Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

OP 4

The processing of applications that include a request for humanitarian and compassionate or public policy consideration

Canada

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Updates to chapter

Listing by date:

Date: 2013-02-26

This chapter has been completely reviewed. All previous versions should be discarded.

OP 4 The processing of applications that include a request for humanitarian and compassionate or public policy consideration

1. What this chapter is about

This chapter explains how to process applications for permanent residence when an applicant who is outside Canada makes a request for consideration under humanitarian and compassionate grounds (H&C), namely, under A25 and R66, R67 and R69. It also covers H&C consideration initiated by the Minister (A25.1) and under the public policy provision (A25.2).

2. Program objectives

Discretion is a valuable element of Canada's immigration program. It benefits our clients and is consistent with the objectives of the *Immigration and Refugee Protection Act* (IRPA or the Act).

The purpose of discretionary provisions allowing H&C and public policy considerations is to provide flexibility to approve deserving cases not anticipated by the legislation. Use of H&C or public policy should not be seen as conflicting with other parts of the Act or Regulations but rather as a complementary provision enhancing the attainment of the objectives of the Act.

H&C (sections 25 and 25.1 of the Act) decision makers exercise this discretion on a case-by-case basis, taking into account an applicant's unique circumstances. The public policy provision (section 25.2 of the Act), however, is a discretionary tool used on a case-by-case basis to facilitate processing of individuals in similar circumstances, all of whom must meet specific criteria linked to the public policy considerations.

Officers making H&C decisions consider whether the grant of an exemption from a requirement of the Act is warranted. It is widely understood that granting an exemption under section 25 or 25.1 is an exceptional measure.

3. The Act and Regulations

In addition to providing the prescribed requirements as to who may enter and remain in Canada, IRPA also provides discretion to delegated decision makers to approve individual deserving cases that would otherwise be refused.

Provisions for applications on humanitarian and compassionate grounds

For more information about	Refer to
Requirements for application before entering Canada	A11(1)
Humanitarian and compassionate considerations	A25(1)
Payment of fees	A25(1.1)
Bar on concurrent H&C applications, bar on H&C applications when there is an outstanding refugee claim, and 12-month bar on applications following a failed, withdrawn (after the Immigration and Refugee Board hearing began) or abandoned claim	A25(1.2)
Provincial criteria	A 25(2)
H&C Minister's own initiative	A25.1(1)
Exemption from fee requirement(s)	A25(1), A25.1(2)
Provincial criteria (Minister's initiative)	A25.1(3)

For more information about	Refer to
Public policy considerations	A25.2(1)
Exemption from fees under public policy	A25.2(2)
Provincial criteria (public policy)	A25.2(3)
Rules of interpretations of grounds for inadmissibility (A34 to A37)	A33
Grounds for inadmissibility	A34, A35, A36, A37, A38, A39, A40, A41, A42
Applications under A25(1)	R66
Applicants outside Canada	R67
Requirements for a foreign national to become a permanent resident in Canada	R72
Work permit	R197, R207
Study permit	R213

3.1. Forms required

Note: No special forms exist for requests for H&C consideration overseas under A25(1).

To make their initial submission, applicants use one of the existing departmental application forms for the three classes of immigration applications (family, economic or refugee). To receive H&C consideration, they apply in one of these three classes and provide additional written information in support of their request for consideration under subsection 25(1) of the Act.

4. Instruments and Delegations

A6 authorizes the Minister to designate any persons to carry out specific duties and powers, and to delegate authorities. It also states those ministerial authorities which may not be delegated, specifically those relating to security certificates or national interest.

4.1. Specific delegation instruments

Officers have the delegated authority to **assess** all applications that include requests for consideration on H&C grounds, including when the applicant is inadmissible on grounds of security, human or international rights violations, serious criminality, organized criminality or health. Officers may refuse such applications or forward them to the Minister's delegate for consideration of a **waiver** of inadmissibility, if they are of the opinion that the H&C considerations might justify an exemption.

For applications in which the sole ground of inadmissibility is non-compliance [A41], the delegated level of authority for the waiver of inadmissibility is the Immigration Program Manager (IPM) or Deputy Program Manager.

IPMs and Deputy Program Managers may also waive such serious grounds of inadmissibility as criminality [A36(2)], financial reasons [A39], misrepresentation [A40] or inadmissible family member [A42]. In the case of criminality, eligible applicants should normally obtain relief (rehabilitation or pardon) if they are eligible to do so. When an inadmissibility is based on serious criminality [A36(1)] or health grounds [A38], the delegated level of authority for waiver remains the Director, Case Review/Case Management Branch. There is no delegation for waiver of

inadmissibility on grounds of security [A34], human or international rights violations [A35] or organized crime [A37]; the Minister decides such cases.

More information can be found in chapter IL 3 – Designation of Officers and Delegation of Authority, items 30 to 35 for H&C and items 36 and 37 for public policy.

The following is an overview of the relevant designations and delegations for decision making in H&C and public policy cases.

Delegations – Quick reference guide

Authority to ...	Under provision	Minister	ADM OPS	Director Case Review/Case Determination	IPM	IO	MIO (CBSA)	DIO
assess all H&C applications	A25, A25.1	√	√	√	√	√	√	√
render a negative decision on all H&C applications	A25, A25.1	√	√	√	√	√	√	√
refuse to process or refuse an H&C request accompanying a Federal Skilled Worker application, in accordance with the Ministerial Instructions	A25, A25.1 A87.3	√	√	√	√	√		
render a positive decision on H&C applications (with no inadmissibilities)	A25, A25.1	√	√	√	√			
exempt from inadmissibility requirements	A25, A25.1 with A36(2), A39, A40, A41 or A42	√	√	√	√			
exempt from serious inadmissibility requirements	A25, A25.1 with A36(1) or A38	√	√	√				

Authority to ...	Under provision	Minister	ADM OPS	Director Case Review/Case Determination	IPM	IO	MIO (CBSA)	DIO
exempt from payment of any applicable fees	A25, A25.1	√	√					
exempt from other serious inadmissibility requirements	A25, A25.1 with A34, A35 or A37	√						

5. Departmental Policy

The purpose of this section is to describe the intent behind sections 25, 25.1 and 25.2 of IRPA and how such discretionary powers should be applied.

While policy guidelines provide assistance to decision makers, they are not intended to be either exhaustive or restrictive. Unlike IRPA or its Regulations, guidelines are not legally binding upon the Minister and "do not afford the applicant the right to a particular outcome" (see *Legault v. Canada* (Minister of Citizenship and Immigration) (C.A.), 2002 FCA 125, [2002] 4 F.C. 358). Each individual case must be assessed on its own merits through consideration of individual circumstances. While guidance may be sought from other government officials, the discretionary decision ultimately rests with the delegated decision maker.

5.1. Guidelines and authorities

A25, A25.1 and A25.2 allow the Minister to grant an exemption from requirements of IRPA or permanent residence, to applicants who do not meet certain requirements of the immigration class in which they have applied [R67 and R68]. Visa offices should refer to the delegation instruments to determine who is permitted to act as the Minister's delegate when considering the issuance of a permanent resident visa under A25, A25.1 and A25.2. The use of this authority is not restricted to a list of defined circumstances.

Officers are accountable for the use of this authority. They must ensure that a complete record of the background and rationale for their decision forms part of case files. Officers' written recommendations to grant an exemption from the requirements of IRPA are part of this record. The decision makers must sign and date their own decisions. The record of background and rationale, recommendations and program manager decisions must appear in the case notes.

5.2. Eligibility to submit a request for H&C consideration in the context of a permanent residence application

In the overseas context, the Act states that the Minister may examine an application for consideration on H&C grounds, from a foreign national outside Canada. This means that any foreign national who is inadmissible or who does not meet the requirements of the Act or Regulations may make a written request for consideration under A25(1), except foreign nationals who do not meet the requirements of Ministerial Instructions relevant to the category in which they make their application.

