

# THE CARL QUARTERLY



**Canadian Association of Refugee Lawyers**  
Association canadienne des avocats et avocates en droit des réfugiés

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## Case to Watch: Kanthasamy

*by: Joo Eun Kim (Staff Lawyer, Refugee Law Office)*

On April 16, 2015, the Supreme Court of Canada (SCC) heard oral arguments in *Kanthasamy v. Minister of Citizenship and Immigration*. The heart of the issue in this case is the scope of the discretion immigration officers reviewing humanitarian and compassionate applications (H&C) have under s. 25 of the Immigration and Refugee Protection Act (IRPA). An H&C application, if granted, allows the applicant to apply for permanent resident status from within Canada. This is an exception to the general rules and is a discretionary decision made on a case-by-case basis.

Until now, immigration officers have adopted a “relative hardship” test found in the Ministerial Guidelines which requires that the hardship facing the applicant reach the level of “unusual and undeserved or disproportionate hardship.” Additionally, the Federal Court of Appeal characterized that the discretion available is “exceptional” and that the hardship must be “personalized.” The Appellant argues that this interpretation of the breadth of discretion is too narrow, contrary to the objectives and language of the legislation.

CARL is intervening in this case, represented by Audrey Macklin, Laura Brittain and Joo Eun Kim. CARL’s argument first focuses on Immigration Officers and how, as delegates of the Minister, they should be given no deference in interpreting the meaning of H&C and the resulting breadth of discretion in s.25 of the IRPA. Furthermore, the scope of the discretion available under H&C applications ought to have a broad interpretation.

First, per Pushpanathan, the standard of review for a question of law that is the subject of a certified question of general importance is the correctness standard. The current interpretation of “unusual and undeserved or disproportionate” used by Immigration Officers conflicts with the Immigration Appeal Division’s interpretation: “excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another”. Immigration Officer’s should not have deference over the IAD. In addition, the current test is fundamentally inconsistent with the requirement that the Officer be alert and sensitive to the best interests of the child.

Second, the interpretation of H&C should be broad which conforms to the purpose and language of the IRPA. H&C

*Background: The Appellant is a young Tamil male from northern Sri Lanka who had faced on-going harassment and discrimination. Mr. Kanthasamy’s H&C application was refused. In the refusal, the Immigration Officer noted: the discretion available in an H&C was not to relieve against hardship, but only unusual and undeserved or disproportionate hardship. The review of this decision at the Federal Court was denied, but a question of general importance was certified: “What is the nature of the risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of IRPA, as amended by the Balanced Refugee Reform Act?”. The Federal Court of Appeal upheld the decision.*

# CARL in the Courts

discretion should assess the factual context of an individual applicant in its own terms, recognizing the potential hardship of removal and the positive contribution that he or she has made to Canada. This hardship need not be unusual undeserved, or disproportionate nor should it need to be exceptional or personalized. The current interpretation leads to the absurd conclusion that an applicant facing homelessness, poverty, and discrimination in a first world country warrants greater relief than an applicant facing the same hardships in a country of widespread suffering, such as Syria or Haiti. CARL argues this is not consistent with IRPA's objectives or with the plain meanings of humanitarian or compassionate.

## Human Smuggling Laws Unconstitutional – CARL Intervenes at Supreme Court

*By: Erin Bobkin (Staff Lawyer, Refugee Law Office)*

On February 16th and 17th, the Canadian Association of Refugee Lawyers (CARL) intervened at the Supreme Court of Canada (SCC) in a case concerning the legality of Canada's human smuggling laws. The Appellants included Sri Lankan refugee claimants who arrived in Canada aboard either the MV Sun Sea or the MV Ocean Lady as well as a Cuban refugee who assisted friends and family in making the journey from Cuba to the United States.

The cases involved the intersection of criminal and refugee law, as Canada's Immigration and Refugee Protection Act (IRPA) both criminalizes and imposes consequences for refugees involved in actions deemed human smuggling. Under section 117, any person found to knowingly (or with willful blindness) organize, induce, aid or abet the entrance into Canada of an individual in contravention with IRPA is guilty of human smuggling and can be fined or imprisoned for life.

