

**Authors: The Honourable Mr. Justice Michel M.J. SHORE and
Me Sarah DENNENE**

Date: 20131126

Docket: IMM-2013-ESPOIR

Montréal, Quebec, November 26, 2013

BETWEEN:

LES MISERABLES

Cosette and Fantine

Applicants

and

**CANADA (MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA)**

Respondent

This judgment is fictitious and is intended for learning purposes.

Introduction

So long as there shall exist, by virtue of law and custom, decrees of damnation pronounced by society, artificially creating hells amid the civilization of earth, and adding the element of human fate to divine destiny; so long as the three great problems of the century—the degradation of man through pauperism, the corruption of woman through hunger, the crippling of children through lack of light—are unsolved; so long as social asphyxia is possible in any part of the world;—in other words, and with a still wider significance, so long as ignorance and poverty exist on earth, books of the nature of *Les Misérables* cannot fail to be of use (Victor Hugo, *Les Misérables*, Volume I, *Fantine*, Preface).

Mr. Victor Hugo, counsel for the applicants

1. Victor Hugo's words still ring out like an alarm and resonate today. There exist literary works that, by virtue of their profundity, their philosophical, political and sociological importance, call into question that which, at first glance, goes unquestioned. There are those timeless works that serve to warn humanity: do not be complacent, remain aware and ready to denounce injustice. *Les Misérables* is one such work.
2. *Fantine*, *Cosette* and *Jean Valjean*. The names of these characters have found their way into the pages of school books the world over. The first two representing the violence directed against women and children, the third, a former convict, prisoner of his social status, hunted by *Javert*, representing a society that sentences without bothering with a trial.
3. Victor Hugo depicts and binds his three destinies with chains forged by society. A society that suffocates them, drowns them in prejudice, prevents them from living,

denies them their fundamental rights and condemns them to struggle for survival.

This is a timeless society that continues to exist in today's world.

4. For the purposes of the exercise, let's bring his literary characters to life. Fantine lay dying, exhausted by life's hardships. As she was breathing her last, Jean Valjean promised to watch over Cosette, but he is being pursued. However, through Jean Valjean's sacrifice, the young Cosette has now arrived in Canada and is seeking refugee protection.
5. In light of international human rights standards, which we hold dear, how must the judicial system examine the story of these three individuals? Is it able to understand Cosette's story? Does it have the means to listen to a child's timid voice, which runs the risk of being drowned out by adults?
6. It is important to understand that the story of Cosette is, above all, that of her mother. The context for this judgment is paradoxical, to say the least. Only Cosette submitted a refugee protection claim because Fantine had died. It is really not possible to grant refugee protection to those who are no longer living. But can we deny the persecution experienced by Fantine, a social persecution that violated her human dignity? This was a woman who, until the end of her days, never stopped sacrificing herself to ensure her daughter's survival. In an ultimate act of courage, she agreed to be separated from her daughter, as her society would not accept her status as a single mother. Yet, until the end of her life, she would nurture the hope of reuniting with her daughter.

7. This decision will not bring her back to life. However, the Court must speak to her child, tell her that it understood her and assuage her feeling of injustice. This decision is Fantine's dream come true. May it also be her refuge.
8. What follows, then, are the sights and sounds underpinning this decision.

Legal Procedure

9. This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act, 2001, c. 27 (IRPA)* of a decision made March 6, 2013, and through which the Refugee Protection Division (RPD) refused to grant the applicant refugee status under section 96 of the IRPA or that of a person in need of protection under section 97 of the same Act.

Facts

10. The applicant, Cosette, age 11, is a citizen of the country of the Miserable.
11. Cosette is Fantine's daughter. The young girl never knew her father and was raised by her mother.
12. The applicant alleges that her mother, Fantine, was forced to leave her to board with the Thénardiens when she was three years old in order to take on a job.
13. The Thénardiens abused Cosette and used ongoing blackmail against Fantine to extract money from her.
14. Fantine lost her job when her supervisor became aware of her status as a single mother who had had a child outside marriage.

15. After losing her job, Fantine resigned herself to selling her hair and then her teeth to pay for her daughter's board.
16. Fantine was forced into prostitution to be able to pay the Thénardiens for her daughter's board.
17. Fantine was arrested by Javert for having defended herself against a man who was violent toward her; she was sentenced to six months in prison.
18. After the intervention of the mayor, Jean Valjean, a former convict, she was released.
19. Suffering from tuberculosis, Fantine was taken in by Jean Valjean; she died at his home shortly thereafter. Before her death, Jean Valjean promised to look after Cosette.
20. Jean Valjean took Cosette back from the Thénardiens and raised her as his own daughter for five years. They lived in a convent.
21. Jean Valjean, who was about to be found again by Javert, made arrangements to send Cosette to Canada.
22. Upon her arrival on August 13, 2012, Cosette was placed in the care of social services who made a claim for refugee protection in her name. This claim was rejected on November 20, 2012.
23. Mr. Hugo took custody of Cosette in December 2012 and became her legal guardian. As legal counsel, he also submitted this application for judicial review.