In accordance with R66, requests for H&C consideration under A25(1) submitted outside Canada must be made in the context of an application for permanent resident status or for a permanent resident visa (IMM 0008). The application must be submitted in accordance with the requirements specified in R10.

As per A25(1.1), applicable fees must be paid in full in order for a request for H&C consideration to be examined. See R307 for information on fees payable for H&C requests.

Restrictions on requests for H&C consideration

These restrictions apply to overseas as well as in-Canada applications and are explained in the following chart.

When an application is received on or after June 28, 2012, and the applicant has ...	Then the H&C application ...	Exceptions
a pending H&C request **Note**: this provision came into effect on June 29, 2010	CANNOT be examined	None
a pending refugee claim in Canada	CANNOT be examined	None
received a negative decision on a refugee claim from the Immigration and Refugee Board's Refugee Protection Division (RPD) or Refugee Appeal Division (RAD)	CANNOT be made until after 12 months have passed since the date of the last decision	Removal of applicant would: result in a risk to life because they have a life threatening medical condition that cannot be adequately treated in their home country have an adverse effect on the best interests of a child under 18 years old
withdrawn a refugee claim AFTER substantial evidence was heard at their RPD hearing	CANNOT be made until after 12 months have passed since date of decision	
abandoned a refugee claim	CANNOT be made until after 12 months have passed since date of abandonment	
been deemed to be a designated foreign national	CANNOT be considered for at least 5 years after their designation See OB 440D "Designated foreign nationals: restrictions on applications for permanent residence", for details	None

5.3. Consideration on humanitarian and compassionate grounds

In the overseas context, a request for consideration on H&C grounds must be made in writing and must accompany an application for permanent residence made under one of the existing three classes (family, economic or refugee). In categories in which Ministerial Instructions apply (e.g. skilled workers), H&C may not be used to overcome the fact that the applicant does not meet the requirements of the Ministerial Instructions (e.g. the applicant has an arranged offer of employment or has experience in one of the National Occupation Classification (NOC) codes.). Otherwise, applicants may apply to overcome any requirement of the Act or Regulations.

In the absence of a specific request from an applicant, the Minister may consider H&C grounds on his own initiative (A25.1) or advise the applicant to request an exemption under A25.

5.4. Consideration under public policy

The Minister establishes public policies to facilitate the granting of permanent residence for a group of individuals with shared circumstances, who do not meet the definition or comply with the criteria for one of the existing immigration classes. Applicants who meet specific eligibility criteria established under a public policy may be granted an exemption from a requirement of IRPA or

may be granted permanent or temporary residence, depending on the specific public policy. The Minister may also impose conditions which applicants must meet in order to benefit from a public policy.

Public policies may be used for applicants in Canada and overseas.

Example: Public policy for Tibetans living in the State of Arunachal Pradesh, India. Information about the public policy for Tibetans can be found at: http://www.cic.gc.ca/english/department/laws-policy/tibet.asp

5.5. Balance between discretion and consistency

Effective decision-making in H&C cases involves striking a balance between certainty and consistency on the one hand and of flexibility to deal with the specific facts of a case on the other. In addition to the legislation, documents such as policy statements, guidelines, manuals and handbooks provide guidance to decision makers on when and how discretion should be best exercised in keeping with the policy intent. Such documents may legitimately guide decision makers in their work.

See *Thamotharem v. Canada* (Minister of Citizenship and Immigration); 2007 CarswellNat 1391; 2007 FCA 198

5.6. Onus on applicant

The onus is entirely upon the applicant to be clear in the submission as to exactly what hardship they would face if they were not granted the requested exemption(s). Officers do not have to elicit information on H&C factors and are not required to satisfy applicants that such grounds do not exist. The onus is on applicants to put forth any H&C factors that they believe are relevant to their case.

5.7. Threshold of proof

Fact finding should be done using the usual standard of proof in administrative law: Balance of probabilities — is it more likely than not that the evidence or information presented is true?

A lower standard of proof, reasonable grounds to believe, may be used to assess inadmissibility. In this regard, A33 provides “The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.”

Once all elements of the case have been determined, using the appropriate standard of proof, the officer should assess all facts in the application and decide whether a refusal to grant the request for an exemption would, more likely than not, result in unusual and underserved or disproportionate hardship.

Element	Standard of proof
Fact finding	Balance of probabilities
Inadmissibility	Reasonable grounds to believe

5.8. The H&C assessment

A25(1) provides the flexibility to grant exemptions to overcome requirements of IRPA (other than those set out in Ministerial Instructions), or grant a permanent resident visa, if justified on H&C grounds. Applicants may request exemptions based on H&C considerations, from any requirements of the Act and Regulations.

The assessment of a request for H&C consideration overseas is essentially a determination of whether the applicant would suffer unusual and undeserved or disproportionate hardship if they are not granted an exemption or an immigrant visa for Canada. As part of this assessment, officers should consider the applicant’s ties to Canada, especially the existence of family members (or *de facto* family members) with whom they have a close relationship. Applicant may

also demonstrate ties to Canada that take other forms, such as time spent in Canada as a student or temporary worker. Although close ties to Canada (familial or other) are not strictly required, they would be a positive consideration.

The assessment of hardship in an H&C application is a means by which Citizenship and Immigration Canada (CIC) decision makers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s) or a permanent resident visa. The criterion of "unusual and undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on subsection 25(1), which means that these terms are more than mere guidelines.

See *Singh v. Canada* (Minister of Citizenship and Immigration); 2009 Carswell Nat 452; 2009 CF 11.

Individual H&C factors put forward by the applicant should not be considered in isolation in a determination of the hardship that an applicant would face; rather, hardship is determined as a result of an assessment of all the H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant.

In the overseas context, officers should consider the applicant's circumstances relative to others living in their country when considering whether sufficient H&C grounds exist to justify an exemption. Hardship must be unusual and undeserved or disproportionate as described in the following table:

Hardship

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

Also see Section 5.9, *Factors to consider in the assessment of hardship*.

5.9. Factors to consider in the assessment of hardship

Officers must assess the hardship that would befall the applicant if the requested exemption is not granted. This assessment is not a comparison of life in Canada versus life in the country of origin. It is an assessment of the hardship that would result if the applicant is not granted the exemption or a permanent resident visa.

Applicants may base their request for H&C consideration on any relevant factors that they wish to have considered, including but not limited to:

- ties to Canada;

- best interests of any children affected by the application;
- factors in their country of origin;
- health considerations;
- consequences of the separation of relatives;
- any other relevant factor they wish to have considered.

Note: In the overseas context there are no restrictions on consideration of the hardship related to risk factors in A96 and A97.

5.10. Ability to establish in Canada

In most cases, applicants should be able to demonstrate that they will not be a burden to Canadian society. In order to make this determination, officers may consider both the resources of the applicant and any meaningful support, including employment opportunities, offered by their Canadian connections.

5.11. Two-step process: exemption from a given requirement of IRPA/IRPR R70(1)(*a*), (*c*), and (*d*), and visa issuance

Initial assessment: the H&C assessment

The decision maker must assess the eligibility of the applicant under one of the three immigration classes. If the applicant does not meet the requirements of the class in which the application was made, the decision maker may consider the H&C request. However, requests made on the basis of H&C grounds that accompany a Federal Skilled Worker application, not identified for processing under Ministerial Instructions, will not be processed.

The decision maker assesses H&C grounds and decides, in light of all the circumstances of a case, whether or not to grant the requested exemption(s) from the requirements of IRPA/IRPR, including R70(1). The applicant bears the onus of satisfying the decision maker that the H&C factors present in their individual circumstances are sufficient to warrant an exemption. The decision maker considers the applicant's submissions in light of all the information known to the Department.

Final decision: the issuance of a permanent resident visa

After a positive H&C decision is made, the applicant must still satisfy the remaining requirements for a permanent resident visa including that they must not have an inadmissibility for which no exemption has been granted. If a new inadmissibility is found, the applicant may request an exemption or the officer may use the Minister's initiative.