Notably for refugee claimants, section 37 of IRPA declares inadmissible anyone found to be involved in people smuggling. These claimants are removed from the refugee protection process and are limited to possible protection from section 97 risks via only the paper-based pre-removal risk assessment (PRRA).

CARL's counsel team included Andrew Brouwer and Erin

Bobkin of the Refugee Law Office and Professor Jennifer Bond of the University Of Ottawa Faculty Of Law, whose work is supported by the University of Ottawa's Refugee Law Research Team. CARL had the privilege of appearing alongside many of Canada's top refugee lawyers at the two day appeal. In fact, the Court was so full of lawyers that counsel seating overflowed into the public gallery.



### CARL Intervention Team:

*Erin Bobkin, Andrew Brouwer, Jennifer Bond*

CARL argued three points: first that the IRPA's penal prohibition on human smuggling is grossly disproportionate and thus unconstitutional because of the severe impact it has on refugee co-claimants, humanitarian workers, and others assisting vulnerable people fleeing persecution. Second, CARL argued that criminal defences, including duress and necessity (which were raised by one of the appellants in the cases), must be fully considered each time refugee status is denied on the basis of alleged involvement in human smuggling. Finally, that the consequences of a decision that an individual is involved in people smuggling are so severe that they engage the rights to life, liberty and security of the person under Section 7 of the Charter.

Over the course of the two-days, the seven-member panel of the SCC grappled with a wide array of issues. Much argument focused on the purpose of section 117, and how broad the Canadian government may cast the net to

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protect Canada's borders from smugglers. The Chief Justice noted that determining the purpose of legislation is the most difficult task for a court. Undoubtedly, the position the Court takes on the purpose of section 117 will govern how the cases are decided. Other issues which will likely factor into the decision are what role international law has to play in the interpretation of sections 37 and 117 of IRPA, how the Charter factors into the refugee protection process, and the role of a PRRA in refugee protection.

## DCO Challenge: Federal Court

*By: Jared Will (Jared Will & Associates)*

On February 24th and 25th, 2015, CARL's constitutional challenge to the designated country of origin (DCO) regime was heard in the Federal Court in Toronto. The challenge came before the Court as a consolidated case invoking three gay men, citizens of Hungary, Croatia and Romania, whose refugee claims were denied and who then challenged the provisions of the Act that denied them a right of appeal of those decisions to the Refugee Appeal Decision—the "RAD bar". The first application was brought in June 2013, and from the outset CARL sought public interest standing.

The challenge involves both the RAD bar itself and the process by which countries are placed on the DCO list; to date, 42 countries have been listed.

CARL and the other applicants argued that the DCO regime violates section 7 of the Charter because it is overly broad and grossly disproportionate because the criteria for designation have allowed for the designation of countries such as Mexico, Hungary, and Croatia where claimants are in fact at risk of persecution. In other words, while the government has stated that its objective is to use the DCO regime to deter claims from so-called "safe" countries, the law allows the designation of unsafe countries.

It was also argued that the DCO regime discriminates against refugee claimants on the basis of their national origin and therefore contravenes s. 15 of the Charter. In addition to discriminating on the basis of national origin, the applicants also led evidence that the DCO regime has a disproportionate impact on particular groups of refugee

claimants, namely those with trauma-related or cognitive impairments and those seeking protection from gender-based persecution or on the basis of their sexual orientation or gender identity, as well as ethnic minorities. CARL and the other applications put before the Court extensive evidence of the negative stereotyping of DCO claimants, and in particular Roma claimants, by the government.

The case was taken under reserve at the close of the hearing, and it is expected that it will take several months for judgment to be rendered. Whatever the outcome, it is all but guaranteed the decision will be appealed.

## IFHP Update

*by: Debbie Rachlis (Student at Law, Waldman Law)*

On July 4, 2014, Justice Mactavish of the Federal Court ruled that the Conservative government's cuts to refugee health care violated sections 12 and 15 of the Charter of Rights and Freedoms. Justice Mactavish suspended the effect of her ruling for four months, allowing the federal government time to implement a new refugee healthcare program.

