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Humanitarian and Compassionate Applications: A Critical Look at Canadian Decision-Makers' Assessment of Claims from "Vulnerable" Applicants

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Abstract: For many people who have made Canada their home but have uncertain legal status and are ineligible to apply for permanent residence through other channels, the Humanitarian and Compassionate (H&C) application is the only available pathway to permanent residence and stability in Canada. Applications for permanent residence on H&C grounds have become a key component of Canada's immigration system and yet this pathway remains under-researched. Drawing upon extensive desk research and the preliminary analysis of interview data, this article addresses this gap in the scholarship by offering a critical analysis of the H&C program. In it, we begin by discussing the specific challenges that this highly discretionary decision-making process poses for vulnerable applicants and suggest areas for improvement. We then focus on H&C applications and decisions that directly impact children and explain why a change in the Canadian application of the best interests of the child principle is required. Finally, we consider two recent trends in H&C cases: the sharp increase in the number of applications and the increasingly high rates of refusal. Throughout this analysis, we highlight the negative repercussions the current system has on the most vulnerable categories of migrants and the need to better understand these phenomena.



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1. Introduction

Around the world, Canada has earned a reputation as a welcoming country for immigrants and refugees. In 2019, it emerged as the world leader in the resettlement of refugees, ranking first among 26 countries (UNHCR 2021), and that same year, the Organization for Economic Co-operation and Development (OECD) noted that Canada has the most comprehensive and elaborate migration system in the OECD (OECD 2019). In 2019, Canada granted permanent residence to 341,180 individuals, including 48,530 refugees and protected persons (IRCC 2020a). There were also 5075 individuals who received a positive assessment regarding their application for permanent residence on humanitarian and compassionate (H&C) grounds (Migrant Rights Network 2021). Although this category accounted for less than 1.5% of all permanent residents in 2019, over time, it has become a key component of Canada's immigration system since it allows the admission of vulnerable claimants who would not otherwise be accepted under any other immigration program.¹

This article offers a critical analysis of Canadian immigration decisions based on H&C grounds. It is built upon findings from a Canadian study conducted in the context of

¹ Despite the challenges resulting from the COVID-19 pandemic, Canada admitted over 184,500 new permanent residents in 2020. In December 2021, Canada announced it had reached its target and welcomed more than 401,000 new permanent residents in 2021. This is the highest number of newcomers in a year in Canadian history (Canada 2021a).

an international project (the VULNER project) that seeks to investigate how the “vulnerabilities” of migrants are defined in government documents, how they are assessed by decision-makers, and how the legal frameworks and the implementation practices concretely affect vulnerabilities as experienced by the migrants themselves.² Those findings are primarily based on desk research data collected during the first phase of the project (April–December 2020). We also use data from interviews conducted with five civil servants from Immigration, Refugees and Citizenship Canada (IRCC) during the second phase of the project (March 2021–June 2022).³ These five civil servants are all at a senior level or higher and have solid experience (at least five years) processing H&C applications as final decision makers.⁴ At the time of writing this article, interviews with civil servants had been completed while interviews with migrants and “on the ground” practitioners (i.e., lawyers, social workers and NGO workers) were ongoing. We recognize that the experiences and views of migrants and practitioners are key to fully understanding the strengths and weaknesses of humanitarian and compassionate consideration. Such insights will be covered in future publications. We also recognize that immigration officers regularly making decisions on H&C applications may not be best positioned to elaborate upon the more systemic changes needed to improve the H&C program. However, immigration officer interviews are used here to complement desk research content and to bring, when relevant, their unique voice and knowledge into the conversation, thus offering a more nuanced understanding of this complex and under-researched topic.

In what follows, we present and analyze our research findings pertaining to H&C claims, which are strongly connected to the specific focus of our research project (migrant vulnerabilities). While we do acknowledge that the problems with H&C consideration extend far beyond the specific question of vulnerability, our objective here is not to address all issues relating to H&C consideration, but rather to seek to contribute to the limited literature in this field by exploring more deeply some of the key connections between vulnerability and H&C. We start by explaining what humanitarian and compassionate consideration is, why it matters and how an H&C application is assessed. Specific attention is paid to the unique purpose of H&C relief in Canada, that is, mitigating the rigidity of the law by introducing a “safety net” for vulnerable persons, and to the specific challenges that come with a highly discretionary decision-making process in applications such as H&Cs. We then make suggestions for improving the overall assessment of applications coming from “vulnerable migrants”, notably that administrative guidelines issued by IRCC should acknowledge the specific challenges associated with vulnerability (Part 2). We continue

² The Canadian portion of the project is funded by the Canadian Research Council (grant agreement no. 2001-2019-0003) and the Fonds de recherche du Québec—Société et Culture (grant agreement no. 294442) as part of an international research initiative (the VULNER project) which has received funding from the European Union’s Horizon 2020 research and innovation program (grant agreement no. 870845). The VULNER project includes researchers from Europe (Belgium, Germany, Italy and Norway), the Middle East (Lebanon), Africa (Uganda and South Africa) and Canada.

³ During the first phase of the project (April–December 2020), the Canadian team examined over 377 legal and policy documents in their first report, including legislation and regulations, guidelines, manuals, and ministerial instructions produced by government departments. Our study was complemented by an analysis of over 884 cases of the Supreme Court, Federal Court (Trial Division and the Appeal Division), Provincial Courts, and the Immigration and Refugee Board of Canada (IRB). Over 100 secondary sources, among them documents issued by UN agencies, NGOs and lawyers as well as academic publications were also analyzed. The second phase of the project (currently underway) includes interviews with migrants, “on-the-ground” practitioners (mainly lawyers and NGO workers), civil servants from Immigration, Refugees and Citizenship Canada (IRCC) as well as board members from the IRB.

⁴ In the spring of 2021, we signed a “Research Partnership Arrangement” with Immigration, Refugees and Citizenship Canada. This agreement stipulates that IRCC will circulate information to its employees concerning the research project, together with an introduction letter to participants from the research team inviting them to participate to a 60 min interview with us and a list of topics/themes covered during the interview. The agreement also indicates that IRCC will provide the research team with names of IRCC officials interested in and available for an interview with the team. Finally, it specifies that participants interviewed for the project will be offered the option to remain anonymous. In each interview selected for this paper, the immigration officer wished to remain anonymous. To fully ensure their anonymity, we do not specify in this paper when the interview took place. We only refer to immigration officers as “Immigration Officer A”, “Immigration Officer B” etc. (note that participants are NOT presented in the order they were interviewed).

by focusing more closely on H&C applications in which children are directly affected by the decision. We explain the “weight” accorded to the “best interests of the child” in the context of an H&C decision in Canada and we argue that it is highly problematic that the best interests of the child are seen as only one of the many important factors that the decision maker needs to consider when making an H&C decision (i.e., an important but not prevailing factor). We then suggest improvements in this area (Part 3). Finally, we discuss two recent trends in H&C considerations: the sharp increase in the number of applications and increasingly higher refusal rates. We illustrate how these trends are worrying, given the devastating impact of the COVID-19 pandemic on the most vulnerable categories of migrants (Part 4).

