iraq and I note that there is little evidence to indicate that the TSR would be likely to end soon. Accordingly, while I acknowledge that the Applicants' H&C materials indicate that they might be negatively affected by adverse country conditions in Iraq if they were to return to that country, I find there is little evidence in the applicant's H&C materials to indicate that they would have to return to Iraq in the near future

Thus, the officer simultaneously found that return to Iraq was a viable option for the applicants (as noted above) and that there was no need to take account of the negative impact of country conditions on them (which the officer acknowledges to some degree) due to the presence of a TSR.

2. Best Interests of the Child (BIOC): Failure to Carry out an Actual BIOC Analysis

What the IRCC Guidelines say:

> In assessing H&C submissions, the decision makers must be "alert, alive and sensitive" to the best interests of the children (Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817) and should bear in mind that "[c]hildren will rarely, if ever, be deserving of any hardship" (Hawthorne v. Canada (Minister of Citizenship and Immigration), 2002 FCA 475, [2003] 2 F.C. 555). As children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief (Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61)
>
> **Factors to consider**
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> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account when raised. Some examples of factors that applicants may raise include but are not limited to:
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> - the age of the child
> - the level of dependency between the child and the H&C applicant
> - the degree of the child's establishment in Canada

- the child's links to the country in relation to which the H&C assessment is being considered
- the conditions of that country and the potential impact on the child
- medical issues or special needs the child may have
- the impact to the child's education
- matters related to the child's gender.

The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born.

What the Courts have said:

Supreme Court

Kanthasamy v. Canada (2015 SCC 61):

> [36] Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: It means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (emphasis added).

Federal Court of Appeal

MCI vs Hawthorne (2002 FCA 475):

> [41] First, the submissions made to the immigration officer on behalf of Ms. Hawthorne emphasized that her removal would be very detrimental to the best interests of Suzette who might feel that she had no effective choice but to return to Jamaica with her mother. The officer found that this would not be a major hardship warranting a positive exercise of discretion, because Suzette had lived in Jamaica for nearly all her life, having been in Canada for less than a year. However, if the officer had started by identifying the best interests of Suzette, now a permanent resident, as being able to continue to live in Canada, the removal of Ms. Hawthorne could only reasonably have been regarded as highly detrimental to Suzette's best interests if she was thereby effectively compelled to return to Jamaica with her mother. A best interests analysis makes Suzette's present life in Canada the relevant point of comparison, not her previous residence in Jamaica: see Koud v. Canada (Minister of Citizenship and Immigration), 2001 FCT 856 at para. 18.
>
> [42] Second, it was submitted to the officer that, given the closeness of their relationship and the material and emotional support that Ms. Hawthorne has provided to Suzette as she has adjusted to her new social and educational environments in Canada, it would be contrary to the best interests of Suzette to deprive her of her mother's presence. The officer's response was that it would not be a major hardship for Suzette to remain in Canada without her mother, since she had been separated from Ms. Hawthorne for the seven years before she came to Canada in 1999.
>
> [43] Again, by failing adequately to identify and define the best interests of Suzette at the time of the decision, the officer compared the seriousness of her mother's removal with the previous period of

> separation. The relevant comparison is with the crucial part that her mother plays in her life in Canada, and the effect on her best interests of having to live in a new country without either her mother or other relatives who could assume her absent mother's role in the way that her grandmothers had done in Jamaica when Ms. Hawthorne came to Canada. (emphasis added)

Federal Court

Williams v. MCI (2012 FC 166)

> [64] There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only then will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is not: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?"
>
> [65] For example, officers should not discontinue their consideration of what is in a child's best interests after determining that the child is not being beaten or malnourished, or, as in the present decision, is not being outright denied medical care. In order to be properly "alert, alive and sensitive to" a child's best interest, the task that is specifically before an officer is to have regard to the child's circumstances, from the child's perspective, and then determined what is in his best interest. (emphasis added).