If the applicant intends to reside in the province of Quebec and is not a member of the family class, they must meet the requirements of R67(*a*).

Once all requirements are met, a permanent resident visa may be issued.

See Sections 7 and 8 for procedures.

5.12. Inadmissibility

Foreign nationals who are inadmissible may request H&C consideration in the context of an application for permanent residence. However, exemptions to inadmissibility must be weighed against the objectives as expressed in IRPA, which indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removal of applicants with such records from Canada, and by emphasis on the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute (*Immigration Act, 1976*), which emphasized the successful integration of applicants more than security.

Example: See paragraph 3(1)(*i*) of IRPA versus paragraph 3(*j*) of the former Act; paragraph 3(1)(*e*) of IRPA versus paragraph 3(*d*) of the former Act; paragraph 3(1)(*h*) of IRPA versus paragraph 3(*i*) of the former Act.

If an applicant does not specifically request an exemption and the inadmissibility is discovered during the application process, the officer may refuse the application or may use the Minister's initiative to grant an exemption.

Viewed collectively, the objectives of IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act: *Medovarski v. Canada* (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 539, 2005 SCC 51. In exceptional circumstances, the Minister or his delegated authority may grant an exemption from inadmissibility if they are of the opinion that it is justified by H&C considerations.

When the decision maker does not have delegated authority but believes that an exemption might be justified, the case should be submitted to the delegated decision maker for consideration. The following is the process for serious inadmissibilities:

When ...	Then ...
• inadmissibilities fall under A34, A35, A36(1), A37 or A38	• the delegated authority is at National Headquarters (NHQ), and • the case should be sent to NHQ for consideration. **For references,** see Section 4.1, *Delegated authorities* and Section 10, *Referrals to NHQ*.
• more than one exemption is required, and • the delegated authorities involve both the visa office and NHQ	• there should be one decision maker, and • it should be the higher authority (NHQ).

5.13. Inadmissible categories

The following table provides information on specific inadmissibilities and the action required by the decision maker when the applicant requests an exemption:

When …	Then …
• Applicant is inadmissible for serious criminality A36(1)	• if it is believed that exemption might be warranted, refer to delegated decision maker at NHQ • if exemption is not warranted, refuse.
• Applicant has outstanding criminal charges that fall under A36(1) or A36(2) – serious criminality, criminality	• depending on the circumstances of a case, either wait for the outcome of the criminal charges (e.g. if there appears to be H&C grounds and there are no other negative factors) or refuse the case if there are insufficient H&C grounds.
• Applicant is inadmissible for criminality A36(2)	• determine if the applicant is eligible to apply for rehabilitation or pardon •

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When …	Then …

	• **When the applicant is...**
	• not eligible to apply for pardon or rehabilitation
	•
	• **Then...**
	assess H&C
	• **When the applicant is...**
	• eligible to apply for pardon or rehabilitation
	•
	• **Then...**
	  • suggest to applicant that they request relief and keep application open until outcome is known;
	  • if they chose not to do so, assess H&C taking into consideration that applicant is eligible to apply for relief.
	For information on rehabilitation and pardons, refer to ENF 14, Section 5.2. For persons who are not eligible for rehabilitation or pardon, refer to IP 1, Section 14.

• Applicant has a suspected health inadmissibility A38	• if other factors suggest that positive consideration may be warranted, instruct applicant to undergo an immigration medical examination (R30(1)(*a*)) in order to have all the relevant information for the H&C assessment. • if medical inadmissibility is confirmed and granting of exemption might be warranted, refer to delegated decision maker at NHQ. • if exemption is not warranted, refuse. **Note:** Results of a temporary residence medical examination may not be used to refuse an application for permanent residence.
• Applicant has a known health inadmissibility (A38) for which an officer believes that an exemption might be warranted	• inform the applicant about the inadmissibility and provide an opportunity for them to make submissions. • undertake consultation with the provincial health authorities. The results of the consultation should be included as part of the referral package for NHQ. Refer the case to the delegated decision maker at NHQ. For cases involving an inadmissibility under excessive demand on health or social services [A38(1)(*c*)], see OB 063 dated September 24, 2008 and OB 063B dated July 29, 2009.

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When …	Then …
• Case involves a non-accompanying family member who was examined and found inadmissible, making the principal applicant inadmissible (A42) (other than a protected person).	• determine whether the H&C grounds outweigh the A42 inadmissibility **Note:** The waiver is not for the actual inadmissibility of the family member but rather the requirement that a family member not be inadmissible (and as a result of the grant of a waiver, the principal applicant may be issued a permanent resident visa). **Example:** The H&C applicant has a non-accompanying family member abroad who is inadmissible under A36. If an exemption is granted, they are granting the H&C applicant an exemption from A42 and a visa may be issued. The family member abroad remains inadmissible under A36. • advise applicant that, if the inadmissible family member makes an application at a later date they must request an exemption under H&C and it may not be granted. • if an exemption has not been requested, the application may be refused, or • consider granting an exemption on the Minister's initiative.
• Case involves a non-accompanying family member who cannot be examined	• consider whether every effort has been made to have the family member examined; **Note:** The authority to waive the requirement under R68(*c*) that non-accompanying family members be examined in order for a foreign national to become a permanent resident, is delegated to officers. • advise the applicant that, if the requirement to examine a family member is waived, the applicant will be barred from ever sponsoring that family member (see R117(9)(*d*)).
• Case involves an accompanying family member who has been examined and found inadmissible	• consider granting an exemption to the family member for their inadmissibility; or • the application may be refused. • if an exemption is granted to the family member, the principal applicant is no longer inadmissible for A42 (because the family member is no longer inadmissible).
• Case involves national security (A34, A35 and A37) and in the opinion of the visa	• the case **must** be forwarded to the Director of Case Review at NHQ (see Section 10,

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When …	Then …
officer, H&C factors might justify an exemption	*Referrals to NHQ*). The assessment of admissibility is normally made before the file is sent to NHQ as the analysis is used in the decision maker's determination as to whether the grant of an exemption on H&C grounds is warranted. **Note:** For those who are inadmissible under IRPA for reasons involving security (A34), human rights violations (A35), or organized crime (A37), an application for Ministerial Relief may be submitted, with the exception of those who are inadmissible under A35(1)(*a*). A person inadmissible on these grounds is not eligible to receive relief as per A35(2). See IP 10, Section 9, *Requests for relief* for more information.
• Case involves national security (A34, A35 and A37) and in the opinion of the visa officer, H&C factors might justify an exemption; and • Ministerial relief for the inadmissibility has been requested	• an applicant is inadmissible until such time as Ministerial relief is granted; • a decision on the H&C application may be made even in the absence of a decision on the Ministerial relief.

6. Definitions

The following table provides definitions and examples of some terms that are common in H&C processing.

Term	Definition	Examples
H&C exemption	A25(1) authorizes the Minister to grant an exemption from any applicable criteria or obligation of the Act if they are of the opinion that it is justified by humanitarian and compassionate considerations.	• Exemption from criminal inadmissibility A36(2).
Public policy exemption	Public policies are used to facilitate the grant of temporary or permanent residence to a group of individuals with shared circumstances, who do not meet the definition or comply with the criteria for one of the existing immigration classes. A25.2(1) authorizes the Minister to establish public policies.	• Temporary public policy concerning some Tibetans without status and who reside in the state of Arunachal Pradesh, India • Afghan nationals in direct support of the Canadian mission in Kandahar (no new applications being accepted).
Administrative law principles – A guide to decision-making	Before processing an H&C application, officers should review the list of administrative	See Appendix A.

