REPORT Nº 27/93
CASE 11.092
CANADA
DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY
October 6, 1993

I. ALLEGED FACTS:

On December 10th, 1992, the Commission received a complaint filed on behalf of Mrs. Cheryl Monica Joseph, against the Government of Canada with regard to its Immigration Refugee Claim Process. The complaint alleges as follows:

1. That Mrs. Joseph a Trinidadian citizen resided for five years with her husband, and their five children in Canada. That her husband was killed in an accident in Canada, leaving her responsible for the five children. That she is still involved in legal proceedings in Canada, and is trying to resolve insurance matters related to his death. That she is now a single parent, and that it would be unreasonable to expect a single parent accompanied by five children to find travel costs to relocate the whole family in Trinidad after five years in Canada, and to be able to pay legal costs in Canada from Trinidad, and to then pay travel costs, to appear in a hearing in Canada. It states that most of her close relatives including her mother are citizens or permanent residents of Canada, and that she has nothing to return to. Her children have developed attachments in Canada, especially her eldest child who lived through the critical and formative teenage years in Canada. That she applied for refugee status in March of 1988, and now has an expulsion date set for December 13th, 1992, and that there appears to be no convincing reason to deport her and her children.

2. Mrs. Joseph was given the choice between "deportation" and a "departure notice." It alleges that this choice cannot be construed as a "choice" to depart. That offered deportation or departure, she did not freely, and voluntarily choose to return to Trinidad. That the UN human Rights Committee, in its General Comment 15, explains a state's obligation as follows: "That Article 13 of the Covenant on Civil and Political Rights is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise."

II. THE PETITIONERS REQUEST THAT:

1. In their petition to the Commission, that it is hoped that the Commission will apply its powers relative to the American Declaration in a manner consonant with Canada's other human rights treaty obligations. That the deportation of Mrs. Joseph be stayed, and that she be allowed to proceed to landing in Canada on humanitarian and compassionate grounds.
2. Petitioners later requested that the Commission take Precautionary Measures under the provisions of Article 29 of its Regulations in order to avoid irreparable damage to Mrs. Joseph, that she be granted temporary permission to remain in Canada, and that the deportation order be stayed.

3. In their response to the Government's reply the petitioners requested that the Commission take measures which will secure Mrs. Joseph's rights to work and social services while her case is resolved. That she should be allowed to continue to enjoy the rights of other aliens who reside in Canada, and be granted a work permit which will be recognized by local authorities as evidence that she has some form of status to remain in Canada.

III. IN THIS CONNECTION THE APPLICANT ALLEGES VIOLATIONS OF:

1. Articles XVIII, XXVII, V, VI, VII, of the American Declaration of the Rights and Duties of Man.

2. Article 26, of the United Nations Covenant on Civil and Political Rights.

3. Various international instruments.

IV. PROCEEDINGS BEFORE THE COMMISSION:

1. Upon receipt of the petition on December 10th, 1992, and up to February 24th, 1992, the Commission acting through its Secretariat, complied with all the procedural requirements of Articles 30 to 35 of its Regulations. It communicated with the petitioner, and the Government of Canada, studied, considered, and examined all information submitted by the parties.

2. During this period the Commission sent several notes, and forwarded the pertinent parts of the petition, to the Canadian Government, with a request that it supply information which it deemed appropriate to the allegations of the complainant, and which addressed the issue of exhaustion of domestic legal remedies. The Commission qualified the request by stating that "the request for information did not constitute a decision as to the admissibility of the communication." There were also several telephone communications between the Commission and the Government.

3. The Commission received several notes from the Government of Canada, including the Government's reply to the petition. One of the notes dated January 14th, 1993, informed the Commission that the Government of Canada, had decided to delay temporarily the removal of Mrs. Joseph from Canada. The Government also submitted its reply to the petition, in which it argued that domestic remedies in Canada were not exhausted, that the petition should be declared inadmissible, that the petitioners argument were meritless, and that it reserved the right to present further submissions to address the merits.

4. Also during this period the Commission sent several notes to, and received a number of notes from the petitioners. Among the notes sent to the petitioners was a note dated January 15th, 1992, informing then of the Government of Canada's decision to temporarily stay the removal of Mrs. Joseph from Canada, and a copy of the Canadian Government's reply to the petition.

5. The petitioners sent several notes to the Commission including a note which indicated that the status of the removal order against Mrs. Joseph will be changed from a "departure notice" to a "deportation order" on January 31st, 1993, under the retroactive provisions of the new legislation. They also urged the Commission to take precautionary measures. They later submitted documentation to show that Mrs. Joseph had been gainfully employed in Canada at different periods during the pendency of her claim for refugee status. The petitioners responded to the Government's reply and argued in their submission that domestic remedies had been exhausted in Canada. They further reiterated their prior arguments contained in their petition as to why Mrs. Joseph should be allowed to remain in Canada.

V. SUBMISSIONS OF THE PARTIES

A. Argument in Support of the Petition

1. The petitioners argue that Mrs. Joseph fell under provisions of a special process,

the Refugee Backlog Clearance Process, created to respond to some 100,000 refugee claimants in Canada as of January 1, 1989, when new legislation took effect. That from the general experience of this process, a humanitarian and compassionate submission of this kind represents the last possibility of relief provided under the Immigration act. The petitioner argues that there is no simple effective court remedy for the rights at issue in Mrs. Joseph's expulsion. That Articles XVIII, XXVII, V, VI, VII of the American Declaration of the Rights and Duties of Man would be violated, and substantive family rights are at risk in deportation. That other applicable international covenants, are the United Nations Covenant on Civil and Political Rights, Article 26, and various international instruments. That Article 26 provides sweeping protection against laws and practices which discriminate even when the substantive right at issue lies outside the Covenant. That this forms a basis for protection of non-nationals.

2. That explicit humanitarian and compassionate grounds against departure are provided for in the Immigration Act as amended in 1989, and are as follows:

a) persons whose government will likely impose severe sanctions on their return home;

b) family dependency; and

c) persons whose personal circumstance, in relation to the laws, and practices of their country, are such that they will suffer unduly on returning home.

3. That in interpreting these explicit grounds reference is made to the case of Sobrie v. MEI (1987) 3 IMM.L.R. (2d) 81 FCID. According to pages 86 and 89 of that decision: "The intention is to provide a fresh view of the immigrant's situation from a new perspective. The purpose... is not merely to repeat the procedure..." ..." ... the Minister .. must be able to direct his mind to what the applicant feels are his humanitarian and compassionate circumstances."