2. Processing and Assessment of Humanitarian and Compassionate Considerations and Impacts on Rejected Applicants

Under s. 25 and s. 25.1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), foreign nationals who have lived in Canada with an uncertain status but who have still made Canada their home may obtain permanent resident status if there are sufficient humanitarian and compassionate considerations, including the best interests of any child directly affected, to justify an exemption from any requirement set out in the *IRPA*.⁵ Thus, H&C is “an exceptional measure” allowing the approval of “deserving cases not covered by the legislation” (*IRCC 2017c*).

H&C relief is specifically designed for individuals who are already in Canada, who would not otherwise qualify under any immigration program and who cannot fulfill the requirement that an application be made outside Canada.⁶ There are, however, some restrictions on examination of H&C applications (ineligibility criteria). For instance, the H&C applications of foreign nationals found criminally inadmissible on grounds of (1) “security” (i.e., espionage, subversion, terrorism, danger to the security of Canada, violence that would endanger Canadians and membership in an organization committing espionage, subversion, or terrorism: s. 34 of the *IRPA*), (2) “human and international rights violations” (i.e., acts considered War Crimes or Crimes Against Humanity; s. 35), and (3) “organized criminality” (s. 37) will in principle not be examined.⁷ Moreover, since the coming into force of Bill C-31 in December 2012 (*Protecting Canada’s Immigration System Act*, S.C. 2012, c. 17), refugee claimants’ access to H&C applications has been severely restricted. Individuals who have made a refugee claim may not apply for H&C consideration if less than 12 months

⁵ Section 25(1) of the *IRPA* reads as follows:

25(1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible—other than under section 34, 35 or 37—or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada—other than a foreign national who is inadmissible under section 34, 35 or 37—who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

⁶ Sections 25 (request of a foreign national for H&C considerations) and 25.1 (Minister’s own initiative for H&C considerations) of the *IRPA* should not be confused with s. 25.2 of the *IRPA* (public policy considerations). Section 25.2 deals with public policies implemented by the Minister to grant permanent resident status to groups of people who share common characteristics (see, e.g., the temporary public policy for out-of-status construction workers in the Greater Toronto Area (*IRCC 2021h*)). Such public policies generally have strict criteria, and individuals who do not meet the criteria cannot access the collective measure. Our article does not deal with s. 25.2 of the *IRPA*: it is only focused on the humanitarian and compassionate program under s. 25, which operates on a case-by-case basis.

⁷ In an interview with us, Immigration Officer R noted that, in exceptional cases, officers may however proceed to an examination of H&C considerations coming from inadmissible applicants under ss. 34, 35 and 37 of the *IRPA* if they “think that humanitarian and compassionate considerations really need to be looked at, such as, first instance, if the best interests of a child are at stake or if the person is at risk in their own country of origin”. It should also be noted that foreign nationals found inadmissible on criminality (s. 36 of the *IRPA*), medical (s. 38(1)) or financial (s. 39) grounds, or whose family members are found inadmissible (s. 42), may submit an H&C request to overcome their inadmissibility.

have passed since the date of the last negative decision of the Immigration and Refugee Board (IRB) on their refugee determination or since the date of the last negative decision of the Federal Court concerning their application for leave or judicial review of the IRB decision (*IRPA*, s. 25(1.2)(c)). This 12 month bar does not apply if the persons who are subject to removal would face a risk to their life on the basis that their country of origin is unable to provide adequate medical care or if the “removal would have an adverse effect on the best interests of a child directly affected” (*IRPA*, s. 25(1.21)).⁸

Once it has been determined that an applicant is eligible to have an application assessed, the H&C claim is processed in two stages. First, a humanitarian and compassionate assessment of the requested exemption(s) is completed. The immigration officer conducts an assessment of the application to determine whether H&C considerations justify the granting of the requested exemption(s) from the requirements of the *IRPA* or of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*) (Stage 1) ([IRCC 2014f](#)). A positive Stage 1 assessment puts into effect a stay of removal (s. 233 of the *IRPR*) and allows the applicant to request a work permit, a study permit, or both (s. 207(d) and s. 215(g) of the *IRPR*) ([IRCC 2014c](#)). Second, a final decision is made on the permanent resident application (Stage 2) ([IRCC 2014f](#)).

Since the main objective of an H&C application is to “mitigate the rigidity of the law in an appropriate case” ([Kanthasamy 2015](#), SCC, para. 19) and to provide immigration officers with the flexibility to grant permanent residence to foreign nationals who would otherwise not qualify in any immigration class, a high level of discretion is key in this process. In fact, according to the civil servants interviewed for this project, it is the program in Canada that provides immigration officers making decisions on migrants’ applications with the highest discretionary power. For instance, one interviewee told us: “It’s a highly discretionary process, one that is very specific to the case [...]. You can never predict the outcome because it all depends on the facts of the case” (Immigration Officer S). Another interviewee noted: “The discretion is just so different from officer to officer [...]. I can look at it with my eyes and approve; another person can look at it with their eyes and refuse” (Immigration Officer V).

The need for flexibility in the immigration regime was recognized by Canadian officials as early as 1967 ([Kanthasamy 2015](#), SCC, para. 12). In the House of Commons, the Parliamentary Secretary for the Minister of Manpower and Immigration stated that immigration rules “necessarily are general”, as “[t]hey cannot precisely accommodate all the variety of individual circumstances”, and that inevitably “[t]here will sometimes be humanitarian and compassionate reasons for admitting people who, under the general rules, are inadmissible” ([House of Commons 1967](#), p. 13267). H&C consideration is thus conceived as a unique “safety net” for vulnerable migrants falling through the cracks of the immigration system. Most of the time, H&C is in fact the only avenue available for foreign nationals with uncertain legal status (such as undocumented migrants) to obtain permanent residence in Canada ([Migrant Rights Network 2021](#); [CCR 2021](#); [Goldring and Landolt 2022](#)).⁹ For example, under s. 230 of the *IRPR*, the Minister of Public Safety

⁸ Pursuant to s. 25(1.01) of the *IRPA*, a “Designated Foreign National” is subject to a five-year ban on H&C applications. “Designated Foreign Nationals” are members of a group of people who arrive in Canada together and are called “irregular arrivals” by the Minister of Public Safety and Emergency Preparedness. This ban may be invoked, for example, if the Minister suspects that they have been brought to Canada through human smuggling or trafficking with the help of a criminal organization or terrorist group. The implications of being a “Designated Foreign National” are significant. For example, all “Designated Foreign Nationals” over the age of 16 face mandatory detention for a minimum of two weeks, and if they cannot establish their identity within two weeks, they will be detained for an additional six months, with the potential for another six months after that, with no judicial review of their detention. Further, designated claimants who are denied refugee status have no access to the Refugee Appeal Division. For more on this topic, see: ([Neylon 2015](#); [Atak et al. 2018](#); [Labman and Liew 2019](#)).