Term	Definition	Examples
	law principles in Appendix A along with the summary explanation provided for each principle. The summary explanations are only overviews of each principle and do not constitute an exhaustive presentation of administrative law principles applicable to the H&C assessment.	
De facto family members	*De facto* family members are persons who do not meet the definition of a member of the family class. They are, however, in a situation of dependence that makes them a *de facto* member of a nuclear family.	• An adult son, daughter, brother or sister without family of their own; • an elderly relative such as an aunt or uncle or an unrelated person who has resided with the family for a long time.
Intrinsic information	Intrinsic information (which does not need to be disclosed to the applicant) is information that: • is provided by or readily available to the applicant; and • the applicant knows will be used in the decision.	Information provided by an applicant's spouse at an interview to determine the *bona fides* of a marriage is considered intrinsic because the applicant has access to it and would reasonably expect it to be used in the decision.
Extrinsic information	Extrinsic information (which needs to be disclosed to the applicant so they have a chance to respond) is: • information that is from a source other than the applicant; and • information that the applicant does not have access to, or is not aware of, and that is being used in the decision.	• Information received from an anonymous source that is integral to the decision. • Following a request about the authenticity of documents, the visa office replies that the documents are not authentic. Although the documents were submitted as part of the H&C application, the information related to their authenticity will be used as the basis for the decision or as a determinative factor. • Opinions from medical officers and provincial health authorities.

7. Procedures: Roles and responsibilities

7.1. Roles and responsibilities

Applicant

Applicants should:

- indicate the specific exemption(s) requested and ensure that they have, when applicable, requested exemptions to overcome their inadmissibilities and included the relevant facts pertaining to the inadmissibility and the H&C grounds that they wish to have considered, including best interests of the child (if applicable);
- ensure that they have presented all the facts that support their belief that the hardship, if the requested exemption is not granted, would be either unusual and undeserved or disproportionate (applicants may present whatever facts they believe are relevant);
- in the case of more than one request for an exemption, identify which submissions pertain to which exemption request;
- complete and sign the required forms and gather all relevant documentation; and
- send the application to the appropriate office and ensure that applicable application fees are paid.

Visa offices

Officers at Canadian visa offices are responsible for processing applications under A25(1) i.e. requests for H&C consideration, or under A25.2(1) i.e. requests for consideration under an existing public policy. See Section 8 for detailed procedures.

Case Processing Centre (CPC) Mississauga

CPC Mississauga plays a role in assessing family class sponsorship cases that may result in requests for consideration under H&C. The CPC may not grant an exemption under A25(1). See Section 8.3 for specific instructions on family class cases.

7.2. Payment of fees

As per A25(1.1) and R307, the collection of processing fees applies to all cases processed under subsection A25(1) of the Act. In the overseas context, processing fees pertaining to the application for a permanent resident visa must be paid before an application may be considered. See R307.

Example: In the case of someone who applies in the refugee classes and requests H&C consideration, there are no fees for processing an application for a permanent resident visa in the refugee classes. However, there are processing fees for H&C and they must be collected before a case is assessed. See R307.

Fee Exemptions

A25.1(2) allows the Minister to exempt applicants from the payment of any applicable fees. Officers should seek the appropriate level of approval before exempting an applicant from paying the applicable fees. See Section 4.1, *Specific delegation instruments*.

7.3. Cost recovery information

The following table explains where information on fees, exemptions and coding for cost recovery can be found:

For more information about	Refer to

Latest fees	Part 19 of the *Immigration and Refugee Protection Regulations* (R307)
Exemptions	IR 8
Cost recovery codes	IR 8

8. Procedures: Processing humanitarian and compassionate cases

The following guidelines describe some situations in which positive consideration may be warranted. They may be helpful when deciding whether the circumstances presented by an applicant might be sufficiently compelling to warrant a grant of the requested exemptions. These guidelines are meant to assist officers in the assessment of H&C considerations. Officers cannot be restricted by guidelines; they are obliged to consider all the information before them.

Information to assist with decision making can be found in the following:

Refer to	For information on
Appendix A	Administrative law principles relevant to decision making
Appendix B	Guidelines for recording the reasons for an H&C decision

8.1. General guidelines

H&C applications must be reviewed on a case-by-case basis. Applicants are free to make submissions on any aspect of their personal circumstances that they believe are relevant to their request for H&C consideration.

Officers should ensure that H&C assessments clearly demonstrate:

- that all factors, including the positive H&C factors and any arguments raised with respect to the best interests of a child (BIOC) directly affected, have been taken into account;
- that the officer has considered and analysed these factors, given them due weight, and explained the weight that they have given to each of these factors and why;
- that they have balanced the positive H&C factors identified and those facts and circumstances which would weigh against granting an exemption under A25 or A25.1.

It is important that all submissions and evidence be taken into account and that case notes reflect that the totality of evidence has been considered and that the balancing exercise described above has been included in the recorded decision.

8.2. Considering exemptions on one's own initiative

In the absence of a specific request from the applicant, decision makers may refuse an application or have the authority to consider exemptions on their own initiative at anytime during the assessment of an application. Such situations may involve new or existing inadmissibilities that emerge subsequent to a positive H&C assessment, but prior to the applicant being granted permanent residence. If an officer does not have the delegated authority to make a decision, they may bring any new inadmissibility to the attention of a delegated decision maker.

Example: The applicant may develop a medical condition after a positive H&C assessment, or it is evident to the officer that the applicant was unaware of an existing medical condition or did not realize it made them inadmissible. Officers may consider the new circumstances and, if they believe it is appropriate, send the application to the Director of Case Review for assessment.

When an officer decides to consider H&C in the absence of a specific request from the applicant, the applicant should be informed that H&C is being considered and provided with an opportunity

to present his or her own reasons for H&C consideration. This is procedurally fair and ensures that the decision maker has all the information necessary before making a decision.

If an applicant provides updated or additional submissions, for example, in response to a letter informing the applicant that he or she may be medically inadmissible, and if, in these submissions, the applicant requests an exemption on H&C grounds from the new or newly discovered inadmissibility, then the delegated authority must consider the request.

8.3. Family class

In some cases, sponsors may not meet eligibility requirements (e.g. because they are in receipt of social assistance). Applicants in the family class whose sponsor is ineligible may request H&C consideration to overcome the requirement to have an eligible sponsor. (As per A25(1), only foreign nationals may request H&C consideration; in other words, the sponsor, who is either a permanent resident or Canadian citizen, may not request H&C consideration.)

In such cases, the sponsor must indicate in the appropriate box on their sponsorship application that, if they are found ineligible, they want CPC Mississauga to forward their application to the visa office for continuation of processing, along with the application for a permanent resident visa from the foreign national they had applied to sponsor.

The applicant must request an exemption from the requirement to have an eligible sponsor. In the assessment of such cases, consider factors such as whether, for example, the prospective permanent resident would be able to help the sponsor become self-supporting.

Similarly, in cases in which a sponsor is eligible but the prospective permanent resident is not, the latter would have to request H&C consideration in writing.

8.4. *De facto* family members

De facto family members are persons who do not meet the definition of a family class member. They are, however, in a situation of dependence that makes them a *de facto* member of a nuclear family that is either in Canada or applying to immigrate. Some examples: a son, daughter (over age 22), brother or sister left alone in the country of origin without family of their own; an elderly relative such as an aunt or uncle or an unrelated person who has resided with the family for a long time. Also included may be children in a guardianship relationship when adoption as described in R3(2) is not an accepted concept. (See OP 3, Section 5.7, *Laws of the place where the adoption took place*). Officers should determine whether compelling humanitarian and compassionate reasons exist to allow such persons to immigrate to Canada.

Consider:

- whether dependency is *bona fide* and not created for immigration purposes;
- the level of dependency;
- the stability of the relationship;
- the duration of the relationship;
- the possible impact of a separation;
- the financial and emotional needs of the applicant in relation to the family unit;
- the ability and willingness of the family in Canada to provide support;
- the applicant's other options, such as family (spouse, children, parents, siblings, etc.) outside Canada able and willing to provide support;
- documentary evidence about the relationship (e.g., joint bank accounts or real estate holdings, other joint property ownership, wills, insurance policies, letters from friends and family);

- any other factors relevant to the H&C decision.