4. That in addition to the explicit grounds, the Immigration Act Section 3(g) intends to comply with Canada's international obligations. That the humanitarian and compassionate grounds must be interpreted so as to provide the protections required for "everyone." That according to the Supreme Court of Canada, "the term everyone in sec.7 of the Canadian Charter of Rights and Freedoms includes every person physically present in Canada and by virtue of such presence amenable to Canadian law.

5. The petitioners argue three main points in favor of the Government of Canada staying deportation and allowing Mrs. Joseph to proceed to landing. These are family, personal circumstances, and minimum redress.

Family: That, the protection of the family has recently emerged as a right which prevails over the state's desire to expel in a variety of immigration situations. That the relevant obligations for Canada are United Nations Covenant on Civil and Political Rights Articles 17 and 23, and the Inter-American Declaration of the Rights and Duties of Man, Articles V and VI. That the United Nations Human Rights Committee underscores the prohibition on arbitrary interference with the family and that the term "family" be given a broad interpretation to include "all those comprising family as understood in the society of the state party concerned." That the right of alien spouses to join, and enjoy married life with citizens took precedence over immigration laws in the case of Aumeeruddy-Cziffra v. Mauritius, United Nations Human Rights Committee 1981. That the jurisprudence of the European Court on Human Rights is part of the context which can be used to interpret the Covenant according to the Vienna Convention on the interpretation of treaties. Thus the case of Abdulaziz. Cabales, and Balkandali v. UK can be said to clarify the UN Committee's Aumeeruddy-Cziiffra case. Also, the Court's recent jurisprudence has prohibited the expulsion of a number of aliens even with criminal convictions on grounds of family relationships - Beldjoudi v. France 1992: Djeroud v. France, 1991: Moustaquim v. Belgium, 1991.

6. That on the instruction of the Supreme Court, family rights must be at least matched by the Charter of Rights and Freedoms. That the closest match to rights with the Charter is the right to the security of the person, Section 7. That alternatively, denial of family rights might be construed as cruel or degrading treatment, Section 12. That in all international human rights cases, the notion of family dependency played an important part. That Mrs.

Joseph's case is different, but the same notion of family dependency is present. Her husband died, and was buried in Canada. In itself, this establishes a link with Canada which is tied to Mrs. Joseph's security of the person. It also means that the notion of family dependency must be considered as attaching to those other members of her family who replace the security of the person normally assumed to accrue to the spouse. Most of her closest relatives are now in Canada. Her mother and sister are in Canada as citizens, two sister, and one brother are landed here. She now has only two sisters, and her youngest child in Trinidad. In the first place Mrs. Joseph came to Canada to visit her sister.

7. That it is not just Mrs. Joseph who will be expelled, but her family. Her eldest child, now 20 years old, must have been significantly shaped during her five teenage years in Canada. The other children, who joined her for her husband's funeral in September 1989, have been here for three years. These largely teenage children, all have family ties in Canada, and as a result of their younger ages, much of their security of the person is bound up with their friends, and their lives here. That it is important to note that the European court considers ties with grandparents as family in its principle judgment on family rights Marckx v. Belgium, 1979. Mrs. Joseph's children have a grandmother who is a Canadian citizen. That there is nothing for these children to return to in Trinidad. That under the Convention on the Rights of the Child, article 3(2), states are to "ensure the child such protection, and care as is necessary for his or her well-being ..." That these words speak for themselves. That as a single mother with three girls, and one boy plus one 20 year old daughter, Mrs. Joseph cannot be expected to sustain her close ties with most of her family who are now residents of Canada, if she is expelled to Trinidad.

8. Personal Circumstances: That it is the personal circumstances which provide Mrs. Joseph with her claim to protection from expulsion for family rights. Her family situation also provides a situation of undue hardship if returned. Mrs. Joseph is presently involved in legal efforts to secure an insurance settlement from the death of her husband. If returned to Trinidad before this situation is resolved, she would incur financial hardship. First, trying to instruct a Canadian lawyer from Trinidad would be difficult. Second, paying for a Canadian lawyer would be difficult for a single parent mother in Trinidad. Third, so as to protect her eventual right to immigrate to her family in Canada, Mrs. Joseph would have to depart. That she would have to buy airline tickets for herself, and her children to Trinidad. This would make it harder to find funds for continuing legal action. Thus, returning her effectively denies her of her rights to seek a remedy under Canadian law with respect to her insurance claim.

9. Minimum Redress: That there are many indications that the Refugee Claimant Backlog has violated international human rights obligations, and rights under the Canadian Charter of Rights and Freedoms. That these might be summarized:

a) Retro-active provisions: This was one of the over 50 constitutional issues raised by the Canadian Council of Churches in its statement of claim before the Canadian Courts. That although the Supreme Court dismissed the case on the technical grounds of "standing'" it recognized in general terms the validity of several of the issues raised.

b) Misleading provisions: In December 1988, persons were encouraged to opt for a backlog program which offered them a simple swift resolution of their problem within two years. That the program is not complete almost four years later.

c) Discrimination: Certain English speaking groups of claimants were targeted for accelerated processing whereas the program promised a first come first served basis. In October 1990, the United Nations Human Rights Committee advised Canada that it did not favor targeting of groups of asylum seekers.

d) Cruel Treatment: The procedural arrangements changed during 1989, and the first half of 1990, introducing uncertainties about the nature, and duration of the program. The Inter-Church Committee for Refugees provided evidence that the process related to enhanced post traumatic stress symptoms for some groups of claimants in the backlog - notably those separated from spouses or children. This group would include Mrs. Joseph.

e) Unfair Process: Persons in legal proceedings such as a civil suit have the right to a

trial within a reasonable time. Persons in criminal proceedings have cases against them dropped after two years, because a longer delay constituted an unfair trial. A fair trial must take place in a reasonable time to satisfy standards of fairness. There is also an element of discrimination in not allowing normal Canadian standards of fairness in procedures which function as an expulsion hearing for non-nations.

10. Finally, that it is not necessary to determine that any, or all the above possible breeches of Canada's obligations to protect human rights have occurred. That if is considered likely that one or more of them may have occurred, this should be considered as a humanitarian, and compassionate ground for staying deportation, and for granting the right to proceed to landing. Canadians have an obligation to honor the Constitution which attracts at least those protections from international human rights treaties. That immigration officials also have an obligation to act in accordance with the Immigration Act which itself intends to satisfy Canada's international obligations. To that extent that this has not been done so far, an official must seek to remedy the situation. This can be done by staying expulsion, and allowing Mrs. Joseph to proceed to landing.