⁹ Interestingly, the Federal Court recently noted in *Hebberd* (2022) that officers should not rely on an alternative immigration stream that is not feasible or realistic to refuse an H&C application:

[10] In the face of evidence indicating that a certain alternative immigration stream is not viable, an Officer’s identification of and reliance on that alternative stream in assessing an H&C application

and Emergency Preparedness may impose a Temporary Suspension of Removals (TSR) to countries where there is a generalized risk affecting the entire civilian population (armed conflict, environmental disaster, etc.). Individuals who are subject to a TSR and who are already in Canada may apply for permanent residence on H&C grounds.¹⁰ As stated by the H&C Program Delivery Instructions, H&C is also a particularly viable option for failed refugee claimants, that is, individuals who were denied refugee protection by the IRB because they were unable to prove a personal risk of persecution (IRCC 2017a).¹¹

In an H&C application, individuals may present any facts and circumstances that they consider to be sufficiently compelling to warrant H&C relief, such as the current conditions in their country of origin, their current establishment in Canada, their family ties, their physical or mental health concerns, or the best interests of any children directly affected by the H&C decision (IRCC 2016c).¹² It is also worth noting that IRCC officers are not limited to assessing factors submitted by applicants and can consider and weigh any information before them including, for example, the applicant's immigration history or criminal record (ibid). Thus, what warrants relief will vary greatly depending on the facts and context of each case.¹³ The test to be met in every case is the following: is the requested exemption justified on a humanitarian and compassionate basis?¹⁴ In *Kanthasamy* (2015), the Supreme Court of Canada clarified how the H&C assessment should be conducted, in other words,

may render their decision unreasonable [...]. I am of the opinion that it does so in this instance. The failure to address Ms. Heberd's submissions leaves doubt as to whether the Officer fully grasped the nature and context of the H&C application or recognized Ms. Heberd's position that the H&C application was the only avenue available to her to obtain permanent residence in Canada.

[11] The Respondent submits the Officer was under no obligation to assess the likelihood of obtaining permanent resident status in a subsequent application [...]. I do not disagree. However, the issue in this instance is not one of assessing the likelihood of success through an alternative stream. It is the Officer's failure to consider submissions arguing that an alternative stream is simply not available. This was a key issue raised within the context of the H&C application and the failure to consider and weigh this factor as part of the Officer's global assessment undermines the reasonableness of the decision.

¹⁰ Under current provisions of the IRPA, individuals from countries affected by moratoria on removal (TSRs) may make a refugee claim (s. 96 or s. 97), apply for permanent residence through the in-Canada spousal category (s. 12) or apply on H&C grounds (s. 25), but it is not uncommon that the latter is the only option available for applicants. For example, when the TSR affecting Burundi, Rwanda and Liberia was lifted in 2009, a policy was adopted to grant an administrative deferral of removals (ADR) to nationals of these countries while their applications for permanent residence on H&C grounds were being assessed (IRCC 2013). The same policy was adopted when the TSR affecting Haiti and Zimbabwe was lifted in 2014 (IRCC 2016d). As of January 1st, 2022, there was a TSR in place for 3 countries (Afghanistan, the Democratic Republic of Congo and Iraq), and there was an ADR in place for 11 countries (certain regions in Somalia, the Gaza Strip, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, Burundi, Venezuela and Haiti). However, as highlighted by the Canadian Council for Refugees (CCR), "[i]n mid-2021, a pattern has emerged of refusals of applications for [H&C] consideration from nationals of moratoria countries". The CCR notes that these refusals are "particularly concerning" because, despite these negative H&C decisions, nationals of moratoria countries continue to live in Canada for several years with a very uncertain status. For more on this specific topic, see: (CBSA 2020; CBSA 2021; CCR 2021). For more on refusals of H&C applications generally, see Part 4 of this paper (below).

¹¹ For more on this subject, including historical context and critical H&C reform propositions, see [Davis and Waldman 1994](#).

¹² Program Delivery Instructions used by IRCC staff provide more details on relevant factors that may be raised by applicants. They state that a request for H&C consideration may be based "on any relevant factors including, but not limited to: establishment in Canada for in-Canada applications; ties to Canada; the best interests of any children directly affected by the H&C decision; factors in their country of origin including adverse country conditions; health considerations including inability of a country to provide medical treatment; family violence considerations; consequences of the separation of relatives; inability to leave Canada has lead to establishment (in the case of applicants in Canada); ability to establish in Canada for overseas applications; any unique or exceptional circumstances that might merit relief" (IRCC 2016c).

¹³ The Stage 1 assessment, however, must not duplicate the refugee determination process set out in ss. 96 and 97 of the IRPA. Section 25(1.3) specifies that the role of IRCC officers making a decision on an H&C application is not to determine if a person is at risk of persecution, although it does not preclude them from considering evidence of hardship affecting the applicant.

¹⁴ The standard of proof when reviewing the evidence is the balance of probabilities (IRCC 2017b). This standard of proof poses the following question: is the information presented likely to be true?

how to consider whether relief is justified by humanitarian and compassionate considerations. The Court held that a segmented approach to assessing humanitarian applications was inappropriate and stated that immigration officers reviewing H&C applications “must substantively consider and weigh *all* the relevant facts and factors before them” (para. 25). In sum, there must be a “global assessment” of all relevant considerations put forward by the applicant rather than an analysis “in isolation”, which means that each H&C factor should not be separately or individually considered but weighed cumulatively (para. 28).

The fact that IRCC officers must proceed to a global assessment of all factors presented before them does not mean that they must consider all factors on an equal footing. In fact, the weight given to the different factors is at the officer’s entire discretion, which leads some observers to conclude that the criteria for assessment in an H&C application are “highly malleable” (Dauvergne 2013, pp. 706–7; see also CCR 2006; CCR 2021). This malleability has important consequences for “vulnerable” applicants. On the one hand, it is a good thing that the H&C program allows for the recognition of different types of vulnerabilities among applicants since, as we have shown elsewhere (Kaga et al. 2021), the concept of “vulnerability” in Canadian law and policy is difficult to grasp and define.¹⁵ Indeed, as one immigration officer noted, “We really [...] acknowledge vulnerability of all kinds in how we interpret section 25(1) of the *Act*” (Immigration Officer R). On the other hand, and not surprisingly, our interviews with IRCC civil servants illustrate how these officers have very different views (and understandings) of who is a “vulnerable” migrant.¹⁶ Even though the sole recognition by immigration officers that an applicant is “vulnerable” will not—in and of itself—lead to a positive decision,¹⁷ the large freedom that immigration officers have in assessing these applications, and more particularly in prioritizing one “vulnerability factor” over the other, is likely to influence the final outcome of the decision and to lead to important variations in decisions for a same application.

To put it differently, the wide margin of discretion that immigration officers have in assessing which vulnerability should prevail over the other can create space for potentially subjective and unpredictable decisions. As one interviewee told us, “At the beginning, as a decision-maker, I struggled a lot with that, because I could understand that another decision-maker could take a different decision on a specific set of factors, but I could not understand why I, with the same view of things, could one day approve, one day refuse a similar case” (Immigration Officer S). This variability is problematic for applicants given the time, effort and money involved in the preparation of an H&C application. Indeed, applying for permanent residence on H&C grounds is a costly and complicated process, which is usually seen as necessitating the help of a lawyer (even though not every applicant

¹⁵ It should be noted, however, that there are a few examples in the case law where the vulnerability of applicants has been explicitly underlined by the Federal Court. See specifically *Nwaeme* 2017 (elderly woman with mental health and mental capacity problems); *Ramprashad-Joseph* 2004 (elderly); *Bailey* 2014 (poor and disabled); *Begum* 2013 (impoverished woman); *Okoye* 2018 (bisexual man with three children).