Case Example 1

This is the above-mentioned case of the Syrian woman with three children back in Syria. The officer states, among other things:

> According to the principal applicant's affidavit, the children who are in Syria have become "anxious and depressed." Thus, M. is "angry all the time," and R. is "constantly afraid and wets the bed." To that end, I am sympathetic to the children's emotional struggles resulting from the absence of their parents. At the same time, I remark that there is a lack of a formal diagnosis and that the children remain under the care of their grandparents in Syria. What is more, no immediate concerns regarding the safety and well-being of her children are identified by the principal applicant.
>
> Counsel argues that the Daraa region is particularly vulnerable to violence and human rights violations but does not present sufficient information to persuade me that the principal applicant's children are in imminent danger as a result of it.
>
> Counsel submits that [the three children] have only been able to go to school sporadically and that children in Syria have no access to adequate health care. However, aside from the anecdotal evidence provided by the children's grandfather in Counsel's submissions, neither Counsel nor the principal applicant provide sufficient information on the children's medical needs, if any, for me to be able to accord significant weight to this assertion.

And the officer concludes:

> Without any reservations whatsoever, I am persuaded that the children should be reunited with the principal applicant. However, I do not find that there is sufficient evidence adduced to show that it is in their best interest that this reunification take place in Canada.

This conclusion is shocking. Given that the Canadian government has decided that a country under a TSR/ADR is too dangerous to safely send people back there, and given that the courts have pointed out that children are more sensitive than adults and that children are rarely deserving of hardship, it seems perverse for applicants to have to prove that it is not in their children's best interests to live there, as opposed to Canada.

More specifically, this BIOC analysis suffers from at least the following problems:

- Most fundamentally, the officer never asks nor identifies what is in the children's best interests: whether to be in Syria or in Canada. Thus, the officer never carries out an actual BIOC analysis. (*Hawthorne, Williams*)
- The officer never asks which would be the "environment in which [the children have] the best opportunity for receiving the needed care and attention". (*Kanthasamy*).
- Indeed, the officer's requirement that the applicants show the children are in "imminent danger" is a radical departure from both the IRCC guidelines and jurisprudence.
- The officer is, at best, taking a "basic needs" approach, deciding in effect that the children are not "suffering too much" (while failing to address the submission that they are attending school only sporadically). As noted above, a "basic needs" approach constitutes a legal error (*Hawthorne*, *Williams*)
- The officer is placing a very high evidentiary burden, requiring a "formal diagnosis" rather than accepting as reasonable the descriptions of the symptoms of children living in a situation of civil war.
- The officer fails to consider that the children have no prospect of being reunited in Syria with their father, whom the officer states has been granted Protected Person status, and thus cannot return to Syria.

Case Example 5

This is the above-mentioned case of the Somali man. He has a young child still living in Somalia. The mother was killed in an attack on a market. The short BIOC section commends the applicant for providing financial support to his son. However, the officer never considers that a negative H&C decision represents a bar to family reunification since only if he is granted permanent residence can the man sponsor his child. Like the previous example, the officer never identifies, nor asks, what is in the child's best interests, simply concluding:

> Having carefully assessed all evidence presented, I am unable to conclude that the children's best interests would be directly compromised by my refusal to grant an exemption from the requirement to apply for permanent residence from outside of Canada.

Case example 6

This case involves a couple from Libya who had been in Canada for more than seven years at the time of the H&C decision. They arrived in Canada with three Libyan-born children, who were included in the H&C in application. The couple had two children after arrival in Canada.

In dealing with the BIOC, the offer refused to take as a given that the children could not return to Libya:

> I find their assertions that their children will face hardships such as kidnapping, extortion, rape and murder in Libya to be general and unsupported by evidence. There is little evidence present in the submissions to demonstrate that their children will experience such hardships upon their return to Libya. I find little information is presented to describe specific experiences or examples of other children that are in a similar circumstance as theirs, who have encountered such crimes and mistreatment in Libya.