11. Conclusion: Mrs. Joseph should proceed to landing on family grounds, and on grounds of personal circumstances which would lead to undue hardship if returned. That she is a person in the refugee claimant backlog who has not been granted treatment, and procedures which conform with Canada's international obligations, and that landing is a remedy open to Canada.

B. The Government of Canada's Reply to the Petition

1. The Government's Reply, provided background information, and outlined the process by which Refugee Claims are considered under the provisions of the Immigration Act of Canada, 1976-77, c. 52, S.1, S.2(1)(a), S.6(2), and para. 114(1)(d). It also submitted exhibits, and replied to the petition brought on behalf of Mrs. Joseph.

2. Background Information: The United Nations Convention Relating to the Status of Refugees (the Refugee Convention) was acceded to by Canada on June 4, 1969, and it entered into force on September 2, 1969. Consequently, Canada bound itself not to expel from its territory persons from other states, whether nationals of those states or residents not having a state of nationality, should those persons be unable or unwilling to return to, or avail themselves of, the protection of their state of nationality or origin for reasons of race, religion, nationality, membership in a particular social group, or political opinion. See ss. 2(1)(a) Immigration Act, 1976-77, c.52, S.1, attached as appendix A). Canada also provides similar protection for persons who, while not strictly refugees on the basis of the Refugee Convention, are nevertheless displaced or persecuted (See ss. 6(2) and para. 114(1)(d) Immigration Act).

3. The immigration Act also sets out the procedures for obtaining refugee status in Canada. This Act was substantially amended in 1989, because it had proved incapable of effectively dealing with the arrival of massive numbers of new claimants. On January 1, 1989, at the time of the amendment establishing a new refugee determination system, there existed a backlog of approximately 95,000 refugee claims at various stages of processing under the previous system. The Canadian government acted to clear this backlog through an expedited process parallel to, and consistent with the new system. (The granting of an amnesty was considered to clear the backlog of refugee claims. However, it was ultimately rejected because it would have unfairly rewarded some illegal migrants and been unfair to those persons who followed normal immigration procedures.)

4. In essence, this process provides that where "a credible basis" for refugee claim can be established, and the person is otherwise eligible (i.e. meets the usual statutory requirements concerning health, criminality, etc.), the claimant may apply for permanent residence from within Canada. It is not necessary for persons in the backlog to proceed to a full refugee determination hearing. This process was enacted by the Refugee Claimants Designated Class Regulations (Appendix B) and can be divided into the following stages:

5. a) Initial Humanitarian and Compassionate Review:

Firstly, a personal interview is held between the claimant, and an immigration officer to determine whether the claimant possesses humanitarian, and compassionate grounds which warrant the use of discretionary authority to process the person for landing in Canada. This is a discretionary review by the executive, and is beyond the requirements of the Refugee Convention. If the immigration officer determines that humanitarian and compassionate grounds exist, the claimant may apply for permanent residence in Canada. If a negative determination is made, the claimant may, with leave, seek judicial review of the decision by the Federal Court of Appeal, and then again, with leave, by the Supreme Court of Canada. (A prior step existed for persons who on January 1, 1989, the date the backlog regulations came into force, had already been examined under oath by a senior immigration officer under the old system. In such circumstances, if a transcript of the proceedings was available, it would be reviewed by an immigration official to assess whether the claimant obviously possessed a basis for remaining in Canada. If a positive determination was made, the purpose of this paper review was to reduce the number of panel hearings, and humanitarian, and compassionate reviews in obvious cases. Over 15,000 cases were decided positively on this basis.)

6. At this stage, unsuccessful claimants have two options. the first option is to leave Canada voluntarily, and apply to immigrate to Canada from abroad. Those that leave voluntarily receive a letter of introduction to the Canadian Embassy or Consulate in their home state, as well as favorable consideration for their experience acquired in Canada. The second option, which is to apply for a hearing, discussed below.

7. b) Credible Basis Hearing:

A hearing is held by a two-member panel consisting of an Adjudicator, and a member of the Immigration Refugee Board (the IRB) to assess whether the claimant has a credible basis for believing that he or she is a Convention refugee as defined in the United Nations Refugee Convention, and incorporated into ss. 2(1)(a) Immigration Act. The requirements of the backlog procedure are less strict than the regular refugee claim process in that only a credible basis need be shown. The individual need not demonstrate that he or she meets all the conditions of a Convention Refugee. The determination is based on the human rights record of the claimant's country of origin, previous decisions by the IRB, and any other credible or trustworthy evidence presented by the claimant in support of the claim. If either member of the panel finds that there is a credible or trustworthy evidence presented by the claimant in support of the claim, the claimant is able to apply for permanent residence pursuant to the Refugee Claimants Designated Class Regulations, rather than proceed to a full hearing before the Immigration, and Refugee Board.

8. If a claimant is determined at this hearing not to have a credible basis for a claim, he or she may, with leave, seek judicial review of the decision by the Federal Court of Appeal, and after that, with leave, by the Supreme Court of Canada.

9. c) Final Pre-Removal Humanitarian And Compassionate Review:

Persons who are unsuccessful at all the stages described above, will receive a final humanitarian, and compassionate review prior to removal of that person from Canada. Senior officials at the Department of Immigration review all the circumstances of each claimant ordered removed to determine if action is warranted on humanitarian and compassionate grounds. The case is then referred to the Minister's delegate who makes the final decision.

10. In summary, as of December 1992, 93,733 cases have been decided with an overall acceptance rate of 58%. 43,000 claimants have now been granted permanent residence and approximately 20,000 have left Canada either by deportation or voluntary departure. Over 14,000 persons have failed to come forward for processing, and are now ineligible for processing under this program.

11. Mrs. Joseph's Claim:

The petitioner, her husband, and her eldest daughter arrived in Canada on December 16, 1987, from Trinidad, and claimed refugee status. Four other children remained in the care of Ms. Joseph's sister in Trinidad. On September 1989, the petitioner's husband was killed in a car

accident, at which time the children in Trinidad joined their mother. On May 27, 1992, the petitioner received her initial humanitarian, and compassionate interview. No grounds were found to warrant granting her status to remain in Canada. Subsequently, on October 29, 1992, a credible basis hearing was held before an adjudicator, and IRB member. Both members of the panel concluded that the petitioner had not demonstrated a credible basis for fearing that she might suffer severe sanctions or persecution if she were to return to Trinidad. Consequently, a departure notice for Ms. Joseph, and four children was issued requiring her to leave by December 13, 1992. (Ms. Joseph's eldest daughter was subject to her own individual refugee backlog proceeding. She has also been issued a departure notice.)