¹⁶ For example, Immigration Officer R noted: “It’s a personal feeling [but for me] the most vulnerable people are children, women, and the elderly [...], these are the people that need the most help”. Immigration Officer S told us that a vulnerable applicant is “probably somebody who does not understand the proceedings [...] what’s happening and what is the case to be met or what needs to be presented”. This officer also referred to individuals without status and who are in a situation that puts them “at risk” (such as abuse at work) as “particularly vulnerable”. For Immigration Officer T, vulnerability is a broad concept which “may include” unaccompanied minors or pregnant women, but also “a person who has experienced trauma, who fears authorities in their country of origin”. For Immigration Officer U, children are particularly vulnerable applicants: “Children that are cancer patients, for example. And they’re facing removal with their parents to country X. These are the ones that stand out. Or children with special needs who get a lot of support here and they’re potentially facing removal. And they might be Canadian born but they’d be going back with the parents who are foreign nationals [...]”. For Immigration Officer V, it is “basically anyone looking for a better life outside of their countries of origin, for themselves, for their children, for their future family. They’re vulnerable. They’re leaving their homes. They’re going somewhere different. They have mostly no English skills, so they come, and they don’t know how to speak to even a representative that could help them apply for refugee status, or any other stream of immigration that could legalize their stay in Canada”. At the same time, this interviewee indicated that “the most vulnerable” are “the children who come with them” and “women who experience sexual violence, such as female genital mutilation” in their countries.

¹⁷ For more on this topic, see: (Kaga et al. 2021).

can afford the services of legal counsel).¹⁸ It is also a “last resort” measure that comes with its own risks for some of the most vulnerable applicants, including “women fleeing gender violence, homeless people, and other undocumented families”, since failed applicants may be deported from Canada to dangerous, turbulent environments, with very negative consequences for them (Migrant Rights Network 2021).¹⁹ Finally, it is worth noting here that recourses after a negative decision are extremely limited. In fact, applicants may submit a request for reconsideration of their negative decision, but while in practice an officer has discretion to reconsider a final H&C decision, such reconsiderations are undertaken only “in exceptional cases” (IRCC 2014h). The only other recourse for the applicant is to seek judicial review of the decision at the Federal Court (IRPA, s. 72(1)), but judicial review is a complex and exhaustive process with little chance of success (Rehaag 2012; Nakache and Blanchard 2014; Purkey 2022).²⁰ For all these reasons, it is particularly essential that H&C decisions are as consistent as possible.

One way to ensure more consistency in H&C decisions would be to make an explicit reference to “vulnerable applicants” in IRCC Program Delivery Instructions (currently, the instructions do not refer to vulnerable applicants: see IRCC 2017c), and to provide immigration officers with specific tools to recognize and address vulnerabilities in their assessment of H&C applications. As highlighted by the Supreme Court in *Baker* (1999, para. 72), IRCC operational instructions and guidelines are a “useful indicator of what constitutes a reasonable interpretation of the power” conferred by s. 25 of the IRPA, and as such, “are of great assistance to the Court in determining whether the reasons of [the H&C officer] are supportable”.²¹ Yet, it has been repeatedly stated in the case law that when statutory discretion is given, it cannot be unduly limited by policy guidelines (Régimbald 2016; see also IRCC 2016a). As Justice Ahmed noted recently in *Kaur* (2019, FC, par. 32), “it is trite law that administrative guidelines are not binding and cannot be applied in a manner that unduly fetters a decision maker’s discretion, unless they constitute delegated legislation”. This principle was stated in many decisions before, including *Singh* (2014, FC, para. 12), in which Justice Roy insisted that “[g]uidelines can only be of limited use because they cannot fetter the discretion given by Parliament”, and *Hawthorne* (2002, FCA, para. 9), in which Justice Décaré emphasized that guidelines should not be interpreted as “hard and fast rules” because they simply are “an attempt to provide guidance to decision makers when they exercise their discretion”.²² Nonetheless, soft law instruments such as guidelines are “situated at this juncture between legal rule making and discretionary decision making”, and thus play an important role as they “validly influence a decision-maker’s conduct” (Sossin and van Wiltenburg 2021, p. 630). Scholarly works also consider administrative

¹⁸ A \$550 processing fee must be included with the H&C application, and a \$500 right of permanent residence fee must be paid if the H&C is successful. Additional fees are also required if the application includes a spouse and/or one (or several) dependent child(ren) (IRCC 2021c). Those fees are disproportionately affecting vulnerable applicants.

¹⁹ As noted by the Supreme Court of Canada in *Vavilov* (2019), “concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh” (par. 134).

²⁰ Applicants receiving a refusal on their permanent residence application under humanitarian and compassionate grounds may file an Application for Leave and for Judicial Review of the refusal at the Federal Court of Canada if they believe that the decision is unreasonable (i.e., that there is an error in the decision-making process). However, the deadline to file a leave application is very short (15 days from the date that the refusal letter was received) and the Federal Court process can take many months. It is also worth noting here that the Federal Court process comprises of two steps: first, the leave application (permission to go to court) and second, the judicial review hearing. It is only if applicants get permission (which is rarely granted) that they can argue their case within a hearing at the Federal Court. If the hearing is successful, then the H&C application is generally sent back to the IRCC office for a redetermination based on the Federal Court decision. A successful judicial review cannot be conducted without the assistance of an experienced lawyer who can carefully determine if it is worth contesting the decision and who ensures that the file is processed correctly.

²¹ See also *Thamotharem* (2007, para. 55), wherein the Federal Court of Appeal noted that “[e]ffective decision making by administrative agencies often involves striking a balance [...] between the benefits of certainty and consistency on the one hand, and of flexibility and fact specific solutions on the other”.

²² See also: *Thamotharem* 2007, FCA, paras. 62–72; *Herman* 2010, FC, para. 28.

guidelines as one of the key means of ensuring that consistent and fair decisions are made (see, e.g., Houle 2008; Houle and Sossin 2006; Filion 1979).