8.5. Best interests of the child

In an examination of the circumstances of a foreign national under A25(1) and A25.1(1), IRPA introduces a statutory obligation to take into account the best interests of a child (BIOC) who is directly affected by a decision under these subsections. This codifies departmental practice into legislation, eliminating any doubt that the interests of a child will be taken into account. This applies to children under the age of 18 years as per the Convention on the Rights of the Child. BIOC must always be considered when a child is under 18 years of age. There may, however, be cases in which the situation of older children is relevant and should be taken into consideration in an H&C assessement. If, however, they are not under 18 years of age, it is not a BIOC case.

Officers must always be "*alert, alive and sensitive*" to the interests of children when examining A25(1) requests through identification and examination of all relevant factors related to the child's life. However, this obligation only arises when it is sufficiently clear from the material submitted that an application relies in whole, or at least in part, on this factor. Officers are cautioned against using the hardship test when assessing BIOC as noted in *Hawthorne v. Canada* (Minister of Citizenship and Immigration) (C.A.), 2002 FCA 475, [2003] 2 F.C. 555. The decision states: "... the concept of "undeserved hardship" is inappropriate in relation to innocent children who are rarely, if ever, deserving of hardship."

An applicant has the burden of justifying the basis of their H&C submission. An officer may also wish to consider that for some applicants it can be difficult to express themselves in writing and that the applicant may be able to provide more information in an interview. If an applicant provides insufficient evidence to support the claim, the officer may conclude that the grant of the exemption is not justified. As with all H&C assessments, the officer has full discretion to decide the outcome of a case.

The codification of the principle of "best interests of a child" into the legislation **does not mean** that the interests of the child outweigh all other factors in a case. While factors affecting children should be given substantial weight, the BIOC is only one of many important factors that officers need to consider when making an H&C decision that directly affects a child.

A decision on an H&C application must include an assessment of the best interests of any child **directly affected** by the decision. In this context, "any child directly affected" means a Canadian or foreign-born child. Although the assessment may include children outside Canada, the Convention should normally be applied to children within Canada's jurisdiction.

The relationship between the applicant and "any child directly affected" need not necessarily be that of parent and child, but could be another relationship that is affected by the decision. For example, a grandparent could be the primary caregiver who is affected by an immigration decision and the decision may thus affect the child.

The outcome of a decision under A25(1) that directly affects a child will always depend on the facts of the case. Officers must consider all evidence submitted by an applicant in relation to their A25(1) request. The following guidelines do not form an exhaustive list of factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide to officers and they illustrate the types of factors that are often present in A25(1) cases involving the BIOC. As stated by Madame Justice McLachlin of the Supreme Court of Canada, "The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty." (*Gordon v Goertz*, [1996] 2 S.C.R. 27).

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:

- the age of the child;
- the level of dependency between the child and the H&C applicant or the child and their sponsor;
- medical issues or special needs the child may have;
- the impact to the child's education; and
- 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.

For supplementary reading on relevant case law, refer to *Baker v. Canada* (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817; *Legault v. Canada* (Minister of Citizenship and Immigration) (T.D.), 2001 FCT 315, [2001] 3 F.C. 277; *Hawthorne v. Canada* (Minister of Citizenship and Immigration) (C.A.), 2002 FCA 475, [2003] 2 F.C. 555, *Owusu v. Canada* (Minister of Citizenship and Immigration) (F.C.A.), 2004 FCA 38, [2004] 2 F.C.R. 635, and see the *Convention on the Rights of the Child*, [Can. T.S. 1992 No. 3] and *Husain v. Canada* (Minister of Citizenship and Immigration) 2011 FC 451.

8.6. Former Canadian citizens

Foreign nationals who are former Canadian citizens may request permanent residence on H&C grounds.

Although not exhaustive, the following table provides some guidelines on the assessment of cases of former Canadian citizens:

Step	Action
1	• Ensure the applicant was a Canadian citizen. • Verify that loss of citizenship has occurred and that the applicant is not a permanent resident. • Ensure that the applicant has contacted CPC Sydney to obtain written confirmation of loss of citizenship.
2	• Consider why and how the applicant lost their Canadian citizenship. • Verify if they would have lost it under the present Act.
3	Assess the hardship that the applicant would experience if the application were refused, for example: • close family members in Canada; • strong cultural and/or emotional ties to Canada; • close family, friends and support in another country. See Section 5.10, *Ability to establish in Canada*
4	• Determine if there is a significant, continuing link to Canada. • Consider any other factors that may be relevant to the H&C decision.

8.7. Ministerial Instructions and H&C

Under subsection 87.3(6) of IRPA, the Minister may establish instructions for the processing of immigration applications which, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.

Ministerial Instructions published in the **Canada Gazette on June 25, 2011,** include instructions on the processing of economic class applications (OB 318, OB 319 and OB 320), Ministerial Instructions published in the **Canada Gazette on November 5, 2011,** include restrictions on the processing of certain family class applications (OB 353) and Ministerial Instructions published in the **Canada Gazette on June 30, 2012**, advise of a temporary pause on certain federal skilled worker and on federal Immigrant Investor applications (OB 438).

Officers must comply with any instructions of the Minister when processing an application or request that is subject to Ministerial Instructions (A87.3(4)). H&C requests made outside Canada that accompany any permanent resident application affected by Ministerial Instructions, but not identified for processing under Ministerial Instructions, will not be processed.

However, if a foreign national is otherwise eligible to apply in a category subject to Ministerial Instructions, but they are inadmissible, they may apply in that category and request H&C consideration to overcome the inadmissibility.

8.8. Persons who spent extended time in Canada

Persons who have spent an extended time in Canada may return to their home country and apply to immigrate. When considering such applications on H&C grounds officers may, in addition to other relevant factors, consider:

- family and other ties to Canada;
- the length of time spent in Canada;
- Canadian employment history;
- volunteer work, etc.

8.9. Cases destined to Quebec

The assessment of H&C should be done and if a case appears to warrant positive consideration and the delegated decision maker is at the visa office, submit the case details to the *Ministère de l'Immigration et des Communautés culturelles* (MICC) along with reasons for a recommended postive assessment. If MICC agrees to issue a *Certificat de sélection du Québec* (CSQ – Québec selection certificate), continue processing the case, if not, the case can be refused. In exceptional circumstances, decision makers may consider whether applicant could go to another province.

When the delegated decision maker is at NHQ, the visa office should not refer the case to MICC until requested to do so by the delegated decision maker.

9. Procedures: Assessing inadmissibilities

Inadmissibilities should be considered in the overall context of the H&C factors put forward by the applicant. In other words, determine whether the H&C factors are sufficient to warrant a waiver of the inadmissibility. Any known inadmissibility should be assessed and either the case is referred to the delegated decision maker for consideration of an exemption to overcome the inadmissibility or the officer may refuse the case.

9.1. Criminal inadmissibilities

Consider whether the known inadmissibility outweighs the H&C grounds and factors such as the applicant's actions, including those that led to and followed the conviction. Consider:

- the type of criminal conviction;
- what sentence was received;
- the length of time since the conviction;
- whether the conviction is an isolated incident or part of a pattern of recidivist criminality;
- evidence of rehabilitation (in the absence of a formal request for rehabilitation); and
- any other pertinent information about the circumstances of the crime.

For assistance with the determination of equivalency of foreign convictions, contact the Danger to the Public and H&C Unit in Case Management Branch (CMB).

9.2. Health inadmissibility

A health inadmissibility must be confirmed prior to the grant of an exemption to overcome it. Officers should therefore request that the applicant completes their medical examination [R30(1)(*a*)] if:

- the applicant has specifically requested an exemption from inadmissibility requirements related to health (A38) and the officer is of the opinion that the H&C factors might outweigh the inadmissibility; or
- a health inadmissibility is suspected.

For applicants destined to Quebec, officers must follow a specific procedure outlined in Appendix D and Appendix E.

