

# IMMIGRATION LAW AND PRACTICE

*Highlighter*

*A monthly current awareness highlighter updating the Immigration Law and Practice looseleaf service.*

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**\*\* IN THIS ISSUE \*\***

- \* There was no basis to stay a removal order against a woman with sole custody of her two children even though the custody order prevented her from taking the children out of Ontario. (*Alexander v. Canada (Solicitor General)*, [2005] F.C.J. No. 1416, BIMM/2005-074)
- \* Refugee status of a woman and her three children was improperly revoked when the Refugee Protection Division determined that the woman had not been abused by her husband in Pakistan, despite medical evidence to the contrary. (*Sethi v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1434, BIMM/2005-075)
- \* Judgment on a judicial review of a decision to remove the applicant was reserved until such time as DNA testing could determine whether the applicant was the father of a child who had already been granted refugee status in Canada. (*Thevaraja v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1366, BIMM/2005-076)
- \* A temporary resident who lost his status after his study permit expired should not have been ordered excluded from Canada without regard to his pending application to renew the permit, which, if successful, would restore his status. (*Yu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1479, BIMM/2005-077)
- \* The Act did not require an Albanian refugee to establish that persecution was atrocious and appalling in order to establish "compelling reasons" why he should be considered in need of protection, despite a change in the circumstances that formed the basis of his original application, a federal judge ruled. (*Kotorri v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1457, BIMM/2005-078)
- \* The Immigration and Refugee Protection Board's denial of the applicants'

refugee claims was set aside because the Board failed to provide evidence that the applicants' fear of persecution was not well-founded or that they had a viable internal flight alternative. (*Cuevas v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1425, BIMM/2005-079)

- \* A new hearing before the Immigration and Refugee Protection was ordered after an initial panel denied an applicant's claim for refugee status without referring to the applicant's evidence of the treatment he would receive if he returned to Syria, where he had previously evaded military service. (*Smoudi v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1404, BIMM/2005-080)
- \* There was no requirement in the Board's gender-related guidelines that a male Immigration and Refugee Board member recuse himself in favour of a female board member in order to hear a female applicant's claim which included allegations that she was raped. The Board member conducted himself with sensitivity toward the applicant and denied her application based on her inability to establish that she was discriminated against in Hungary because of her Roma background. (*Gyorgyjakab v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1375, BIMM/2005-081)

### **\*\* NEW CASE LAW \*\***

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Principles of fundamental justice -- Family law -- Custody and access -- Removal of child from jurisdiction -- Immigration law -- Exclusion, detention and expulsion -- Deportation or removal -- Order -- Execution of -- Family of deported or excluded persons -- International law and conflict of laws -- Conflict of laws -- Custody and access.

*Alexander v. Canada (Solicitor General)*; [2005] F.C.J. No. 1416, BIMM/2005-074; *Federal Court, Dawson J., August 23, 2005.*

Application by Alexander for judicial review of a decision holding that a custody order which provided she could not remove her children from Ontario did not operate to stay a removal order against her. Alexander came to Canada from Grenada as a visitor and remained beyond her visa's expiration. While in Canada she gave birth to two children. Her applications for refugee status and appeal on humanitarian and compassionate grounds were dismissed and a pre-removal risk assessment was negative. A removal order issued. Alexander then applied for custody and child support for her children and an order prohibiting the removal of the children from Canada. The father of the first child had no relationship with Alexander after learning she was pregnant, and the father of her second child had previously denied paternity. Alexander admitted she sought the non-removal order to assist her in efforts to keep her together

with her children in Canada. Alexander was granted interim sole custody of the children. The non-removal order formed part of the judgment. Her counsel faxed a copy of the order to the removals officer, who concluded the custody order did not constitute a stay of the removal order. No reasons were provided. Alexander was granted an interim stay of the removal order, later extended pending final resolution of the custody issues. In January 2005, Alexander was granted sole custody of the children, with access rights to the father of the second child. She was ordered not to remove the children from Ontario for six months.

HELD: Application dismissed. The execution of the removal order against Alexander did not contravene either the interim or the final custody order. The removal order did not apply to the children, only to Alexander. As such, a statutory stay of the removal order was not necessitated. The best interests of the children was only one of a number of factors to be considered in determining whether or not to remove Alexander, although it was the paramount consideration in determining custody. The Charter did not apply to the situation, as it did not protect the right to maintain and continue a parent-child relationship, and the best interests of children was not a principle of fundamental justice. No breach of procedural fairness was evidenced by the failure of immigration officers to give reasons for their decisions. The question of whether or not a family law order precluding the removal of children from Canada was contravened if the parent were ordered removed from Canada was certified.