In this context, IRCC should not only make a specific reference to “vulnerable” migrants in its guidelines, but also promote among its employees a more consistent use of such guidelines.²³ This was recently reminded by the Supreme Court of Canada in *Vavilov* (2019, para. 129), where the Court noted that “administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions”, and more importantly, that “[t]hose affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker”. While we recognize that conducting an H&C assessment is a complex task and that the program operates on a case-by-case basis, coherence and consistency are paramount for applicants and provide the ultimate safeguard against potentially arbitrary decisions. Interestingly, most civil servants interviewed for this project also indicated that they currently use guidelines from a different institution (the Immigration and Refugee Board) to help them make their H&C decision when a “vulnerable” claimant is involved.²⁴ However, as one interviewee noted, “at the end of the day, it’s not directly applicable to IRCC, because the process is not the same as with the IRB” (Immigration Officer T). In the same line, one interviewee noted that more could be done to explain the vulnerabilities to the officers (Immigration Officer S). It is thus fair to conclude that immigration officers would benefit from more guidance provided by IRCC in their specific field of practice—when they render H&C decisions. In line with this change, a common approach at IRCC may be further developed through mandatory training.²⁵

In sum, the flexibility provided by H&C applications allows the Canadian government to address the multiple vulnerabilities of migrants and to provide legal protection to individuals who would otherwise fall through the cracks of the system. However, the highly discretionary decision-making process also creates challenges related to how immigration officers assess and weigh the H&C factors and can lead to important variations in immigration decisions, with real life consequences (such as removal to the country of origin) for the most vulnerable applicants. One way to address this problem would be to add a specific section on “vulnerable migrants” in IRCC Program Delivery Instructions, which should contribute to a better identification and assessment of all key vulnerability factors. Even if these instruments are not perfect and deserve improvements, they are currently the best way to ensure that decisions are fair and consistent for all applicants. Another major issue, to which we now turn, is the weight given to the best interests of the child in H&C decision making.

²³ This is a good practice among administrative institutions, as they “routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers” (*Vavilov* 2019, para. 130).

²⁴ In 2006, the Immigration and Refugee Board issued the “Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB”, amended in 2012 (*IRB 2012*). The Guideline on Vulnerable Persons defines vulnerable persons in the context of procedures before the IRB as “individuals whose ability to present their cases before the IRB is severely impaired”. It includes a non-exhaustive list of persons who may be vulnerable: “Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity”. IRB guidelines are not mandatory but “provide guiding principles for adjudicating and managing cases” (*IRB 2022*). In fact, “decision-makers are expected to apply them or provide a reasoned justification for not doing so” (*ibid*).

²⁵ In *Vavilov* (2019, para. 130), the Supreme Court pushed for the use of a wide variety of resources by administrative bodies: “Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making”.

3. Ensuring That the Best Interests of the Child Prevail in Any Assessment of H&C Applications

In Canada, children have long been recognized as a “vulnerable group”. As highlighted by the Supreme Court of Canada in several of its decisions, the “inherent vulnerability of children” is now well established and has “deep roots in Canadian law” (*A.B.* 2012, para. 17; *M.M.* 2015, para. 262). As Justice Martin also recently noted, children are “members of a group made vulnerable by dependency, age, and need” and therefore “merit society’s full protection” (*Michel* 2020, para. 77). Canadian law is based on the principle of the “best interests of the child”, a key principle derived from the *Convention on the Rights of the Child* (1989) to which Canada is a party (since December 1991). The concept of the child’s best interests is complex, and it is beyond the scope of this paper to address its many dimensions (for more on this topic, see [United Nations 2013](#)). Suffice it to say here that this principle gives children the right to have their best interests assessed and taken into account as a primary consideration in all actions or decisions that concern them, both in the public and private sphere, and that the best interests of the child must be determined on a case-by-case basis, considering the child’s personal context, situation and needs. Thus, courts, administrative authorities at all levels, legislative bodies, as well as private and public entities that provide social services must consider the best interests of the child in all actions concerning children (i.e., acts, conduct, proposals, services, procedures, decisions, and any other measures that concern children directly or indirectly).²⁶ The “best interests of the child” principle has many applications, depending on its context. In what follows, we focus on the “best interests of the child” in the immigration context, and more particularly, in the H&C context.

The *IRPA* makes specific reference to the best interests of the child in only a handful of provisions, including s. 25.²⁷ Relevant passages of this section read as follows:

25. (1) Subject to subsection (1.2), the Minister must [...] examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[...]

(1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national

(a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or

(b) whose removal would have an adverse effect on the best interests of a child directly affected.

H&C decisions are extremely important for children, “as they represent in some circumstances the only provision in the immigration legislation to allow them to reunite or remain with family members, including parents” ([CCR et al. 2008](#), p. 2). Canadian courts have recognized that the “best interests of the child” should be given careful consideration in the exercise of H&C discretion by an IRCC officer. The most important case is the ruling in *Baker* (1999), where the Supreme Court of Canada noted:

²⁶ Article 3(1) of the *Convention on the Rights of the Child* provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

²⁷ The *IRPA* makes specific reference to the “best interests of the child” in the following provisions: s. 25(1) and (1.21)(b) (H&C considerations—request of a foreign national); s. 25.1(1) (H&C considerations—Minister’s own initiative); s. 28(2)(c) (residency obligation of permanent residents); s. 60 (detention of minor children); s. 67(1)(c) (appeal before the Immigration Appeal division); s. 68(1) (stay of a removal order); s. 69(2) (Minister’s appeal before the Immigration Appeal Division respecting a permanent resident or a protected person).

[74] [...] Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H&C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) [now s. 25 of the *IRPA*] judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values.

In *Hawthorne* (2002), the Federal Court of Appeal addressed the situation of a teenage girl whose mother was being deported from Canada. In overruling the immigration officer's negative decision on the H&C application, the Court of Appeal stated:

[4] The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer either from her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interest of the child.

It is thus only by carrying out a full and proper "best interests of the child" determination that an immigration officer can really assess where the best interests of the children lie and, consequently, consider both the "benefit" and the "hardship" at stake for any child/children involved in the H&C decision. In *Somera Duque* (2007), the Federal Court of Appeal also observed:

[32] It is true that the best interests of the child cannot be assessed in a vacuum [...] in the context of an H&C application [and] must be assessed in a reasonable manner. Where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. The applicable Minister's guidelines in this instance [...] provide that a child's emotional, social, cultural and physical welfare should be taken into account.

[33] I find that there is a defect in the process by which the Officer's conclusions were drawn in respect to the best interests of the child and as a result, the interests of the child were minimized. Consequently, the Officer failed to accord sensitive consideration to the best interests of the child. I am satisfied that this constitutes an unreasonable exercise of discretion and warrants the Court's intervention.²⁸

Given the importance in Canadian immigration case law of the principle of the best interests of the child, the IRCC has prepared Program Delivery Instructions aimed specifically at providing guidance to immigration officers in this area ("Humanitarian and compassionate assessment: Best interests of a child": [IRCC 2016b](#)). Those guidelines specify how an

²⁸ In addition to the above cases, which set out the main principles surrounding the best interests of the child in H&C applications, Canadian courts have also ruled that immigration officers must examine the best interests of all children concerned—not just Canadian-born children or children who are the applicants, but also children living overseas (for example, a child outside Canada who is being supported by a parent who is in Canada). However, the onus is on the applicant to raise the issue clearly and provide the necessary evidence. Courts have also ruled that it is unreasonable and insufficient for an immigration officer to not consider the best interests of the child by simply stating that it is up to the parent to decide whether to take the child with him/her, if the parent is removed. For more on this topic, see: ([Corrigan and Mejia 2020](#), p. 6); *Owusu* 2004, FCA, paras. 5–10.