Excessive demand on health or social services A38(1)(*c*)

The exemption under A38(1)(*c*) for excessive demand on health or social services applies to members of the family class, Convention refugees and protected persons only [A38(2)]. H&C applicants and their family members who are not members of the these classes and who are inadmissible under A38(1)(*c*), must apply for an exemption under A25(1).

When assessing cases involving A38(1)(*c*), consider the following factors along with the essential instructions provided in OB 063 dated September 24, 2008, and OB 063B dated July 29, 2009:

- What is the cost of the treatment or care, if available?
- When the health inadmissibility is one that affects health or social services, what arrangements are there to cover treatment, care and other costs (e.g. private insurance, family finances, public health coverage, etc.)?
- Is the applicant likely to become self-supporting?
- Is there a risk the person will require public assistance? and
- The extent of the applicant's anticipated need for health or social services in relation to the average demand for these services by Canadian residents?

9.3. Inadmissibility of family members (A42)

An H&C applicant may specifically request an exemption from A42. In such cases, consider whether the H&C grounds outweigh the inadmissibility and make a decision based on that determination (the officer is not waiving the actual inadmissibility of the family member but simply the requirement that a family member not be inadmissible).

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Except in a few limited situations (see R23), an inadmissible family member, whether in Canada or not, renders the principal applicant inadmissible, regardless of whether the inadmissible family member is accompanying.

If the principal applicant resides in Canada and the family member to be examined is overseas, it is the delegated decision maker in Canada who decides whether to grant an exemption to overcome the principal applicant's A42 inadmissibility on H&C grounds; the decision to waive the inadmissiblilty of the family member overseas rests with the delegated decision maker at the visa office (unless the delegated decision maker is at NHQ, as would be the case for A38, or the more serious inadmissibilities).

For instances in which non-accompanying family members might not render an applicant inadmissible to Canada, see OP 2, Section 5.11, *Inadmissibility and non-accompanying family members*.

10. Procedures: Referrals to National Headquarters

The case should be forwarded to the Director of Case Review at NHQ.

- if it involves inadmissibilities A34, A35, A36(1), A37 or A38; **and**
- when, in the officer's opinion, the H&C factors **might justify an exemption**.

The Director will assess the entire case and determine whether an exemption regarding the inadmissibility and eligibility requirements is justified.

Note: The Director of Case Review does not communicate directly with the client or their representative. The Director's role is to examine the application to see if an exemption from the inadmissibility is warranted. Carriage of the file and communication with the client as well as finalization of the application remain the responsibility of the forwarding office.

10.1. Procedures: visa offices

Follow these steps when referring a case to NHQ.

Step	Action for visa office
1	Ensure that applicant is inadmissible under A34, A35, A36(1), A37 or A38.
2	Procedural fairness letter. Send a letter to the applicant to advise them of the suspected inadmissibility, disclose any extrinsic evidence and provide them with an opportunity to make submissions to include in the information for NHQ. The letter should include any extrinsic information about which the applicant may not be aware and that will be used in the decision, for example: ♦ a conviction certificate and any police/intelligence report; ♦ if the case involves a health inadmissibility, detailed information on the medical condition and the associated costs (this may be available from the Health Branch); ♦ if the applicant states that treatment is not available in their country of origin and the officer has information to the contrary, this information should be included. *Gnanaguru v. Canada* (Minister of Citizenship and Immigration) 2011 FC 536
3	Review reply from client to ensure applicant is still inadmissible prior to sending the package to NHQ.

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Step	Action for visa office

4	Prepare a package for the Director of Case Review containing copies of relevant documents for H&C decision-making. It should include:
	• a copy of the entire H&C case file including any submissions related to the case;
	• a brief factual case summary, including details such as whether applicant has applied for Ministerial Relief, if applicable. When preparing the case summary, officers should*:*
	  • be objective (i.e. use neutral terms and avoid comments on the credibility of the information, do not record personal opinions or interpretations of the facts, do not include a recommendation); and
	  • use point form whenever possible. Some situations may warrant more complete notes (e.g. for issues which are crucial to the decision or when there is a complicated history and several parties are involved);
	• any correspondence between the visa office and the applicant as well as notes from an interview with the applicant;
	• if the case involves a health inadmissibility:
	  ♦ a medical notification;
	  ♦ the client's submissions following the procedural fairness letter;
	  ♦ the results of consultations with the provincial/territorial health authorities, when required by the province or territory, or a statement confirming that the province or territory does not require a consultation;
	  ♦ detailed information on the medical condition and the associated costs (this may be available from the Health Management Branch). For cases involving A38(1)(*c*), the officer's assessment (see Appendix C);
	• a conviction certificate and any police/intelligence report; and
	• other relevant documents in the file (e.g. if new information becomes available to the officer after the package is referred to NHQ, send the new information).
	
	Any extrinsic evidence should be forwarded to CMB along with the file and an indication of whether any of it has already been disclosed to the client. Opinions of medical officers and provincial health authorities are considered extrinsic.

5	Indicate in the Global Case Management System (GCMS) when the application has been forwarded to NHQ for consideration and specify the date of the referral.
6	Receive decision from the delegated authority at NHQ.
7	Enter the decision in GCMS. **If an exemption has been granted**, the officer should enter the following remark, "An exemption is hereby granted from the inadmissibility under [provide section or subsection] of the IRPA for [name of person(s)]". **If an exemption has not been granted**, the officer should enter the following remark, "An exemption is hereby not granted from the inadmissibility under [provide section or subsection] of the IRPA for [name of person(s)]".
8	Send a letter to inform the applicant of the decision maker's decision.

10.2. Procedures: Director of Case Review

The Director of Case Review follows these steps when they receive referrals of A36(1) and A38 cases.

Step	Action for Director of Case Review
1	Receive the H&C application package from the visa officer.
2	Determine whether the file is at “selection decision” or “final decision”. **Note:** Quebec cases with a known health inadmissibility need to be done in two steps. The Director of Case Review first decides whether there are sufficient H&C grounds to warrant a positive decision. If yes, the Director of Case Review then informs the visa office that they should proceed to contact MICC regarding the issuance of a CSQ and to provide any costing information. This can be done by e-mail — no separate decision is required. Once MICC’s input is received at the visa office, it should be forwarded to the Director of Case Review who will then examine the case in more detail and write a final decision on whether or not to grant a waiver of the health inadmissibility. Also see Appendix D and Appendix E.
3	Review all material submitted by the applicant.
4	Make a decision after weighing all the information submitted. **Note:** For cases in which more than one inadmissibility has been identified, the Director of Case Review must address whether the waiver (if granted) applies to each/all inadmissibilities.
5	Prepare reasons for the decision, taking into consideration all the relevant information in the file, including recent GCMS entries.
6	Convey the decision to the forwarding office.

The Director of Case Review follows these steps when they receive referrals of A34, A35 or A37 cases.

Step	Action for Director of Case Review
1	Receive the H&C application package from the visa officer.
2	Review all material submitted by the applicant.
3	Make a decision or recommendation. **When the Director...** believes that there are insufficient H&C grounds to justify an exemption **Then the Director...** has the authority to make a negative decision. **When the Director...** is of the opinion that the H&C factors warrant consideration by the Minister **Then the Director...** • consults with National Security Division at the Canada Border Services Agency (CBSA); and

	• prepares case summary, including outcome of consultation with CBSA, and briefing note requesting a ministerial decision.

10.3. Applications for leave and judicial review of a decision

If the client makes an application for leave and judicial review of the decision, the visa office should:

- forward the request from the Federal Court for a Rule 9 or Rule 17 to the decision maker at NHQ along with the actual refusal letter which was sent to the client. See http://laws.justice.gc.ca/eng/SOR-93-22/FullText.html

The record will be prepared at NHQ, where the decision was made.

Appendix A Administrative law principles to guide decision-making

Before processing an H&C application, officers should review the administrative law principles that are summarized below. This section is an overview and does not constitute an exhaustive presentation of legal principles applicable to H&C decision-making.