Following this ruling, the federal government waited until the last possible minute to announce an appeal of this decision. The government also sought an order staying Justice Mactavish's decision until the appeal was heard. On October 31, 2014, Justice Webb of the Federal Court of Appeal dismissed the motion for an order staying the decision.

On November 5, 2014, the government enacted a new Order in Council to reinstate healthcare for refugees. The new Order in Council does not provide the same level of coverage that existed before the cuts.

CARL and the rest of the IFHP team are preparing to head to the Federal Court of Appeal this spring.

Two groups have been granted leave to intervene: the Coalition of Amnesty International and the International Network for Economic, Social and Cultural Rights, and Registered Nurses' Association of Ontario and Canadian Association of Community Health Centres.



# Student Corner: Updates from CARL's Student Chapters

## Chapter Updates from Dalhousie, Osgoode, Ottawa, and Windsor

*By: Claire Tempier, Kassie Seaby, and Joanna Berry,  
CARL National Student Coordinators*

With great pride and enthusiasm, we look back on another year of incredible achievement by CARL's student chapters! Here are some of the highlights of chapter activities across Canada.

CARL student members have been active in a wide variety of awareness and fundraising events. Some chapters provided support to local refugee clinics. For instance, CARL uDalhousie raised a generous amount of money for Halifax's Refugee Clinic. CARL students have also established some important partnerships with local non-for-profit organizations. CARL uToronto has engaged in a variety projects with the Asper Centre for Constitutional Rights. One of these projects involved coordinating a community legal education session that was presented at the end of January 2015.



Valentine's Bake Sale uOttawa

This year, **CARL uWindsor** raised funds, engaged students and raised the campus community's awareness of CARL. They coordinated a well-attended bake sale fundraiser. The chapter also organized a screening of the 7th CARL National Conference. Additionally, they held an event with two notable immigration and human rights professors from the University of Detroit Mercy. These guest speakers debated the differences and advantages to claiming refugee status in Canada versus the United States.

**CARL Osgoode** hosted their first successful event of the year on November 10, 2014, where Professor Sean Rehaag from Osgoode Hall Law School spoke to students on the substance and consequences of the new appeal process in the Canadian Refugee Status Determination. This event was followed in the winter term by an Immigration and Refugee Career Panel, which featured a variety of practitioners in the field.

**CARL uOttawa** held two very profitable bake sale fundraisers at the Faculty of Law. Their famous, annual Halloween and the Valentine's Day Bake Sales have become quite the attraction amongst students and faculty members, and raised roughly \$1,800 in support of chapter initiatives and CARL litigation projects. CARL uOttawa also held numerous events including a film screening, a judicial review hearing of a refugee an RPD hearing at uOttawa's Ian Scott Courtroom, and a reception for litigators after the joined human smuggling cases were heard by the Supreme Court of Canada. The chapter's signature event – its fourth annual Refugee Night - took place on February 27, 2015 and attracted more than 270 people. Amongst the spectators were law students, medical students, professors and community members, who learned about current refugee policy issues through the event's academic and dramatic presentations.

# Student Corner: Updates from CARL's Student Chapters

Student members of CARL chapters across Canada have conducted extensive research for the benefit of CARL National and refugee law practitioners. The first Research Team contributed to research on the Suspension on the Moratorium of Removals to Haiti and Zimbabwe. A second Research Team undertook research on conditional sentence orders (CSO) for a CARL lawyer. A third Research Team took on the project of reviewing the Standard of Review in decisions by Refugee Appeal Division Members since July 2014. **CARL uToronto** completed a legal memorandum on the recent changes to the citizenship legislation in Canada, and an update on the domestic and international jurisprudence on statelessness and asylum. Members of **CARL uDalhousie** worked with Professor Constance MacIntosh on research regarding the federal government's new health policy for refugees. We are very pleased to welcome two new student chapters: one at the **University British Columbia** and one at **l'Université de Montréal**. Student coordinators of these chapters are keen to build their membership, take on projects support CARL National, to connect with refugee law practitioners in their communities. ACAADR uMontréal is already assisting CARL National with a French translation project.

Finally, the CARL National Student Committee has expanded to include two additional student representatives. The entire National Student Committee, represented by Joanna Berry, Kassie Seaby and Claire Tempier, provides support to the CARL student chapters in both official languages.