H&C application should be assessed when the best interests of a child are at stake.²⁹ One passage deserves to be quoted at length:

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 best interest of a child is only one of many important factors that the decision maker needs to consider when making an H&C decision that directly affects a child. [emphasis in original]

This passage is consistent with the case law. Indeed, Canadian courts have consistently maintained that the best interests of any child directly affected in immigration decisions is only one of the many important factors in an H&C application. In *Baker* (1999), for example, the Supreme Court indicated that although decision makers should give “substantial weight” to the best interests of the child, “that is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim even when children’s interests are given this consideration” (para. 75). Three years later, the Federal Court of Appeal in *Legault* (2002) specified that the “mere mention” of a child’s best interests is not sufficient, and that such interests must be “examined with care and weighed with other factors” in light of the evidence (para. 13). However, it also emphasized that *Baker* did not create a presumption that the best interests of children should prevail (ibid). Even when strong evidence has been presented, “an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result” (*Kisana* 2009, FCA, para. 24). In short, even though Canadian courts have cautioned decision makers to take the best interests of children into account when exercising their discretionary powers in an H&C decision, this consideration is not seen as having necessarily a higher value than other considerations. In other words, the obligation of IRCC officers is limited here to the sufficient consideration, identification, and assessment of the best interests of a child directly affected, as well as to the duty to give them substantial—but not primary—weight in the H&C determination.

The position taken by Canadian courts on the “best interests of the child” (i.e., a substantial but not a primary consideration) is not aligned with Canada’s international obligations, particularly art. 3(1) of the *Convention on the Rights of the Child*, which specifies that the best interests of the child shall always be a primary consideration. Not surprisingly, this position has been the subject of numerous critiques. For example, as early as 1995, the United Nations Committee on the Rights of the Child wrote about Canada that it “regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugee or immigrant children”

²⁹ The IRCC Guidelines (IRCC 2016b) start by highlighting that an H&C decision “must include an assessment of the best interests of any child directly affected by the decision”, which means in this context “a Canadian or foreign-born child (and could include children outside Canada)”. They continue by stating that “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” (a grandparent as the primary caregiver for instance), and that it must be “sufficiently clear from the material submitted that an application relies in whole, or at least in part, on [the best interests of the child] factor”. The guidelines also note that, “in assessing H&C submissions, the decision makers must be ‘alert, alive and sensitive’ to the best interests of the children” (referring to *Baker*) and should “bear in mind that ‘[c]hildren will rarely, if ever, be deserving of any hardship’” (referring to *Hawthorne*). They emphasize that the outcome of an H&C decision that directly affects a child “will always depend on the facts of the case” and that “circumstances which may not warrant humanitarian and compassionate relief when applied to an adult may nonetheless entitle a child to relief”, since “children may experience greater hardship than adults faced with a comparable situation” (referring to *Kanthisamy*). IRCC Program Delivery Instructions also state that “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; 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” (IRCC 2016b).

(United Nations 1995, para. 13). In 2007, a Canadian Standing Committee analyzing Canada's effective implementation of its international obligations also raised a number of concerns regarding the country's respect for the principle of the best interests of the child. The *Standing Senate Committee on Human Rights* (2007, p. 137) noted that "the best interests of the child should always be a primary consideration in immigration decisions affecting children". It is worth remembering here that Canada signed (in May 1990) and ratified (in December 1991) the *Convention on the Rights of the Child*, and that the *IRPA* provides that Canadian law "is to be construed and applied in a manner that [...] complies with international human rights instruments to which Canada is signatory" (s. 3(3)(f) of the *IRPA*). As the Federal Court of Appeal noted in *De Guzman* (2004):

[75] [T]he words "shall be construed and applied in a manner that complies with" are mandatory and appear to direct courts to give the international human rights instruments in question more than persuasive or contextual significance in the interpretation of the *IRPA*. By providing that the *IRPA* "is to be" interpreted and applied in a manner that complies with the prescribed instruments, paragraph 3(3)(f), if interpreted literally, makes them determinative of the meaning of the *IRPA*, in the absence of a clear legislative intent to the contrary.

If we follow the Federal Court of Appeal's reasoning in *De Guzman* that a legally binding international human rights instrument to which Canada is signatory is determinative of how the *IRPA* must be interpreted and applied in the absence of a contrary legislative intention, then the principle of the best interests of the child should be regarded as a primary consideration in any H&C decision affecting children (for more scholarly analysis on this topic, see *Aiken and Scott 2000*; *Collins 2010*; *Chan and Stone 2016*; *Pobjoy 2015*; see also *CCR et al. 2008*, p. 18). In other words, when it is demonstrated, on a balance of probabilities, that the children's best interests militate in favor of a positive H&C, then there should be a presumption that H&C relief be allowed. Immigration officers should not treat any other consideration as inherently more significant than the best interests of the child.

Good decisions are rendered each year by immigration officers who demonstrate genuine sensitivity towards children's interests, but there are persistent problems in the understanding and application of the best interests of the child in H&C proceedings. One of these problems, which has been the focus of this section, is the appropriate weight to be given to best interests of the child determinations in H&C. As previously discussed, the best interests of the child cannot remain in assessment of H&C applications "a factor amongst others": they must prevail over all other factors. This means, concretely, that Program Delivery Instructions should be modified to clearly indicate that the best interests of the child must be a "primary consideration" in H&C decisions. This is not to deny that broader reforms of the system are needed. In fact, we believe that statutory amendments should ultimately be made to the *IRPA* to align the language of section 25(1) with Canada's international obligations under the *Convention on the Rights of the Child*. Moreover, reforms such as ongoing training of H&C officers on best interests of the child determinations and regular monitoring of decision making to ensure that the best interests determination is "done, and done appropriately" should be pursued (*CCR et al. 2008*, p. 19). Nonetheless, our suggested changes to the Program Delivery Instructions would constitute an important step in the right direction. IRCC officers would also strongly benefit from clearer instructions on how the relevant factors should be assessed, thus resulting in more consistency in decision making.

4. A Worrying Trend: An Increase in Refusal Rates Paralleling an Increase in the Number of H&C Applications

Since the Supreme Court's decision in *Kanthasamy* (2015), there has been a notable increase in the number of H&C applications submitted yearly. In 2016, there were approximately 8045 applications on H&C grounds. That number reached 9135 in 2018 and 11,105 in 2020. Complete data for the year 2021 are not available yet, but early figures indicate that it will certainly be a record year, as 8970 applications had been completed in the first quarter

of 2021 ([Migrant Rights Network 2021](#); [Toronto Star 2021](#)).³⁰ Not surprisingly, this new situation is generating a backlog of H&C claims, as the number of immigration officers does not seem to have increased at the same pace as the number of applications ([The Canadian Press 2021](#)).³¹ In January 2022, the Canadian government estimated its current processing times for H&C cases under review at 20 months, and for applicants who had not applied yet, this time could range from 22 to 36 months ([Canada 2022](#)).