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Immigration law -- Admission to Canada -- Appeals or judicial review -- Refugees -- Disqualifications -- Misrepresentation -- Grounds -- Battered women.

*Sethi v. Canada (Minister of Citizenship and Immigration)*; [2005] F.C.J. No. 1434, B1MM/2005-075; Federal Court, Tremblay-Lamer J., August 29, 2005.

Application by Sethi and her three children for judicial review of a decision allowing the Minister to vacate their refugee status. The family members were citizens of Pakistan. They were found to have a well-founded fear of persecution in Pakistan in their application for refugee status in 1998. In 2003, the Minister applied to vacate the Sethis' refugee status because it was obtained on the basis of wrong or misrepresented facts. The 1998 decision was nullified by the Refugee Protection Division. Sethi traveled under different names in Canada and the United States, and she gave different accounts regarding her relationship with her husband, including allegations of abuse against him. Sethi claimed to have suffered abuse in Pakistan by her husband, but the Refugee Protection Division determined it did not occur, although medical evidence existed to the contrary.

HELD: Application allowed. The matter was referred back for redetermination by a differently-constituted panel. Given the medical

evidence from Pakistan, the Refugee Protection Division's decision was so flawed that it could not stand.

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Immigration law -- Exclusion, detention and expulsion -- Appeals or judicial review -- Deportation or removal -- Stay of -- Family of deported or excluded persons.

*Thevaraja v. Canada (Minister of Citizenship and Immigration); [2005] F.C.J. No. 1366, BIMM/2005-076; Federal Court, Lemieux J., August 16, 2005.*

Application by Thevaraja for judicial review of a removal officer's decision not to defer his removal. Thevaraja had a pending application for landing based on humanitarian and compassionate grounds. The removal was stayed pending the resolution of this application. Thevaraja claimed he was the father of a child conceived while he lived in Sri Lanka. Thevaraja came to Canada in 2000, claiming refugee status. He included information about the child and her mother in his application, but it was rejected. The child and her mother came to Canada in 2003 and were granted refugee status. Thevaraja claimed he married the child's mother when he met up with her in Canada in 2004. The removal officer refused to defer Thevaraja's removal because he disputed whether Thevaraja was indeed the child's father.

HELD: Judgment was reserved until such time as Thevaraja and the child underwent DNA testing to determine whether he was her father.

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Immigration law -- Exclusion, detention and expulsions -- Appeals or judicial review -- Admission to Canada -- Permits.

*Yu v. Canada (Minister of Citizenship and Immigration); [2005] F.C.J. No. 1479, BIMM/2005-077; Federal Court, Simpson J., September 7, 2005.*

Application by Yu for judicial review of an exclusion order. The applicant was in Canada on a study permit that expired on October 30, 2003 and he did not apply for a renewal. The expiration of his permit resulted in the loss of his status as a temporary resident. The applicant applied for renewal on October 31, 2003, one day after the expiration. The exclusion order was issued on April 1, 2004 before the renewal application was considered. As a result, the renewal was denied.

HELD: Application allowed. The question was whether it was fair and in accordance with the principles of natural justice and the meaning of s. 182 of the Immigration and Refugee Protection Regulations to issue the exclusion order based on a loss of status without deciding the application to restore the permit. It could not be said that a temporary resident who had applied for restoration of his permit in a timely manner, as he was entitled to do under the Regulations, had failed to comply with or breached the

## Immigration and Refugee Protection Act.

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Immigration law -- Admission to Canada -- Refugees -- Grounds -- Well-founded fear of persecution -- Political activity or opinion -- Person in need of protection -- Changed circumstances.

*Kotorri v. Canada (Minister of Citizenship and Immigration)*; [2005] F.C.J. No. 1457, B1MM/2005-078; Federal Court, Beaudry J., September 1, 2005.

Application by Kotorri for judicial review of the Immigration Refugee Board's determination that he was not a Convention refugee and a person in need of protection. Kotorri, an 18-year-old citizen of Albania, claimed a well-founded fear of persecution based on his political opinion and membership in a particular social group, defined as family. The applicant's parents were both politically active with the Democratic Party and the police twice beat his father as a result. In March 2001, Kotorri's family, except for Kotorri, left Albania because of problems related to their political affiliations and came to Canada. Upon returning to his hometown in July 2002, Kotorri alleged that the situation had improved, but that he thought the police were following him. He fled to Canada. The Board dismissed the claim on the basis that there was insufficient evidence to warrant the application of the compelling reasons exception found in s. 108(4) of the Immigration and Refugee Protection Act.