1. Delegated authority

As a holder of decision-making authority delegated from the Minister, the officer cannot exceed the scope of the delegation granted.

2. Duty to consider

The officer is under a duty to consider formal applications under A25(1) on H&C grounds on behalf of the Minister. They must remember that the onus is on the applicant to satisfy them that there are grounds for an exemption. They are not required to satisfy applicants that such grounds do not exist.

3. Onus on applicant

The officer does not have to elicit H&C factors; the onus is on applicants to put forth any H&C factors that they believe exist in their case. Although the officer is not expected to delve into areas that are not presented, they may clarify possible H&C grounds if these are not well articulated.

4. All the evidence

The officer must consider and weigh all the relevant evidence and information, that is, what the applicant sees as important and what the officer considers to be important. The officer cannot ignore evidence or place too much emphasis on one factor to the exclusion of all other factors. They must look at the whole picture. If there is information or evidence that they do not believe is relevant or should be given much weight, they should document this appropriately.

5. The right to be “heard”

One of the fundamental components of natural justice or fairness is the right to be heard. This means that applicants must have a fair opportunity to present their case. For the purpose of assessing an H&C application, the applicant's written submissions may contain the information the officer needs to make their decision. The right to be heard does not require an absolute right to a personal interview or hearing.

If the officer provides the applicant with a period of time within which to provide information or make further submissions, they cannot make a decision on the application until after this time period has elapsed.

6. The “case to be met”

There is no particular “case to be met”. Applicants determine what they believe are the H&C factors of their particular circumstances and make submissions on them.

Situations may arise in which the officer has adverse information or evidence from a source other than the applicant (extrinsic evidence). If they wish to rely upon it when making their H&C decision, they **have an obligation to share the information with the applicant** and allow submissions to be made on this information.

If the source of the information is confidential, the obligation remains to share the gist of the information with the applicant, so that they are aware of the officer’s concerns. There is no need to release the identity of the confidential source. The officer must exercise discretion and seek

advice from their Program Manager.

In cases in which the information on file is not relevant to the officer's decision, that is, when they do not rely on it, they will note in the file that they did not take the information into consideration.

Intrinsic information

- is provided by or readily available to the applicant, and
- the applicant is aware it will be used in the officer's decision.

For example, information provided by an applicant's spouse at an interview to determine *bona fides* of a marriage is considered intrinsic because the applicant has access to it and would reasonably expect the officer to use it in their decision.

Extrinsic information

- is from a source other than the applicant, and
- the applicant is not aware that it is being used in the officer's decision or does not have access to it.

For example, information received from an anonymous source that the officer relies upon in making the H&C decision.

Or, the officer may ask an office in Canada or elsewhere about the authenticity of documents submitted as part of the H&C application. If the office replies that the documents are not authentic, and the officer wishes to rely upon this information, they will have to share this extrinsic evidence with the applicant and allow them to make submissions on it.

7. Bias

The second major component of natural justice or fairness is the right to have a fair and impartial decision maker. In other words, the officer must approach the case with an open mind and be free to come to their own decision in light of all the facts known and the submissions made. Their decision-making must be carried out in an impartial and objective manner.

Examples of a failure to approach the case with an open mind could be:

- too much reliance on the factors set out in the H&C guidelines, to the exclusion of any other submissions made by the applicant;
- "pre-judgment" by the decision maker; each individual case must be determined on its own merits.

As a decision maker, the officer may consult with colleagues and supervisors in relation to cases they are considering. However, the final decision must be their own.

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8. Right to a decision

Decisions must be rendered within a reasonable time period and applicants informed of the decision in writing.

9. Right to reasons

The established rule is that formal, written reasons are not required unless the statute requires it. Because there is no statutory right to reasons in relation to H&C decision making, the written decision need only state that there were or were not sufficient H&C grounds to warrant a positive decision. However, **it is a good practice to record the reasoning behind the H&C decision** in the officer's GCMS notes on the file.

10. Legal decisions

A. Supreme Court of Canada decision in *Baker v. M.C.I.*, [1999] 2 S.C.R. 817

This was a landmark ruling for CIC. The appeal was against a negative decision on an application for permanent residence made in Canada on humanitarian and compassionate grounds.

The main points for purposes of this chapter are:

Consideration of children's interests – While the best interests of children must always be taken into account as an important factor that is given substantial weight, this does not mean that they will necessarily outweigh other factors of the case. There may be grounds for refusing an H&C application even after considering the best interests of children.

Canada's international obligations – Although Canada may be a signatory to international treaties and conventions, they are not part of Canadian law unless they have been implemented by statute; they have no direct application within Canadian law. They may, however, help inform the context of statutory interpretation and judicial review. In the instance of the *Convention on the Rights of the Child*, it is an indicator of the importance of considering the interests of children when making H&C decisions.

Written reasons for decision and impact on note-taking – The Court's willingness to accept notes to file as reasons for decision does not mean that note-taking practices have to change or become more elaborate. Adhering fully to the principles of note-taking as in all applications for permanent residence is all that is required.

Appropriate standard of review for discretionary H&C decisions: **reasonableness *simpliciter*** – The rule of administrative law relating to review of discretionary decisions has traditionally been on limited grounds, such as decisions made in bad faith or for improper purpose or when irrelevant considerations were used or, from time to time, if the decision was considered "unreasonable." Discretion must be exercised in a manner that is within a reasonable interpretation of the statute, in accordance with general principles of rule of law and administrative law governing discretion, reflective of the fundamental values of Canadian society and consistent with the *Canadian Charter of Rights and Freedoms*.

The Court concluded that significant deference should be accorded to immigration officers exercising discretionary H&C authority. However, the standard of reviewing H&C decisions should be reasonableness *simpliciter*. This means that decisions must be supported by reasons that can withstand a "somewhat probing examination"; that is, there must be a solid foundation of evidence and conclusions drawn must be logical.

The complete text of the Supreme Court's decision in *Baker* can be found at http://scc.lexum.org/en/1999/1999scr2-817/1999scr2-817.html

B. Federal Court of Appeal Decision in *M.C.I. v. Legault,* [2002] 4 F.C. 358

This followed on a judicial review of a refusal by an immigration officer of a request made under subsection 114(2) of the Act to obtain permanent residence from within Canada on humanitarian and compassionate grounds.

The case involved six Canadian-born children. The Minister's appeal was allowed and the decision of the immigration officer was restored.

A number of elements from *Baker* were included in the Federal Court's reasoning in this case.

It was concluded:

- that the immigration officer had examined the interests of the children with a great deal of attention;
- that she weighed that factor in the light of other factors, related, *inter alia*, to the past conduct of Mr. Legault; and
- that she made a decision that was reasonable in the circumstances.

In addition, this case brought out the following information relevant to H&C and "best interests of the child":

- In reviewing such applications, the mere mention of the children is not sufficient; the interests of the children are a factor that must be examined with care and weighed with other factors; to mention is not to examine and weigh.
- *Baker* does not create a *prima facie* presumption that the children's best interests should prevail, subject only to the gravest countervailing grounds.
- Citing another Supreme Court ruling (*Suresh v. M.C.I.*, [2002] S.C.R. 72) this case points out that, in *Suresh*, the Supreme Court clearly indicated that *Baker* did not depart from the traditional view that the weighing of the relevant factors is the responsibility of the Minister or his delegate. The interests of the children are one factor that an immigration [or visa] officer must examine with a great deal of attention, but it is up to the officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to re-examine the weight given to the different factors by the officers.