12. On December 7, 1992, a final humanitarian, and compassionate review was conducted, and it was again concluded that there were no extraordinary grounds warranting a departure from the usual requirements of the Immigration Act. Among the factors considered were the continued existence of family ties in Trinidad. As regards insurance proceedings relating to her husband's death, Ms. Joseph could give, if necessary, a power of attorney to a relative or friend resident in Canada. As well, if the proceedings required her return to Canada, she could apply for a special Consent of the Minister. Another relevant factor in humanitarian consideration was that Ms. Joseph had obtained little work attachments. As well, it cannot be reasonably expected that Ms. Joseph will be able to support herself, and her family in Canada, are unwilling to provide her with assistance. Ms. Joseph has been primarily dependent on welfare payments. The petitioner would, of course, be able to apply for entry into Canada from Trinidad as a regular immigrant.

13. Exhaustion Of Domestic Remedies:

Article 35 of the Regulations of the Inter-American Commission on Human Rights (the Regulations) provides that for a petition to be admitted by the Commission, all effective domestic remedies must be first exhausted. It is the position of the Government of Canada, that in failing to seek leave to appeal both the credible basis decision, and the humanitarian, and compassionate review, the petitioner failed to exhaust all recourse available to her in Canada. Article 35 of the Regulations reflects a fundamental principle of general international law that local recourse be exhausted before an international remedy is sought. This ensures that domestic remedies are not superseded by an international organ, and that a state has an opportunity to correct any wrong which may be shown before its internal fora, before that state's international responsibility is engaged. (Robertson, A.H., "Human Rights in Europe," Manchester University Press: Oxford 1970, 160; Mose, E. and Opsahl, T, "The Optional Protocol to the International Covenant on Civil, and Political Rights," 1981, 21 Santa Clara Law Review 271 at 302.)

14. Moreover domestic courts are generally better placed to determine the facts of, and law applicable to a particular case, and where necessary, to formulate, and enforce an appropriate remedy. As noted above, the decisions of the two-member panel on credible basis, and Immigration officials on humanitarian, and compassionate grounds, may be appealed with leave to the Federal Court of Appeal. An application for leave must be filed within 15 days from the date of notification of the panel's or immigration's conclusions, as the case may be (s. 82.1(3) of the Immigration Act). In turn, a decision of the Federal Court of Appeal may be appealed with leave to the Supreme Court of Canada. In application for leave, Ms. Joseph could have raised the arguments she has put forward to the Inter-American Commission under the Canadian Charter of Rights and Freedoms. The Charter provides, inter alia, the following rights and freedoms:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

> 24(1). Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

15. Mrs. Joseph could have also sought judicial review on the basis of administrative law principles. These include her right to natural justice, and a duty of fairness upon public officials. It should also be recalled that in Canadian Council of Churches v. Her Majesty the Queen et al., the Supreme Court of Canada denied standing to the Canadian Council of Churches to contest the refugee determination procedure in the Immigration Act because the legislation directly affected all refugee claimants. The claimants were necessarily before the courts, and had an opportunity to challenge the Act's provisions. The Court underlined that refugee claimants were in fact raising arguments on a daily basis akin to those brought by the Canadian Council of Churches. It is therefore submitted that effective domestic remedies were available to the petitioner. She had a duty to avail herself of those remedies prior to petitioning an international body, but she chose not to invoke them. Her failure to do so should not now allow her to by-pass the important precondition stated in article 35 of the Regulations, and accordingly, the petition should be dismissed for failure to exhaust domestic remedies.

16. Article V: Protection From Abusive Attacks on Family Life

The petitioner alleges a violation of the right to be protected against abusive attacks upon the family in article V of the Declaration, as a consequence of her being denied residence in Canada. The Government of Canada submits, firstly, that there is no evidence of "abusive" conduct by the state, and secondly, that the Article does not include a right to enter or reside in a particular state. There is no evidence that Ms. Joseph suffered any "abusive attacks" in the conduct of her refugee claim. She received a credible basis hearing in accordance with the Immigration Act, and due process norms. As well, the discretionary review on humanitarian, and compassionate grounds was conducted according to publicly stated criteria. Moreover, there is no evidence of arbitrary conduct or bad faith on the part of the public officials who considered Ms. Joseph's claim.

17. It is further submitted that Article V does not grant a right to enter or reside in a country, particularly where no legal obstacles exist for a person to establish family life in another country to which that person is connected. The European Commission and the Court of Human Rights have repeatedly interpreted Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention") in this fashion. The case of Abdulazia, Cabales and Balkandali ((15/1983/71/107-9) Series A, vol. 94), cited by the petitioner, provides a clear illustration. The three applicant wives, who were lawfully, and permanently settled in the United Kingdom, alleged in part, a violation of Article 8 because of the government's refusal to permit their non-national husbands to enter or remain in the United Kingdom. The European Court noted firstly, that "as a matter of well-established law, and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory." (at p. 34.) The Court also noted that:

> The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. (At p. 34.)

18. Because each of the applicant wives could establish a family life in another country in which they or their husbands had a connection, the Court held that there was no violation of Article 8 of the European Convention. However, the applicants were successful on the grounds that the Immigration Rules made it easier for a male resident of the United Kingdom to obtain permission for his non-national spouse to enter or remain in that country, than for a female resident of the United Kingdom. The Rules thus discriminated on the grounds of sex in the enjoyment of the right protected by Article 8. It was this discrimination, contrary to Article 14 of the European Convention, which the Court found abusive.

19. Similarly, in Agee v. United Kingdom ((7729/76) DR 7, 164) the complainant alleged, in part, that his deportation would adversely affect his family life contrary to Article 8 of the European Convention. The Commission declared this allegation manifestly ill-founded on

the following basis:

> The applicant and his common-law wife, who have apparently been living together in England since 1973, are both aliens and are of different nationality. They have been residents in the United Kingdom on a temporary basis and it has not been shown that they will be unable to make reasonable arrangements to live together outside the United Kingdom, ever if they would prefer to remain. Where in such circumstances the wife has the possibility of following her husband out of the country, this does not in the Commission's opinion constitute an interference with family life contrary to Art. 8(1) ... (At pp. 173-4.)