Backlogs and longer processing times have negative repercussions for both applicants and immigration officers assessing claims. Most interviewees told us that their workload with regard to H&C applications has substantially increased over the years.³² In particular, one officer noted that the pressure to render fast decisions is impacting how they work. For example, to meet their workload targets within the prescribed timelines, some officers might avoid setting up lengthy interviews with H&C applicants or might decide to prioritize “easier” cases that will not require interviews.³³ For applicants, delays also mean greater risk of being removed from Canada while awaiting a decision. Indeed, removal decisions can be deferred on humanitarian and compassionate grounds, but only for applicants whose H&C application has received Stage 1 approval on its merits. Thus, there is no stay of removal for H&C applicants who are under a removal order and who are awaiting a Stage 1 decision: they must leave on or before the date stated on their removal order, unless they apply for—and successfully receive—a stay of removal from the Federal Court (s. 233 of the *IRPR*; [IRCC 2021c](#); [IRCC 2021d](#); [IRCC 2014d](#)).³⁴ This rule is highly problematic, according to the Canadian Bar Association (CBA), given the long waiting times—more than 12 months in many cases—for a Stage 1 determination, and since the IRCC does not always communicate those Stage 1 decisions in a timely manner:

Current practices needlessly subject applicants and their families to the emotional and financial hardship of impending separation [...]. Removal steps, deferral requests and stay applications also put an unnecessary strain on the limited resources of the [government] and Federal Court [...]. And while people who are removed from Canada before their Stage 1 decision are theoretically allowed to return once it has been granted, there is no guarantee that their return will be authorized. Evidence shows that those who have been removed from Canada are far less likely to get a favourable Stage 1 decision in the first place ([CBA 2019](#)).

³⁰ These data were initially obtained by Jenny Kwan (immigration affairs critic of the New Democratic Party) through an access to information request ([Toronto Star 2021](#)).

³¹ Immigration lawyers, such as [Meurrens \(2016\)](#), had already predicted this issue a few years ago:

Considering that the Supreme Court of Canada recently ordered [in *Kanthasamy*] that IRCC stop being so restrictive in its processing of these applications, it will be interesting to see if there is a resulting increase in H&C applications, and what sort of backlogs, if any, start to form.

³² For example, Immigration Officer R highlighted that the workload of immigration officers is now approximately 35 cases per trimester, instead of 8 to 10 cases per month a few years ago. This same officer also explained that there have been changes in the calculation method: if an application includes six people—for example, two parents and four children—it is now only compiled as one case rather than six. According to this officer, the targets are not reasonable because they do not sufficiently consider the complexity of some applications. Immigration Officer S and Immigration Officer U also told us that the targets set are not “completely logical” and that it’s “quite a lot of work” for immigration officers, but both noted that immigration officers can always go to their manager and explain their situation.

³³ Even if the right to be heard is “[o]ne of the fundamental components of natural justice”, this right does not encompass the right to an interview in the H&C context, as it is primarily a paper-based process ([IRCC 2014a](#)). When credibility issues are central in a case, officers are nonetheless invited to set up an interview with the applicant, as a poor credibility assessment could be under scrutiny in the event of a request for judicial review at the Federal Court ([IRCC 2014b](#)). Of note, IRCC Program Delivery Instructions encourage immigration officers to use “less contentious” phrases when recording their reasons, especially if no interview was completed ([IRCC 2014g](#)). For example, it is stated that phrases such as “I am not satisfied” should be used rather than “I do not believe”, as the latter suggests that credibility is being questioned and that it has been “fully investigated”.

³⁴ It is worth noting that this policy applies to all applicants, including failed refugee claimants. A conditional removal order is issued to rejected refugee claimants in Canada. It comes into force 15 days after the refugee claim has been rejected (s. 49(2) of the *IRPA*).

As highlighted by the CBA, the regulations should be amended so that the removal of inadmissible applicants can be deferred until a Stage 1 approval has either been granted or denied. In fact, in other applications—such as a Pre-Removal Risk Assessment (PRRA)³⁵—deferrals of removals are already happening: the applicant benefits from a stay of the removal order (s. 232 of the *IRPR*). It is thus difficult to see why H&C applicants must endure the risk of being deported during their assessment.

In the last two years, refusal rates for H&C applications have also increased dramatically. Between 2016 and 2019, refusal rates ranged from a low 35% to a high 41%. In 2020, however, that rate reached 57%, and preliminary data for the first quarter of 2021 reveal a refusal rate of 70% (Migrant Rights Network 2021; Toronto Star 2021). This trend is worrying given the devastating impact of the COVID-19 pandemic on many migrants in countries of destination such as Canada. Asylum seekers and refugees, migrant workers in low-skilled occupations and undocumented foreign nationals have traditionally been identified as “vulnerable populations” owing to the longstanding structural barriers and inequalities that they continually face in the country of destination. However, “[t]heir vulnerabilities have become more conspicuous and exacerbated since the advent of the Coronavirus disease of 2019 (COVID-19) pandemic” (Mukumbang 2021, p. 1; see also Guadagno 2020; WHO 2020; McAuliffe and Triandafyllidou 2021, pp. 151–72). As an example, the International Labour Organization (ILO) has illustrated how states’ measures in response to the pandemic, including lockdowns, travel restrictions and border closures, have increased the vulnerability of migrant workers, especially those serving on the front lines of the pandemic who are carrying out essential jobs concentrated in sectors of the economy with high levels of informal or unprotected work (health care, domestic work, construction, transport, services, agriculture and agro-food processing) (ILO 2021).

Canada is no exception in this regard. Since COVID-19 started in this country, research has shown that migrant workers “shoulder a disproportionate burden of economic, social, and health risks on account of their ‘temporary residency status’ in Canada” (Vosko and Spring 2021; see also Haley et al. 2020; Landry et al. 2021). Canadian courts recently recognized this disproportionate burden shared by migrant workers and emphasized that their contribution might warrant relief on a humanitarian and compassionate basis. In *Mohammed* (2022), which was a judicial review of a decision rendered by the Immigration Appeal Division (IAD) of the IRB regarding the applicant’s failure to comply with the permanent residence requirements under s. 28 of the *IRPA*, the Federal Court stated that the “moral debt owed to immigrants who worked on the frontlines to help protect vulnerable people in Canada during the first waves of the COVID-19 pandemic cannot be understated”, and that this contribution should have been given “the weight it deserved” by the IAD (par. 43). The Court concluded by underlining that the IAD did not “substantively assess all of the H&C factors through a lens of compassion, as is required by the jurisprudence” (par. 44).³⁶ In Canada, recent research is also calling for the inclusion of international students as

³⁵ Under s. 112(1) of the *IRPA*, individuals in Canada may apply for a PRRA if they are subject to a removal order that is in force. The PRRA assessment is completed by IRCC immigration officers who must determine, pursuant to s. 115(1) of the *IRPA*, whether a person would be at risk of persecution or at risk of torture, or of any other cruel and unusual treatment or punishment, if they would be removed to their country of origin. A PRRA involves a formal risk assessment that does not use the same criteria as the H&C assessment, although it is not uncommon that people submit both PRRA and H&C applications simultaneously (IRCC 2014e). As we explained in Part 2, the H&C assessment “is not limited to the PRRA’s specific legislative parameters of persecution”. A person may not apply for a PRRA if less than 12 months have passed since the date of the last negative decision of the IRB on their refugee determination or of the last negative decision of the Federal Court concerning their application for leave or judicial review of the IRB decision, or since a previous PRRA application (s. 112(2) of the *IRPA*), unless a specific country has been exempted from the 12 month bar requirement (s. 112(2.1)). As soon as a PRRA application is filed, the removal order is stayed for the duration of the process (s. 232 of the *IRPR*). For more on this subject, see: (Kaga et al. 2021; IRCC 2020b).