CARL Fundraising Bake Sale Dalhousie

**Join a CARL student chapter – CARL student chapters participate in CARL's work through independently organized events and projects from CARL National. To find out more about joining your local chapter, send an email to the chapter coordinator:**

- ◇ Dalhousie University: [dal.law.carl@gmail.com](mailto:dal.law.carl@gmail.com)
- ◇ McGill University: [carl.umcgill@gmail.com](mailto:carl.umcgill@gmail.com)
- ◇ University of Ottawa: [carl.uottawa@gmail.com](mailto:carl.uottawa@gmail.com)
- ◇ University of Toronto: [carl.utoronto@gmail.com](mailto:carl.utoronto@gmail.com)
- ◇ York University (Osgoode Hall Law School): [carl.osgoodehall@gmail.com](mailto:carl.osgoodehall@gmail.com)
- ◇ University of Windsor: [uwindsor.carl@gmail.com](mailto:uwindsor.carl@gmail.com)
- ◇ University of Victoria: [carl.uvic@gmail.com](mailto:carl.uvic@gmail.com)

**Can't find a CARL Student Chapter at your University? - We are looking for eager students to initiate CARL chapters on their campus. Contact us!**  
[carl.nationalstudent@gmail.com](mailto:carl.nationalstudent@gmail.com)

# Refugee Night 2015: *A Hard Welcome Mat*

*By: Amanda Bergmann & Veronica Elin Sjolin  
(CARL uOttawa)*

A classroom filled with nearly 300 people is like any other lecture at uOttawa. Refugee Night co-sponsored by uOttawa, CARL uOttawa, the Human Rights Research & Education Centre, and the Refugee Hub is not like any other lecture, however. The fourth annual Refugee Night “A Hard Welcome Mat” took place on February 27th and was a great success.

Rooted in a desire to bring the Ottawa community together to discuss pressing issues in the Canadian refugee protection system, Refugee Night has grown to include live dramatizations, engaging speakers and the Roberto Miranda Award. This year’s event began with a light-hearted but informative conversation about who is considered a refugee led by Emily Bates, the Director of the University of Ottawa Refugee Assistance Project.



Roberto Miranda Award Winner 2015  
*Aurelia Achor*

Renowned lecturer, lawyer and former Chair of the Immigration and Refugee Board, Peter Showler wrote the evening’s artistic pieces. Together, legal practitioners and uOttawa law students directed, acted and sang in all of the skits. The first dramatization explored issues surrounding federal healthcare cuts for refugee claimants. Set in the federal court, uOttawa law students and practitioners played the roles of the judges, DOJ lawyers and CARL lawyers with conviction and a touch of humour. The “News Bulletin: No Crap Zone” skits parodied issues such as Canada’s anti-smuggling laws and incorporated the stories of real refugee claimants. The final piece, “Border Security: The Thing Speaks for Itself”, drew upon actual dialogue and events that occurred in the TV show “Border Security”. The skit was both eye opening and comedic.

The event also included a number of speakers. **Doctor Doug Gruner** delivered a captivating presentation on the changes to the Interim Federal Health Program.

**Maran Nagarassa’s** account of his time spent on the Ocean Lady was deeply moving and unsettling. Mr. Nagarassa has been granted refugee protection and is trying to rebuild his life, but he continues to wait for immigration approval so his wife and daughter may resettle with him in Canada.

The night concluded with the Roberto Miranda Award, presented to **Aurelia Achor**. The award recognizes the positive qualities that emerge from refugee experiences like courage, resilience and a respect for others. Aurelia came to Canada as a refugee from South Sudan. Since settling here, she has personally sponsored over 29 refugees. Her contributions to human rights and social justice continue to inspire us.

A thank you also goes out to **Café Justicia** for providing coffee for the event.





# ANNOUNCEMENTS

## CARL 8th National Conference

The eighth national conference of CARL took place on April 2, 2015. Unlike previous national conferences, the format of this meeting differed from the previous conference format by hosting attendees only in Toronto. The change was made to foster a more collegial environment amongst colleagues and to reduce technical delays. The conference was also available by webcast to those unable to attend in Toronto. The theme of the conference was Advocacy before the IRB.