The complete text of the decision can be found at

http://decisions.fca-caf.gc.ca/en/2002/2002fca125/2002fca125.html

Appendix B Recording the reasoning behind an H&C decision

Guidelines:

- Record all the factors, both positive and negative, that were considered in order to make a decision.
- Explain your thought process. Make no assumptions; fill in the gap between the facts listed and your decision.
- Avoid absolute statements like “there is no evidence” or “there would be no hardship”; usually what we really mean is that there is *insufficient* evidence or *insufficient* hardship.
- Use neutral terms.
    - For example, it is preferable to say, “he states” rather than “he claims” or “he admitted”.
- When possible, avoid strong comments on the credibility of the information.
    - For example, if you write “I do not believe”, this suggests that you are questioning credibility. In this case, you need to demonstrate that you have fully investigated the issue (e.g., interviewed applicant). If you use the phrase “I am not satisfied”, it is less contentious and keeps the onus on the applicant to satisfy you.
- Comment on the evidence rather than the inference you draw from the evidence.
    - For example, don't comment on whether or not a common-law couple has a close relationship; comment on whether sufficient evidence has been submitted to satisfy you that there is a genuine relationship.
- Once you are satisfied that you have adequately addressed an issue, don't go any further by trying to reinforce your decision.
- Your notes should be written in simple, straightforward and dispassionate language.
- Record how the applicant was given the opportunity to be heard, i.e., was provided with an opportunity to satisfy you of the H&C considerations in relation to their case.

Appendix C Case summary form

Case Summary
for Minister's Delegate
H&C Application – Request for Exemption

FILE:
UNIQUE CLIENT IDENTIFIER (UCI):

DATE OF REFERRAL TO NHQ:

DATE APPLICATION RECEIVED:

REQUIRES PRIORITIZATION: ❒ YES ❒ NO
If YES, please explain _____

PRINCIPAL APPLICANT'S INFORMATION

GIVEN NAME:
SURNAME:
DATE OF BIRTH:
COUNTRY OF BIRTH:
CITIZENSHIP:

APPLICANT'S IMMIGRATION HISTORY including the applicant's date of arrival in Canada and any other relevant dates that could provide a better understanding of the applicant's case (e.g. Dates on which previous applications or refugee claims were made and or decisions rendered.):

IMMIGRATION CATEGORY:

- ❒ **Family class**
- ❒ **Refugee class**
- ❒ **Economic class**

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DEPENDANTS WHO LIVE IN COUNTRY OF ORIGIN:

- ❒ **NO**
- ❒ **YES** **If so, how many:**_____

For each: Surname, Given name:
Date of birth / Country of birth:
Citizenship:
Accompanying ❒ **Non-accompanying ❒**

DEPENDANTS IN CANADA OR ANOTHER COUNTRY:

- ❒ **NO**
- ❒ **YES** **If so, how many:**_____

For each: Surname, Given name:
Date of birth / Country of birth:
Citizenship:

H&C

EXISTING INADMISSIBILITIES (mark "X" where applicable):

Inadmissibility	Principal applicant	Family member
Security A34		
Human and international rights violations A35		
Serious criminality A36(1)		
Criminality A36(2)		
Organized criminality A37		
Health A38		
Financial reasons A39		
Misrepresentation A40		
Non-compliance with the Act A41		
Inadmissible family member A42		

IF INADMISSIBLE ON HEALTH GROUNDS:

Date of medical notification:

Type of health inadmissibilty (excessive demand on social services/medical services, danger to public health, etc.):

Date procedural fairness letter sent:

Was a declaration of intent and ability sent to client?

Rebuttal submissions received on:

New medical information (if any) forwarded to Health Branch on:

If applicable, Health Branch confirmed inadmissibility on:

OP 4 The processing of applications that include a request for humanitarian and compassionate or public policy consideration

If a declaration of intent and ability was received, was health inadmissibility finding maintained? (Rationale should be included in the summary):

IF CRIMINALLY INADMISSIBLE:

Date of procedural fairness letter (if client was unaware):

Date of client's most recent submissions/interview:

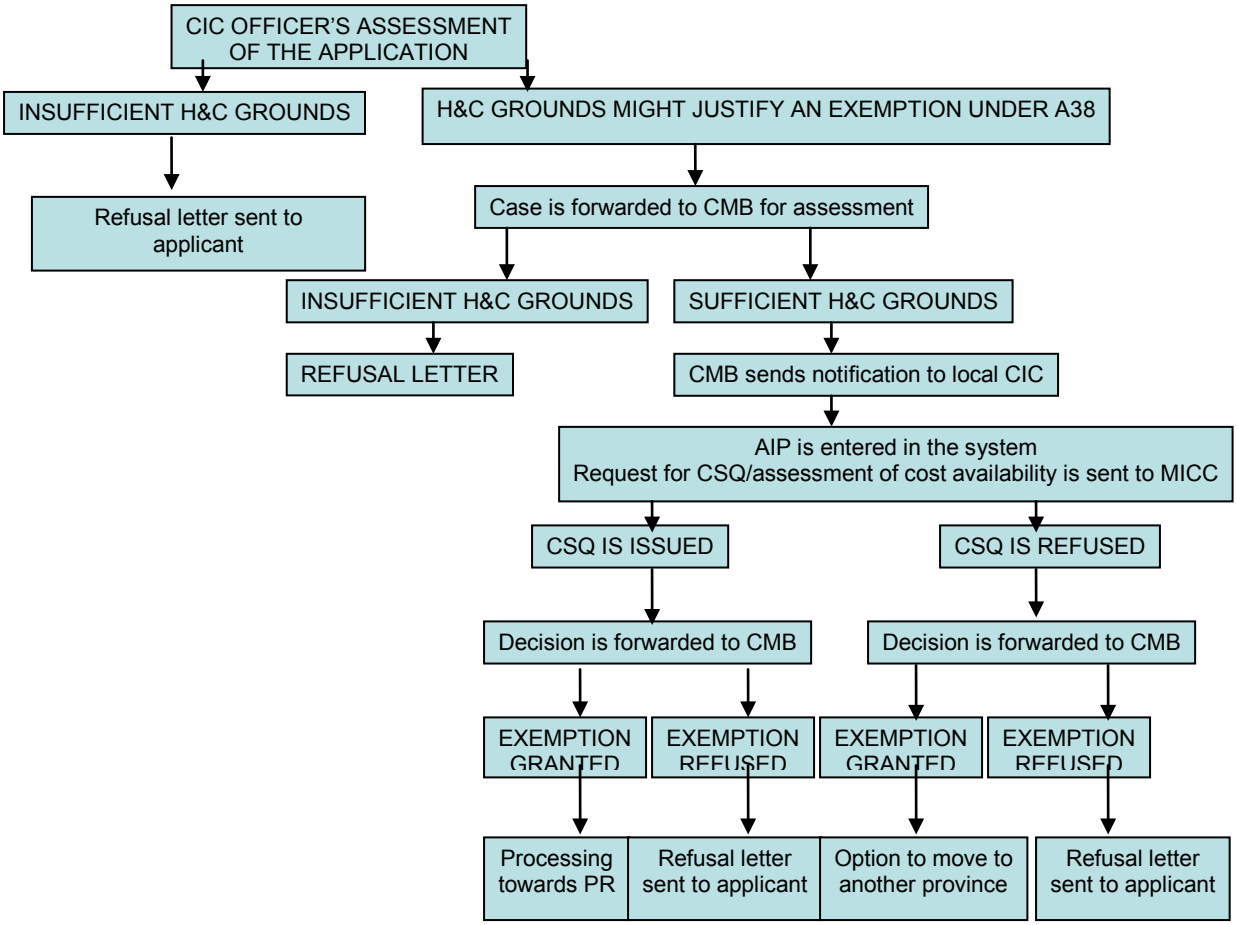
Are all available documents related to the client's criminality included with the referral?

OP 4 The processing of applications that include a request for humanitarian and compassionate or public policy consideration

CASE SUMMARY

Include relevant factors submitted by client. Do not include a recommendation or opinion about whether you think the H&C factors warrant an exemption.

Appendix D Health inadmissibility known by CIC prior to preliminary decision – Process for Quebec cases



Appendix E Health inadmissibility known by CIC after positive Stage 1 decision – Process for Quebec cases