Thus, this decision suffers also from the above-mentioned problem of an officer placing the onus on the parents to prove that it is unacceptable for the children to go to a country with an ADR/TSR in place.

All but the youngest child was in school at the time of the decision. The officer recognizes the children "have most likely obtained a certain level of establishment in Canada as they have all been in the country for either all their life or a majority of their life" but then states:

> However, I am not satisfied that the children are so integrated into Canadian society nor that the country conditions in Libya are so poor in their particular situation, that accompanying their parents to Libya would greatly compromise their wellbeing and development and impact them significantly on a negative basis.

This reasoning clearly adopts the erroneous approach, highlighted in *Hawthorne* and *Williams*: asking whether the children's wellbeing and development would be "greatly compromised" (i.e. whether the children would "suffer too much"), as opposed to asking what is in the children's best interests. It also fails to consider which environment would best suit the children's needs (*Kanthasamy*). No consideration is given to the impact on the non-Canadian children of remaining in Canada with no status. The oldest son is about to turn 18 – without permanent residence he has little realistic prospect of pursuing further education.

Indeed, as in the previous two case examples, the officer never identifies, nor even asks what is in the children's best interests (whether to remain in Canada or go to Libya), simply concluding:

> Based on the information present in the submissions, I find [the children's] best interests will be met as long as they remain with their parents, regardless of what country they are in, as both parents will likely continue to ensure that their best interests and basic needs are met.

Thus, the officer effectively avoided carrying out an actual BIOC analysis by stating that nothing matters, so long as the children remain united with their parents.

In addition, with regard to establishment the IRCC Guidelines state, as noted above, that:

> Positive H&C consideration may be warranted when the period of inability to leave Canada due to circumstances beyond the applicant's control is of considerable duration and when there is evidence of a significant degree of establishment in Canada.

This family has spent seven years in Canada and has four children in school. Two of their children are Canadian-born. There is no indication of an imminent lifting of the ADR/TSR. If this does not constitute a "significant degree of establishment" over a "considerable duration", the officer has set an extremely high bar for establishment.

Case Example 4

This is the above-mentioned case of the Iraqi family. There are four children aged 7, 14, 16 and 18 at the date of the decision. The officer states:

> However, the applicants have not submitted sufficient evidence demonstrating what negative impact the children would experience if they had to return to Iraq. I acknowledge there will be an initial period of adjustment but I am convinced that the applicants will be able to guide and support the children during this period just like they did when the family moved between several countries, namely Iraq, Syria, Lebanon, USA, and Canada.

This case demonstrates the same problematic reasoning noted in the above examples, notably placing the onus on the family to show that it is in the children's best interests to live in Canada, rather than Iraq, failing to identify or ask what is in the children's best interests, ignoring the impact on the older children's education of remaining without status in Canada, and stating that everything will be fine so long as the children benefit from their parents' support.

E. Conclusion: The Challenges of H&C

H&C is a discretionary recourse, meaning that different decision-makers can reasonably reach opposing conclusions on individual applications. As a result, a person can never know when they have met the test, or exactly what factors in their personal circumstances will be given significant weight. In the TSR/ADR context, for example, they don't know how many years in Canada will be viewed by as "a considerable duration", whether an officer will accept the presence of a TSR/ADR as an "inability to leave Canada" or whether evidence of the personal impact of country conditions will be required or – to the contrary – whether an officer will even consider such evidence if it provided. They also cannot know how high an evidentiary burden a particular officer will impose.

Applicants therefore face the task of raising all possible arguments in their favour, and bringing all possible evidence to document all aspects of their situation, and that of affected children.

The decisions analyzed illustrate the very high expectations that some officers have with regard to evidence that should be submitted. For example, as mentioned above, the officer deciding the application of the Syrian woman (case example 1) wanted a "formal diagnosis" for the psychological distress being experienced by her children (who are separated from their parents and living in Syria). The officer also wanted evidence for why the children's grandparents are not able to adequately look after the children's health in Syria: "for example,

medical certificates". The situation in TSR/ADR countries is by definition difficult, making it particularly challenging to obtain the kind of documentary evidence that it seems some officers expect. Applicants are forced to pressure family members (in the case cited, the grandparents who are struggling to care for the grandchildren) to obtain documentation that may be expensive and in some cases even dangerous to obtain.