CARL 8<sup>th</sup> National Conference:  
*Sarah Boyd, Barb Jackman, Jennifer Bond*

## CARL's 7th National Conference & AGM

The CARL Annual General Meeting took place on October 16, 2014 as part of the national conference. The current members of the National Executive Committee that directs CARL can be found at:

<http://www.carl-acaadr.ca/about>

## Recognizing CARLA Winners:

The Canadian Association of Refugee Lawyers Advocacy awards – CARLAs – recognize outstanding work in refugee advocacy; the annual CARLA was awarded in October at the national conference. The winner was **Carole Dahan**, Carole Simone Dahan, formerly the Director / Senior Counsel of the Refugee Law Office, and currently the Senior Legal Advisor (Judicial Engagement) with the UNHCR. Carole Dahan was recognized for embodying so many of the qualities of a good refugee advocate – including making an extra effort on behalf of her clients, and a determination to fight for justice regardless of the odds or institutional opposition. Carole has had amazing success at pulling seemingly hopeless cases back from the fire, through huge personal effort, last minute stay applications, persuading a judge to allow a little time to take a second look. Carole is a visionary leader at the RLO and the wider legal community. She has led by example: working as hard or harder than any of her staff, by being smart, fearless, generous, and relentless. And she does it all with great elegance, humour, and joie de vivre.

CARL also awarded the first student CARLA award in recognition of the contribution of the student chapters to CARL. The inaugural student CARLA recipients were **Michelle Carlesimo** and **Anna Du Vent** for their various contributions while students at the University of Ottawa. Michelle Carlesimo completed the articling requirement at West End Legal Services in Ottawa and looks forward to clerking at the Federal Court next year. Anna is currently completing her articles with Carter Professional Corporation.



# ANNOUNCEMENTS

## Get involved with CARL !!

Committees are the driving force of CARL, and we need your help to make their work as good as it can be! If you're interested in being a part of CARL's work, please consider joining a committee or volunteering on a project. As a young organization, we are especially interested in people who can help us grow and establish our presence. Get in touch with us to let us know how you'd like to contribute! This year, we are especially interested in the following contributions:

- ◇ National committee members, especially for the Advocacy Committee and the Sustainability Committee!
- ◇ Translation from English to French!  
If you want to get involved and contribute to CARL's work, please email [membership@carl-acadr.ca](mailto:membership@carl-acadr.ca) with an expression of interest.

## Thank you, CARL volunteers!!

All of CARL's activities are achieved by volunteers who donate their time and expertise to our young organization. Our litigation efforts, bi-annual conferences, advocacy efforts, and a range of student activities would not be possible without these valuable contributions. As we enter into our third year of operations, CARL would like to extend our sincere thanks to the wonderful team of volunteers who have driven our growth. We look forward to continuing our work together!

## Thank you to our donors!!

CARL is extremely grateful to the many generous donors who have helped to support our organization and specifically our Federal Court challenge to the Interim Federal Health Program cuts. We would like to thank all CARL Members who have contributed funds. We would also like to thank our corporate donors who have made generous donations to our litigation reserve fund, set up to guard against the negative impacts of a potential costs award against CARL.

The IFHP challenge is still in process, and donations are always welcome. If you'd like to support CARL by making a donation, please visit [www.carl-acadr.ca/donate](http://www.carl-acadr.ca/donate).

## Is your Membership up to date?

CARL is now using GiftTool software to manage our membership database. If you haven't already done so, please remember to renew your CARL membership! As a CARL member, you enjoy reduced rates for our conferences, first notice of CARL activities, and many opportunities to get involved with CARL's varied and exciting work. Please visit [www.carl-acadr.ca/membership](http://www.carl-acadr.ca/membership) to register as a CARL Member.

If you're not sure whether your membership is up to date, contact [membership@carl-acadr.ca](mailto:membership@carl-acadr.ca) to inquire.

*Don't miss a beat!*

**Keep up with CARL's activities by following us online! You can find us via our twitter handle, @carladvocates, or visit and 'like' our Facebook page.**