20. Another illustration is provided by X and Y v. United Kingdom ((5269/71) CD 39, 104). The Commission there held that in some circumstances, exclusion of a person from a country where close family members are living may amount to an infringement of Article 8 of the European Convention (e.g., where the only legal residence a couple can find is in a country unconnected with either of them). However, such was not the case where the complainant husband was being deported, but his wife was able to follow. This was so even though the wife was a citizen of the United Kingdom, and had very "close attachments" to her parents with whom the couple lived in the United Kingdom. (See also X and X v. United Kingdom (5445/72 and 5446/72) CD 42, and X v. United Kingdom (5301/71) CD 43, 82.

21. The United Nations Human Rights Committee has interpreted the relevant provisions of the International Covenant on Civil and Political Rights (the "Covenant") in much the same fashion. At issue in Aumeeruddy-Cziffra v. Mauritius (Communication Nº 35/1978), a case cited by the petitioner, were statutes which granted virtually automatic residence to alien wives of male nationals, but required residence permits for foreign husbands of female nationals. These permits could be refused or withdrawn at any time, upon which the husbands could be deported without judicial review. The Human Rights Committee did not hold that restrictions on the entry of foreign spouses was in and of itself an interference with the family, contrary to Articles 2(1), 3 and 26 of the Covenant, in relation to the way its nationals could exercise the rights protected by Articles 17 and 23:

> Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them from there for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements."

22. This interpretation is also consistent with the Human Rights Committee's General Comment 16 (on Article 17), also cited by the petitioner. Regardless of how broad an interpretation is given to "family," the right in Article 17 does not grant the petitioner and her children a right to enter and reside in a country of their choice, particularly where they have status in and connections to their country of origin.

23. The petitioner also cited three other European cases in support of her position. It is submitted that they are not similar to the circumstances in question in that they do not involve the right of an individual to enter a country. Moustaguim v. Belgium ((31/1989/191/291) Series A, Vol. 93) concerned reparations for a 5 year deportation, as a consequence of criminal conduct, of a youth who already had resident status in Belgium. The deportation order, which the Court considered disproportionate to the offenses, resulted in the complainant's separation from his parents, and siblings after having spent virtually his whole life in Belgium.

24. The cases of Beldjoudi v. France ((55/1990/246/317) Series A, Vol. 234-A) and of Djeroud v. France ((34/1990/225/289) Series A, Vol. 191) also involved deportations, as a result of criminal conduct, of individuals with resident status in France. Again, the complainants had spent most of their lives in France (in both cases, nearly 40 years) and consequently, did not have any family or social links with their country of origin, Algeria. Thus, deportation was considered disproportionate to the state's aim of preventing crime, and disorder. (Ultimately, the European Court did not address the issue because, in the interim, there had been a friendly settlement between the parties.)

25. The importance of distinguishing in the application of Article 8 between a complainant with resident status in a particular country, and one who is simply seeking entry, was emphasized in Berrehab v. Netherlands ((3/1987/126/177) Series A, Vol. 138). The complainant, a Moroccan national, had been granted a visa by the Netherlands authorities to allow him to live with his Dutch wife. After he and his wife divorced, the authorities refused further visas even though the complainant had extensive visiting rights with the young daughter of the marriage. In finding a violation of Article 8, the Court stated:

> ... it must be emphasized that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had lawfully lived there for several years ...

26. It is submitted, based on the above case law, that the petitioner has failed to demonstrate a breach of Article V of the Declaration. There has been no arbitrary or abusive conduct on the part of Canadian officials. Moreover, Article V is not intended to interfere with the general right of states to determine immigration policies and conditions of entry for aliens. Therefore, it is submitted that Article V cannot be invoked by Ms. Joseph for the purpose of obtaining first-time residence for her, and her children in Canada, particularly where she is able to return to her country of origin, Trinidad. Ms. Joseph has connections to and family in Trinidad, and has in fact lived many more years there than in Canada. She is not being separated from her children, as they are required to leave with her. It is therefore submitted that the petitioner has failed to demonstrate even a prima facie violation Article V and that the petition should be declared inadmissible under Article 41 of the Regulations.

27. Article VI: Protection Of The Family:

The petitioner alleges a violation of Article VI of the Declaration because she and her family have not been granted permission to reside in Canada. It is submitted that for the reasons given in the immediately preceding section, Article VI is also inapplicable to the petitioner's circumstances. It is submitted that the protection of the family does not include a right of a family to choose their preferred country of residence. This is particularly so where all members of the family have legal status in their country of origin and do not risk persecution there. In this regard, reference should be made to the decision of Aumeeruddy-Cziffra v. Mauritius, discussed above. In considering the parallel guarantee under the Covenant, the Human Rights Committee stated that protection of the family did not preclude a state from restricting access by aliens to its territory.

28. Article VII: Protection Of Pregnant Women And Children:

It is again submitted that the petitioner has failed to demonstrate any facts which would support a violation of Article VII of the Declaration. The protection in this Article does not entitle the petitioner to select her country of residence.

29. Article XVIII: Resort To The Courts:

It is also alleged by the petitioner that she was denied the right in Articles XVIII of the Declaration to resort to the courts for violations of legal or fundamental constitutional rights. This Article obliges states to ensure to individuals an effective means of judicial recourse for the determination of rights. (Sieghart, Paul, "The International Law of Human Rights," Clarendon Press: Oxford, 1983.) The Government of Canada submits that not only are effective legal, and judicial remedies available in Canada, but they have in fact been employed by the petitioners. As discussed above, Ms. Joseph received an oral hearing before an independent, impartial panel to determine whether she had a credible basis for her Convention refugee claim. (Persons in the backlog process only need to demonstrate a "credible basis," not that they are in fact Convention Refugees.)

30. She had the benefit of the right to counsel, as well as the full range of due process guarantees. These included the right to receive a copy of the information on which the inquiry was based, to present evidence, to examine, and cross-examine witnesses, to use an interpreter, if necessary, and to know the basis on which the removal order was issued. As

well, Ms. Joseph had the option of seeking leave to appeal the panel's decision to the Federal Court of Appeal, although she chose not to exercise that option. In addition, Ms. Joseph received the benefit of two humanitarian, and compassionate reviews. She could also have sought judicial review of these decisions, with leave, by the Federal Court of Appeal, but she chose not to do so. Based on the above, it is submitted that not only is Canadian law consistent with the right delineated in Article XVIII of the Declaration, but that the petitioner had the full benefit, and use of that right. There is thus no evidence of a violation of article XVIII.