³⁶ The *IRPA* makes specific reference to the “humanitarian and compassionate considerations” in the following provisions: s. 25(1) (H&C considerations—request of a foreign national); s. 25.1(1) (H&C considerations—Minister’s own initiative); s. 28(2)(c) (residency obligation of permanent residents); s. 65 (criteria to prevent H&C factor before the IAD when an application is based on membership in the family class); s. 67(1)(c) (appeal before the IAD); s. 68(1) (stay of a removal order); s. 69(2) (Minister’s appeal before the IAD respecting a

a “vulnerable population” due the negative impacts of the COVID-19 on this specific group of migrants, more particularly their heightened social and psychological distress and their increased challenges with respect to mobility and securing employment (Firang 2020; Jenei et al. 2020; Hari et al. 2021; Han et al. 2022).

In sum, it is now well documented that the pandemic has created—or exacerbated—vulnerabilities among different categories of migrants. The surge of temporary migrants requiring an exemption on H&C grounds in the context of the global COVID-19 pandemic is therefore a sad but not surprising reality. What is surprising—and highly concerning—is the sharp increase in refusal rates, for reasons that are far from clear. We can hypothesize that this increase is due to Canada’s immigration targets. In fact, Immigration Officer R referred to the targets as a reason for more refusals and noted: “It’s the circumstances [. . .]. I’m sorry if I sound rather cynical, but that is the reality”. In its 2021–2023 Immigration Levels Plan, the Canadian government planned to admit between 4000 and 6000 permanent residents through the H&C stream yearly, with an official target of 5500 individuals (Canada 2021b). Obviously, considering the major increase in H&C applications in the last two years, the Canadian government would have to exceed its immigration targets for that program if officers were to approve applications at the same rate as they did in the past. The possibility that the increase in refusal rates is the result of an increase in the number of applications is extremely problematic because H&C decisions are supposed to be made independently and on a case-by-case basis, and there is no plausible reason to believe that current applications are less meritorious than in the past. There could be other reasons, but if so, they need to be clearly provided by the Canadian government and closely scrutinized.

In May 2021, the Canadian government opened a one-time pathway to permanent residence for 90,000 “essential” temporary workers and international graduates already in Canada and “who are actively contributing to Canada’s economy”, called the Temporary Resident to Permanent Resident Pathway (IRCC 2021e). The pathway closed in November 2021. To be eligible, workers had to have at least one year of Canadian work experience in a health care profession or another pre-approved essential occupation.³⁷ In June 2021, the Canadian government also implemented an “Agri-food Immigration Pilot”, with a view to addressing the labor needs of the Canadian agri-food sector. The pilot provides a pathway to permanent residence for “experienced, non-seasonal workers in specific industries and occupations”. It will run until May 2023 (IRCC 2021a). Although these programs represent an important effort to address the effects of the ongoing pandemic, they cannot be seen as genuine alternatives to the H&C process. To start with, many “essential” workers have been excluded from this pathway (such as home caregivers or agricultural workers from the Seasonal Agricultural Worker Program). Moreover, these programs come with very specific eligibility requirements. For example, refugee claimants whose applications had been denied and who were awaiting appeal or a PRRA decision, and all undocumented people, were prevented from applying to the Temporary Resident to Permanent Resident Program (IRCC 2021f). Finally, as noted by Isaac and Elrick (2021, p. 858), the revaluation of some individuals seen as “essential” (i.e., migrant workers who “risk” their lives and “limb” for the well-being of the host country) “harbours the potential of producing new grounds for marginalization and exclusion”. Thus, while a door might currently be opening for “essential” workers, another door might be closing for those deemed “non-essential”. That is the reason why H&C relief, despite its flaws, remains such a useful and necessary protection status: applications are used precisely to assist in complex circumstances that are unexpected in a person’s life (loss of status in Canada, medical inadmissibility, misrepresentation, etc.).

permanent resident or a protected person). Our article deals solely with the H&C program under s. 25 of the IRPA. The other provisions only provide H&C relief in the specific contexts mentioned herein (i.e., appeals before the IAD). For more on this subject, see: (Canada 2020; IRB 2008; IRB 2009).

³⁷ For a list of “eligible” essential occupations, see: (IRCC 2021g). For more on this program, see: (IRCC 2021b).

5. Conclusions

It is estimated that there are currently over 1.6 million temporary migrants living in Canada, including at least half a million undocumented migrants ([Toronto Star 2021](#); [Migrant Rights Network 2021](#)). With the H&C application process, Canada has created a pathway to permanent residence for vulnerable applicants who would not otherwise be able to apply under any other immigration program. While recognizing the necessity of the H&C program and its exceptional value, our article has highlighted why improvements are needed, especially regarding the H&C decision-making process.

Our article has discussed how, given the huge freedom that immigration officers have in assessing and weighing H&C factors, this situation can lead to potentially subjective and unpredictable decisions. It has proposed a change to IRCC Program Delivery Instructions to include some specific reference to “vulnerable migrants”, which would allow immigration officers processing H&C applications to better identify—and address—applications introduced by vulnerable applicants. In this article, we have at the same time highlighted why, even though IRCC guidelines are not perfect and clearly deserve improvements, they are currently the best way to ensure that decisions are fair and predictable for all applicants, and thus should be used more consistently. We have also shown that the Canadian application of the best interests of the child principle in H&C proceedings (i.e., as a substantial but not a primary consideration) is not aligned with Canada’s international obligations and is not consistent with recent developments in courts’ use of international human rights law as a tool to inform the contextual approach to statutory interpretation and judicial review. We have argued that the best interests of the child should be considered as a *prevailing* factor in the global assessment of the relevant H&C factors. Finally, we have highlighted two recent trends regarding H&C applications: an increase in the number of H&C applications, which is not surprising given the COVID-19 pandemic, and a parallel increase in refusal rates, which remains largely unexplained. We have highlighted the negative repercussions for applicants and why further attention should be devoted to understanding the interplay between the sharp increase in H&C applications and in refusal rates.

Of course, given “the profound importance of an H&C decision to those affected” ([Baker 1999](#), SCC, para. 43), more changes to the H&C program should be made with a view to benefiting the most vulnerable applicants. For example, besides making the H&C process less expensive and easier to navigate, it is essential that IRCC provides reasons to applicants as soon as a decision is made (currently, applicants are only provided such reasons “upon request” ([IRCC 2014a](#))). It is also important that IRCC’s reconsideration process be bolstered. Clearly, the list of changes needed does not stop there, and migrant advocates have long insisted for broader systemic reforms to address some of the root problems with H&C (see, e.g., [Davis and Waldman 1994](#); [CCR 2006](#); [CCR 2021](#)). Thus, it is our hope that our article will form the basis for further critical examination of this very understudied, and yet increasingly important topic.

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