Decision under Judicial Review

24. The RPD rejected the claim, concluding that the child's fear was unfounded. To comply with the Immigration and Refugee Board's *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (Guideline 3), an

RPD-designated representative was named for Cosette, an unaccompanied minor, other than Mr. Hugo. Cosette did not testify before the RPD. The RPD criticized the credibility of the designated representative's testimony. The latter determined that Cosette, as the daughter of a single mother, was the victim of discrimination and not persecution. As for the risk to life, the RPD recognized that Javert was the agent of persecution, but that he had personally targeted Jean Valjean and not Cosette. It also determined that Cosette had been the victim of abuse from the Thénardiens, but that they were not searching for her.

Status of Parties

25. The applicant claims, first, that the RPD wrongly assessed her fear under section 96 of the IRPA. The applicant alleges, in fact, having been persecuted due to her being a member of the particular social group of children born outside marriage and raised by a single mother. Her mother, Fantine, was also allegedly persecuted due to her social status as a single mother. Additionally, the applicant claims that the RPD erred in applying the Immigration and Refugee Board of Canada's *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (Guideline 3) by not giving her the opportunity to be heard and by erring in the assessment of her fear.
26. The respondent claims that Cosette would have reason to fear discrimination, and not persecution, if she should return to the country of the Miserable. The respondent also claims that the RPD based its decision on the designated representative's testimony and that Cosette had therefore been heard. The respondent also noted that the claim for refugee protection cannot be based on Cosette's best interests and that she must

instead make a claim on humanitarian and compassionate grounds to the Minister to be granted permission to stay in Canada.

Issues in Dispute

27. The Court asked the following questions:

- 1) Did the RPD err in concluding that Cosette and Fantine were victims of discrimination and not persecution?
- 2) Did the RPD err in its application of Guideline 3 relating to the assessment of Cosette's fear and with regard to her right to be heard?

Applicable Legislation

28. The following provisions from the IRPA are relevant:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays ;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture ;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de

of that country to provide adequate health or medical care.

l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Standard of Review

29. Deference is due to the factual conclusions made by the RPD, and the reasonableness standard applies. Therefore, as explained in *Dunsmuir v. New Brunswick*, 2008 SCC 9, reasonableness is concerned with “justification, transparency and intelligibility within the decision-making process” (*Dunsmuir*, at paragraph 47).
30. Nonetheless, no deference from this Court is required with regard to issues of law and procedural fairness, and the correctness standard must apply.

Analysis

Did the RPD err in concluding that Cosette and Fantine were victims of discrimination and not persecution?

31. To understand Cosette’s story, it is necessary to begin with the story of Fantine. The Court is aware that, in so doing, it finds itself deciding upon a claim for refugee protection for a deceased individual. Fantine made every sacrifice to save Cosette. She even sacrificed her dignity. Cosette only lived with her mother for the first three

years of her life, but the strength of the bond between these two is palpable and evident in the child. As Mr. Hugo explained:

At the age of twenty-two, on a beautiful spring morning, [Fantine] quitted Paris, bearing her child on her back. . . . This woman had, in all the world, nothing but her child, and the child had, in all the world, no one but this woman.

(Victor Hugo, *Les Miserables*, Volume I, Fantine).

32. According to *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, to be granted refugee status, the claimant must feel fear of persecution relating to a reason under section 96 of the IRPA, and it must be objectively well-founded. In this case, the applicant alleges that she was persecuted because her mother was a single mother who had her outside of marriage, something that was unacceptable in the country of the Miserable.

33. The 1951 Geneva *Convention Relating to the Status of Refugees* does not make gender a reason for persecution; however, it has been recognized that this reason is similar to those stated in this Convention, listed in section 96 of the IRPA. Moreover, according to the Immigration and Refugee Board of Canada's *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*

(Guideline 4), certain women may constitute a social group:

These particular social groups can be identified by reference to factors, in addition to gender, which may also be innate or unchangeable characteristics. Examples of other such characteristics are age, race, marital status and economic status. Thus, for example, there may be sub-groups of women identified as old women, indigenous women, single women or poor women. In determining whether these factors are unchangeable, consideration should be given to the cultural and social context in which the woman lives, as well as to the perception of the agents of persecution and those responsible for providing state protection [Emphasis of the Court]

34. With regard to the subjective aspect of fear, the Court is faced with a situation that is, at the very least, paradoxical, because the applicant cannot attest to her fear. How, then, can the problem of evidence be resolved? The Court will give credence to the testimony of Jean Valjean in the Court Record. In fact, when Cosette arrived in Canada, she was carrying a letter from Jean Valjean. This letter was notarized and therefore entered into evidence. It corroborated the previous allegations. The following excerpts are relevant:

I am Jean Valjean, sentenced to imprisonment for stealing a loaf of bread. I was going to help my sister who did not have enough for her children. The end is near for me and I hope that this letter, given to Cosette, will fill the gaps in her own story.