31. Article XXVII: Right Of Asylum:

Article XXVII of the American Declaration provides a right to seek and receive asylum in accordance with domestic laws and international agreements. The international instrument of greatest relevance to the current circumstances is the "United Nations Convention Relating to the Status of Refugees." As indicated above, its obligations have been incorporated into the Immigration Act. Clearly, Ms. Joseph exercised her right to seek asylum. She did not receive asylum because an independent, and impartial panel determined that she had not demonstrated a credible basis on which she might be found to be a Convention refugee. In addition, several humanitarian, and compassionate reviews of Ms. Joseph's case were conducted to determine whether there existed extraordinary circumstances warranting her residence in Canada, despite the fact that she did not meet the legal requirements for refugee status.

32. It is relevant to note that the case of Maroufidou v. Sweden, Communication No. 13/58 under the "United Nations Optional Protocol to the International Covenant on Civil and Political Rights." In that case, the communicant claimed that her deportation on the grounds that there were good reasons to believe she would participate in Sweden in a terrorist act, violated Article 13 of the Covenant. Article 13 provides that:

> An alien lawfully in the territory of a State Party ... may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion....

33. The Human Rights Committee held that there had been no violation of the Covenant because the communicant was expelled in accordance with the procedure laid down by the State's domestic law, and there had been no evidence of bad faith or abuse of power. Importantly, the Human Rights Committee concluded that where an alien was expelled in accordance with the procedure laid down by the state's domestic law, it was not for the Committee to evaluate whether the competent authorities of the state had correctly interpreted and applied that law, unless it was established that they had acted in bad faith or abused their power.

34. The Government of Canada submits that the reasoning of the Human Rights Committee is applicable to the current circumstances. The decision not to grant Ms. Joseph refugee status was made in accordance with domestic, and international law. There is no evidence of an abuse of power by Canadian authorities, and absent the interpretation, and application by those authorities of Canadian law. Accordingly, it is submitted that there is no evidence of a violation of Article XXVII of the Declaration.

35. Refugee Backlog Process:

A wide variety of allegations are made in the petition against the refugee backlog procedure in general. However, no evidence is presented to support these allegations, and accordingly, it is submitted that the petition should be dismissed by the Inter-American Commission as manifestly groundless pursuant to Article 41 of the Regulations.

36. In conclusion, the Government of Canada submits that the present petition should be declared inadmissible pursuant to the Commission's Regulation. However, if the Commission should reach a contrary conclusion on any of the above submissions, the Government of Canada reserves the right to make further submissions at a later date.

VI. THE LAW:

The two issues raised in this petition are as follows:

1. Is this petition admissible?

2. Do the facts as alleged constitute violations of human rights recognized in the American Declaration of the Rights and Duties of Man?

1. IS THIS PETITION ADMISSIBLE?

Immediately prior to the submission of this petition both parties submitted several exhibits outlining the procedures of Canada's Immigration Act, a copy of Canada's Immigration Act as amended in 1989, a copy of the Canada Act 1982 including a copy of the Constitution Act of Canada 1982, in which Part I contain provisions of the Canadian Charter of Rights And Freedoms, Court Judgments, and other documentation which have been considered by the Commission, are relevant, material, and which will be utilized in the determination of this petition. In order to determine whether this petition is admissible it is necessary examine the relevant Articles which are applicable to this case. Article 37 of the Regulations of the Commission provide that:

1. For a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law.

2. The provisions of the preceding paragraph shall not be applicable when:

a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;

b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

3. When the petitioner contends that he is unable to prove exhaustion as indicated in this Article, it shall be up to the government against which this petition has been lodged to demonstrate to the Commission that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the background information contained in the petition.

2. An examination of Article 46 of the American Convention on Human rights is necessary here, because it reflects most of the provisions of Article 37 of the Commission's Regulations, notwithstanding that it is not the controlling instrument because Canada has not yet ratified the Convention. Article 46 provides:

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;

c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and

d) that, in the case of article 44, the petition contains the name, nationality,

profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

Article 2 provides that "the provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

3. Petitioners assert that Mrs. Joseph has a number of rights under the American Declaration which will be violated in expulsion from Canada. These Articles are, V, VI, VII, XVIII, and XXVII.

i. Article V provides that: Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

ii. Article VI provides that: Every person has the right to establish a family, the basic element of society, and to receive protection thereof.

iii. Article VII provides that: All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

iv. Article XVIII provides that: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him, a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

v. Article XXVII provides that: Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

4. An examination follows on what domestic remedies were available to Mrs. Joseph in Canada in order ascertain whether she should have invoked and exhausted those remedies Canada, prior to the submission of her petition. After arriving in December 16, 1987, Mrs. Joseph applied for refugee status in March of 1988. During the pendency of her claim, there existed three sets of immigration procedures under the Immigration Act as amended in Canada. The first being the Immigration Procedure for regular immigration claims, such as permanent residency and citizenship claims, but not limited to these claims. The second being the Convention Refugee Procedure for dealing with claims of persons claiming to be Convention Refugees. The third being a procedure under the Immigration Act of 1989 as amended called the "Refugee Claimants Designated Class Regulations" often referred to as the "Refugee Claimants Backlog Procedure."

5. It is undisputed by both parties that the "Refugee Claimants Backlog Procedure was established to deal with the large number of claims for refugee status under the "Convention Refugee" procedure, and in order to expedite the processing of such claims. Claimants were encouraged to apply to have their claims processed under this procedure which it is alleged would result in a simple, swift, and brief procedure. In opting to have their claims processed under this procedure, it is alleged that claimants in effect gave up their rights to appeal to the Refugee Appeals Division of the Immigration Board. Instead they could with leave appeal directly to the Federal District Court Trial Division, or with leave to the Appellate Division of the Federal Court.

6. Mrs. Joseph's claim was processed under the expedited process, the "Refugee Claimants Backlog Procedure." She had her initial humanitarian, and compassionate interview on

March 27, 1992. Thus the controlling instruments applicable to her claim for refugee status are the Immigration Act of Canada 1985" as amended in 1989, and the Regulations made thereunder which is titled, the "Refugee Claimants Designated Class Regulations," often referred to as the "Refugee Claimants Backlog Procedure." The relevant sections applicable to the class Mrs. Joseph fell under are Sections 6(2) and Sections 114(1)(d), and 114(2).

7. Section 6(2) of the Immigration Act 1989 as amended provides that:

> Any Convention refugee and any person who is a member of a class designated by the Governor in Council as a class, the admission of members of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted, may be granted admission subject to such regulations as maybe established with respect thereto and notwithstanding any other regulations made under this Act." 1976-77,c.52.6.