HELD: Application allowed. The Board erred in inferring that persecution must reach a level qualified as atrocious and appalling for the compelling reasons exception to apply. The Board must decide each case based on the totality of the evidence. On that basis, the court's intervention was justified.

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Immigration law -- Admission to Canada -- Appeals or judicial review -- Refugees -- Grounds -- Well-founded fear of persecution -- Persecution, protection of country of nationality -- Internal flight alternative -- Immigration and Refugee Board -- Reasons for decision.

*Cuevas v. Canada (Minister of Citizenship and Immigration)*; [2005] F.C.J. No. 1425, B1MM/2005-079; Federal Court, Kelen J., August 24, 2005.

Application by Cuevas and his wife for judicial review of a decision by the Immigration and Refugee Protection Board refusing their refugee claims. Cuevas ran a collection agency in Venezuela. He claimed members of the guerilla forces extorted money from his business on a monthly basis, and that he was threatened and beaten by the extortionists. An employee of his business was also robbed. Cuevas reported the robbery and beatings to the police and as a result his life was threatened. He and his wife left Venezuela in 2003 and claimed refugee status in Canada. Cuevas claimed family members in Venezuela had received threatening phone calls from

the guerillas demanding to know where he and his wife were. The Board rejected the refugee claims by Cuevas and his wife because there was no more than a mere possibility that they faced persecution if they returned to Venezuela since they no longer operated the business and 10 months had passed since they left Venezuela. The Board also concluded they had a viable internal flight alternative to Caracas, Venezuela.

HELD: Application allowed. The matter was remitted to a different panel for redetermination. The Board erred in requiring Cuevas and his wife to demonstrate that their fear of persecution was objectively well-founded. It was incumbent on the Board to provide some evidence that the fear was not well-founded. The Board erred in failing to consider evidence about the fact that the guerillas were still looking for them. It also erred in its assessment of the internal flight alternative, as it referred to no documentary evidence to support its conclusion.

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Immigration law -- Admission to Canada -- Appeals or judicial review -- Refugees -- Person in need of protection -- Hearings -- Evidence.

*Smoudi v. Canada (Minister of Citizenship and Immigration)*; [2005] F.C.J. No. 1404, B1MM/2005-080; Federal Court, O'Reilly J., August 22, 2005.

Application by Smoudi, a citizen of Paraguay, for judicial review of a decision by an Immigration and Refugee Protection panel refusing his refugee claim. Smoudi was born in Syria and moved to Paraguay in 1986. He came to Canada for business reasons in 1995, later making a claim for refugee protection here when his Canadian work visa and Paraguayan citizenship expired. Smoudi asserted that he had a fear of returning to Syria, as he was a conscientious objector to military service there. The panel based its decision in part on the fact that Smoudi was not credible in making allegations that he faced disproportionately severe punishment by Syrian authorities because he evaded military service. Smoudi had testified that he would be jailed for at least five years and could receive the death penalty.

HELD: Application allowed. The panel erred in failing to properly weigh evidence Smoudi gave about the disproportionately severe treatment he would receive if he was returned to Syria.

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Immigration law -- Admission to Canada -- Appeals or judicial review -- Refugees -- Person in need of protection -- Hearings -- Composition of panel.

*Gyorgyjakab v. Canada (Minister of Citizenship and Immigration)*; [2005] F.C.J. No. 1375, B1MM/2005-081; Federal Court, Blais J., August 16, 2005.

Application by Gyorgyjakab for judicial review of a decision by the

Immigration and Refugee Board that Gyorgyjakab was neither a convention refugee nor a person in need of protection. Gyorgyjakab was born in Romania but moved to Hungary in 1993 when she was 15 years old. She moved after she was beaten by police in Romania when they discovered she was a lesbian. She was ill-treated in Hungary because of her Roma background, which she claimed was discernible from her appearance. She claimed she was raped by her landlord's son, Steve, and later accused of making up the rape. She claimed Steve also tried to poison her and her mother. She had a relationship with Steve and later was gang-raped in exchange for the forgiveness of Steve's debts to organized crime. Gyorgyjakab left Hungary for Canada in 2002 and made a refugee claim. Gyorgyjakab argued in the judicial review that the male Board member hearing her application should have recused himself and been replaced by a female board member.

**HELD:** Application dismissed. The Board did not commit an error in having a male member rule on Gyorgyjakab's application. The member conducted himself with sensitivity and made his decision based on inconsistencies in Gyorgyjakab's story. Gyorgyjakab failed to establish she was discriminated against because of her Roma background.