Even with respect to evidence for establishment and hardship in Canada, there are significant challenges. Obtaining documentation of personal activities is time-consuming and often involves costs. One applicant had submitted a letter from a psychotherapist – it was dismissed because the therapist's credentials were deemed inadequate and they had only met the applicant once. It should be noted that people without status generally do not have access to health care coverage that would produce the kind of report that the officer hoped for, and they are generally confined to low-wage jobs, due to their lack of permanent status, and often are sending money to support family back home.

In addition to the cost of collecting evidence, and paying the H&C application fee ($550 per adult), in most cases people need to pay for legal representation, since applicants will not generally qualify for legal aid. In theory, people can apply for H&C by themselves, but given the discretionary nature, and the high expectations of officers for submissions and supporting evidence, it is advisable to have legal representation, which will generally cost thousands of dollars. And even when someone has a lawyer representing them, and has, with the lawyer's help, submitted hundreds of pages of documents, they may still receive a response saying that there was not enough evidence!

Finally, the H&C process explicitly prohibits consideration of factors that are taken into account in refugee determination.[7] This means that applicants who have a well-founded fear of persecution in the country of origin cannot rely on this argument in their submissions – they must instead present the relevant elements as "hardships". This is particularly problematic for the many applicants who were denied the opportunity to have their refugee claim heard, because they were found ineligible. Of the 11 decisions analyzed, in **six** cases the applicants had been found ineligible to make a refugee claim. The applicants may very well be refugees, but Canada has denied them any opportunity to make the case.

F. Recommendations

Our analysis examined only a small number of negative decisions, but there nevertheless emerged a troubling pattern of misapplication of formal guidance and jurisprudence in the areas of hardship related to a TSR/ADR and best interests of the childen.

In the short-term, we recommend that IRCC provide reminders and training to officers, particularly with respect to the following:

- The presence of a TSR/ADR must be considered an "inability to leave Canada"

[7] IRPA 25 (1.03)

- Officers must assess country conditions in the country of removal regardless of the TSR/ADR, and not defer the assessment to a later date (for example, in a PRRA application).

- The full consequences of a decision (for example, bar to family reunification) must be considered – not just that the applicant would not face an imminent return, due to the suspension of removals

- A proper BIOC analysis must include asking and clearly identifying what is in the child's best interests

- Officers should avoid imposing prohibitively high evidentiary burden on applicants, for example insisting on expert reports on children living in situations of civil war.

We believe that our analysis also highlights once again the need for a simple avenue by which nationals of moratoria countries can be granted permanent residence.

It is in no one's interest to refuse individuals or families who have already been living in Canada for many years, and are well-established here, especially when there is no sign that the TSR/ADR will be removed anytime soon. The costs of H&C applications are huge, both to the applicants (who have to pay fees and lawyers, and collect mountains of evidence) and to the government (since officers spend valuable time studying lengthy applications).

An effective solution would be the **adoption of a regulatory class providing permanent residence to all persons from countries to which Canada does not remove who have been in Canada for three or more years**.

Canada has in the past successfully had a program on these lines: the Deferred Removal Orders Class (DROC), introduced in 1994.

Reinstating such a solution would have the following advantages:

- It would be simple and quick for immigration officers to apply, avoiding long hours spent studying voluminous H&C applications.

- It would be clear and transparent for nationals of moratorium countries, allowing them to know the criteria on which their application will be evaluated and to avoid the high (and often repeated) costs of complex H&C applications.

- It would ensure that moratorium country nationals, most of whom in any case will very probably remain permanently in Canada, can get on with their lives without too much delay, rather than being kept needlessly on hold for years (or even decades) and enable them to contribute to Canadian society to their fullest potential as soon as possible.