8. The term "Convention Refugee" is defined its definition section under two headings, "Convention," and "Convention Refugee." "Convention" is defined as meaning, "the United Nations Convention Relating to the Status of Refugees signed at Geneva on July 28, 1951, and includes the Protocol thereto signed at New York City on January 31, 1967;"

"Convention refugee" means, "any person who

> a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of that protection of that country, or
>
> ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and
>
> b) has not ceased to be a Convention refugee by virtue of subsection (2), but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

9. Section 114(1)(d) of the Act provides that:

> The Governor in Council may make regulations designating classes of persons for the purposes of Subsection (6)(2).
>
> Article 114(2) provides that:
>
> The Governor in Council may by regulation exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Governor in Council is satisfied that the person should be exempted from the regulation or the person's admission should be facilitated for reasons of public policy or due to the existence of compassionate or humanitarian considerations."

10. Upon the conclusion of Mrs. Joseph's initial interview on humanitarian and compassionate grounds no grounds were found to warrant granting her "status" to remain in Canada. Because this was a discretionary review Mrs. Joseph had the right to file an application for leave to seek judicial review of this decision in the Federal Court Trial Division, under Section 18 of the Federal Court Act. Section 18 of the Act provides that "the Trial Division has exclusive original jurisdiction:

> a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal." R.S.c. 10(2nd Supp.)

11. Mrs. Joseph could also have sought judicial review of this decision under Section 28 of the Federal Court Act. She could have done so by filing an application for leave for judicial review in the Federal Court Appellate Division, on the grounds that the principles of natural justice were not complied with. Section 28 provides that:

Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal:

a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) erred in law in making its decision or order, whether or not the error appears on the face of the record: or

c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

12. However, she did not seek review of this decision either under Section 18 or Section 28 of the Federal Court Act. On October 29, 1992, a "credible basis" hearing was held before an adjudicator, and an Immigration and Refugee Board member. The factors which must be taken into consideration on which a finding of "credible basis" can be made are set out in Section 46.01 of the Immigration Act. Section 46.01(6) provides that:

If the adjudicator or the member of the Refugee Division, after considering the evidence adduced at the inquiry or hearing, including evidence regarding

a) the record with respect to human rights of the country that the claimant left, or outside of which the claimant remains, by reason of fear of persecution, and

b) disposition under this Act or the regulations of claims to be Convention refugees made by other persons who alleged fear of persecution in that country,

is of the opinion that there is any credible or trustworthy evidence on which the Refugee Division might determine the claimant to be a Convention refugee, the adjudicator or member shall determine that the claimant has a credible basis for the claim."

13. In Mrs. Joseph's case neither the adjudicator nor the Immigration Board member concluded that she had a "credible basis" for her claim to refugee status. At this hearing Mrs. Joseph did not have to prove that she was a "Convention Refugee," she only had to establish that she had a "credible basis" for her claim of refugee status. The Government stated in its reply to the petition that she had the benefit of Counsel at this hearing, the right to receive a copy of the information on which the inquiry was based, the right to present evidence, the right to examine, and cross-examine witnesses, the right to use an interpreter if necessary, and to know the basis on which the removal was issued. Mrs. Joseph could again have sought judicial review of the Refugee Board's decision, pursuant to Sections 18 and 28 of the Federal Court Act but did not.

14. Mrs. Joseph received her final humanitarian and compassionate review on December 7, 1992, and it was found that there were no extraordinary grounds warranting a departure from the usual requirements of the Immigration Act. Given the choice of a "deportation order" or a "departure notice," to leave Canada, she chose a "departure notice"

which is a voluntary act of removing herself and children from Canada, and which would not bar her from seeking future admittance to Canada. A departure notice was then issued requiring that she and her four children leave Canada by December 13, 1992. The definition section provides that a "removal order" means "an exclusion order or a deportation order.

15. Mrs. Joseph could again have filed an application for judicial review of this order under Sections 18 and 28 of the Federal Court Act. Furthermore, under the Immigration Act as amended in 1989, Article 82(1) which provides that:

> An application or other proceeding may be commenced under section 18 or 28 of the Federal Court Act with respect to any decision or order made, or any other matter arising, under this Act or the rules or regulations only with leave of a judge of the Federal Court - Trial Division or the Federal Court of Appeal, as the case may be.

16. Therefore, Mrs. Joseph could have sought leave to make an application for judicial review of this final humanitarian and compassionate review, and against the removal order, because the section states that "an application or other proceeding may be commenced under section 18 or 28 of the Federal Court Act with respect to any decision or order made, or any other matter arising, under this Act or the rules or regulations..."

17. However, a time limit is imposed under Section 82.1(3)of the Act which provides that:

> An application under this section for leave to commence a proceeding shall be filed with the appropriate Court within fifteen days after the day on which the applicant is notified of the decision or order or becomes aware of the other matter.

18. Thus, the application for leave to seek judicial review of the Board's decision has to be filed within fifteen days. The Act further provides under Section 82.1(6) that:

> A judge of the appropriate Court may, for special reasons, allow an extended time for filing an application under this section for leave to commence a proceeding or for commencing the proceeding.

19. Thus, if the application to seek leave for judicial review was not filed within the 15 days time limit, a later application can be made to the Federal Court to extend the 15 days time limit to seek judicial review if there are special reasons for not filing within this time limit. Furthermore, the Act provides for a "stay of execution of the removal order when certain conditions are met. Article 49 provides as follows:

> 49(1) Except in the case of a person residing or sojourning in the United States or St. Pierre and Miquelon against whom a removal order is made as a result of a report made pursuant to paragraph 20(1)(a), "the execution of a removal order is stayed."
>
> a) in any case where the person against whom the order was made has a right of appeal to the Appeal Division, at the request of that person until twenty-four hours have elapsed from the time when the person was informed pursuant to section 36 of the right of appeal;
>
> b) in any case where the person against whom the order was made has a right to file an application for leave to commence an application or other proceeding under section 18 or 28 of the Federal Court Act in respect of the order, at the request of that person until seventy-two hours have elapsed from the time when the order was pronounced;
>
> c) in any case where an appeal from the order has been filed with the Appeal Division, until the appeal has been heard and disposed of or has been declared by the Appeal Division to be abandoned.

20. Therefore, if Mrs. Joseph had exercised her right and filed an application for leave to commence proceedings against the removal order, it would have the effect of staying the

execution of the removal order for seventy-two hours from the time when the order was pronounced. (Article 49(1)(b)). The Act further provides for, and outlines the right to Counsel in Article 30(3). It provides that:

Article 30(3) of the Act provides that:

> In such cases as, are prescribed, a person against whom a removal order is made, or to whom a departure notice is issued shall be represented, at the Minister's expense, with respect to any application for leave to commence an application under section 28 of the Federal Court Act in relation to the removal order or departure notice and with respect to the application under that section by a barrister or solicitor who is designated in accordance with the regulations and who is ready and able to proceed, unless the person is represented by a barrister or solicitor who is available to take instructions with respect to such an application
>
> a) in the case of a person against whom a removal order is made, within twenty-four hours after the making of the order; or
>
> b) in the case of a person to whom a departure notice is issued, prior to the date on or before which the person is required to leave Canada.

21. Thus, Mrs. Joseph had the right to have a Counsel represent her in her application for leave to commence proceedings against the removal order. This Counsel could have been provided for her by the Minister at his or her own expense, who is defined in the definition section of the Act as meaning, "such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for purposes of this Act." Or, she could have retained her own Counsel who would have to be available within twenty-four hours after the making of the "removal order," or in the case of a "departure notice" prior to the date on or before which she was required to leave Canada.

22. An examination follows on the other relevant Sections of the Act.

> 82.2(1) provides that "No appeal lies to the Federal Court of Appeal from a decision of a judge of the Federal Court - Trial Division on an application under section 82.1 for leave to commence an application or other proceeding under section 18 of the Federal Court Act."
>
> 82.2.(2) provides that "No appeal lies to the Supreme Court of Canada from a decision of a judge of the Federal Court of Appeal on an application under section 82.1 for leave to commence an application under section 28 of the Federal Court Act."
>
> 82.1(4) provides "Unless a judge of the appropriate Court directs otherwise, an application under the section for leave to commence a proceeding shall be disposed of without personal appearance."
>
> 82.1(5) provides "Where leave under this section to commence proceeding is granted, the proceeding shall be commence within fifteen days after the granting of leave."
>
> Article 50(1)(a) provides that: "A removal order shall not be executed where the execution of the order would directly result in a contravention of any other made by any judicial body or officer in Canada."

23. Therefore, although Mrs. Joseph was not required to personally appear in her application for leave to commence proceedings against the two decisions denying her right the right to remain in Canada on humanitarian and compassionate grounds, and the "no credible basis finding" by the Refugee Board, an application could have been filed on her behalf to the Federal Court Trial, and Appellate Divisions. However, in interpreting the above sections, if the application was to seek leave to file an application for judicial review, and leave was denied, there would be no right of appeal to the Appellate Division of the Federal Court, nor to the

Supreme Court of Canada. Moreover, if leave had been applied or an application was pending before the Court, the execution of the order would be stayed for 72 hours under Section 49(1) (b) discussed above, or where its execution would contravene the order of a judicial body or officer in Canada.

24. In addition to the rights and remedies discussed above, Mrs. Joseph has a number of other rights and remedies provided by the Canadian Charter of Rights, which are contained in the Canada Act of 1982, and the Constitution Act of 1982. A brief examination follows on the relevant rights and freedoms, and the remedies available to a person physically present in Canada under the Charter.

Section 7 provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 15(1) provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 24(1) provides that:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

25. In reviewing the documentation submitted to the Commission by the parties, the term "everyone" which is contained in the Charter applies to "everyone physically present in Canada," and is not limited to persons on "permanent resident visas" in Canada, nor is it limited to "Canadian citizens." Thus from the examination, and discussion above, Mrs. Joseph could have utilized the domestic remedies available to her in Canada by invoking and exhausting them, that is by filing an application to seek leave for judicial review of the three decisions rendered against her, and in particular, if warranted, on the basis of a violation of natural justice principles, or have attacked the constitutionality of the Immigration Act. Furthermore, the arguments contained in the petition raised by the petitioners with regard to violations of the rights contained in the Canadian Charter of Rights could have been raised by the petitioner before the Courts.

26. The question to be asked here is whether the domestic remedies examined above would have been adequate and effective to address Mrs. Joseph's claim. This issue was discussed in the case of Velásquez Rodríguez, by the Inter-American Court of Human Rights, with regard to a state's domestic remedies which must be invoked and exhausted "in accordance with the general principles of international law." The Court in construing Article 46(1)(a) of the American Convention on Human Rights, page 114, paragraph 63, that "Article 46(1)(a) of the Convention speaks of "generally recognized principles of international law." Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2)."

27. The Court further stated at page, 114, paragraph 64, that "Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the governments, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty." (I/A Court H.R., Judgment of July 29, 1988, Series

C:4)

28. At page 115, paragraph 66, the Court stated that " a remedy must also be effective -- that is, capable of producing the result for which it as designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; if it is not impartially applied." The Court went on to state on the same page paragraph 67, that, "on the other hand, contrary to the Commission's argument, the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion."

29. Thus, from the examination, and discussion above, domestic remedies were available to Mrs. Joseph in Canada against the initial humanitarian and compassionate interview, the "credible basis" hearing, and the final humanitarian and compassionate review, and the removal order. These remedies should have been invoked and exhausted by filing an application to seek leave for judicial review of these decisions, under the Immigration Act as amended, on principles of natural justice, by challenging the constitutionality of Act, and for alleged violations the rights and freedoms provided under the Canadian Charter.

30. The petitioners raised a number of arguments related to "family considerations" which are reviewable by the Immigration Review board under the "Convention Refugee Procedure," where the claimants have to demonstrate that they are in fact Convention Refugees, and which imposes a heavier burden. Mrs. Joseph's claim was not dealt with under that process. Her claim was processed under the "Refugee Backlog Procedure," where only "a credible basis" standard is applied, and she did not have to demonstrate that she was in fact a "convention refugee."

31. Based on the facts of this particular case, the examination and discussion above focused on the domestic remedies that were available to Mrs. Joseph under the Immigration Procedure under which her claim was processed and which as discussed above, was the "Refugee Claimants Designated Class Regulations," referred to as the "Refugee Claimants Backlog Procedure." Having examined the domestic remedies available to Mrs. Joseph under that process, the petitioners have not demonstrated that the domestic remedies available to her in Canada were "inadequate and ineffective," and therefore she should be excused from invoking and exhausting them as provided by Article 37(2) of the Commission's Regulations discussed above. Thus, for these reasons, and as discussed above the petition is inadmissible, and therefore a decision would not be rendered on the merits of the case.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

HAVING CONSIDERED the domestic remedies available to Mrs. Joseph under the procedures reviewed above, and BEARING IN MIND the humanitarian aspects of this case,

INVITES the Government of Canada to give favorable consideration to the possibility of permitting Mrs. Joseph to remain in Canada until the completion of the court actions brought in connection with the estate of her late husband,

CONCLUDES that the petition is inadmissible.

[Table of Contents | Previous | Next]