I was a convict for nearly 20 years. I escaped from the galleys, and Monseigneur Bienvenu gave me a new lease on life by offering me a chance for pardon. He was the first to see beyond my appearance. The first to perceive my humanity underneath the label of convict. I became mayor, and I assumed a new identity. Life offered me a second chance, but my past was chasing me. It was chasing me in the form of the unyielding Javert. For him, there was no possible redemption for former convicts. My society offered no pardon to people like me.

I met Fantine when I was mayor. She was working in my workshop and was fired without my knowledge. What fault had she committed? That of having given birth to a child outside of marriage? No. Fantine had loved and was abandoned, and afterwards she lived for her child.

I met her for the first time when I intervened on her behalf with Javert. The latter had arrested her for defending herself against a man. What misfortunes has she not endured? She went so far as to sell her body to pay her daughter's board.

Alas! As life was finally putting her on a path toward me so that I might help her, it was already too late. She was dying. To her dying breath, she wanted her child. I was only able to shorten her suffering by promising to watch over her daughter. I went to take back Cosette from the Thénardiens. I loved her and raised her as my own daughter.

35. The RPD accepted the facts presented to it, but concluded the following:

[34] While I accept the fact that the claimant as an illegitimate daughter is a member of a social group, she and her mother were, at most, victims of discrimination and harassment. Although deplorable, none of the acts suffered by Fantine constitutes persecution under section 96 of the IRPA.

36. It is true that international refugee law does not recognize discrimination as a form of persecution. The Court, in *Csonka v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1056, made the following comments in an obiter:

The demarcation line between discrimination and persecution in refugee law is thin.

...

Therefore, this Court has no option but to differentiate and to delineate between discrimination and persecution as have the higher courts in their jurisprudence. The higher courts have recognized the state of the civilized world in which the higher courts find themselves, in that, reality and the ideal have not, as yet, met in this regard. [Emphasis added.]

37. Fantine suffered numerous acts of discrimination. In the RPD's reasoning, Fantine did not suffer to the point of being described as persecuted. How much pain must a person suffer for us to say that he or she has been persecuted? The question asked by the Court in *Bayrak v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1056, is relevant:

[6] In the case before this Court, certain acts of harassment could have been categorized as distinct, separate in time and space, from the cumulative discrimination and collective harassment of a population targeted by the Turkish government's agents of persecution; however, when we look at it cumulatively, all together, when is enough, enough?

38. The UNHCR's *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status*

of Refugees provides a legal answer to this question. It states the criterion to apply when several acts of discrimination are alleged:

c) Discrimination

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.

39. This Court, following the judgment of the Federal Court of Appeal in

Sagharichi v. Canada (Minister of Employment and Education) (1993), 182 NR 398, recognized, on numerous occasions, that acts characterized as discrimination, at first sight, are the equivalent, through their cumulative effect, of persecution (*Naikar v. Canada (Minister of Employment and Education)*, [1993] F.C.J. No. 592; *Iruthayanathar v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1097).

40. Furthermore, the extent of the abuse should be assessed, taking into account the characteristics of those suffering it. Age, vulnerability, and weakness exacerbate the

seriousness of the violence in discriminatory acts (*Bayrak*, above, at paragraph 18; *Nejad v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1168

41. In this case, as stated by Jean Valjean, Fantine was forced to abandon her daughter to take on a job. When her status as a single mother was discovered, she was fired. The Thénardiens shamelessly exploited her social status, pushing her to dispose of her hair, her teeth and then her body in succession. Moreover, the state in the person of Javert persecuted Fantine by arresting her for defending herself, by ruling against her, using his position, without any other kind of trial.

42. Fantine went so far as to sacrifice her dignity for her child. In objective terms, Mr. Hugo submitted her society to a rigorous analysis:

When she was in the street, she divined that people turned round behind her, and pointed at her; every one stared at her and no one greeted her; the cold and bitter scorn of the passers-by penetrated her very flesh and soul like a north wind.

She was obliged to accustom herself to disrepute, as she had accustomed herself to indigence.

(Victor Hugo, *Les Misérables*, Volume I, Fantine; Documentation package from the country of the Miserable)

43. In fact, Fantine was directly persecuted by the state. Because of her social status, she did not enjoy the same fundamental right granted to other citizens, including the right to be tried before being convicted or protection against arbitrary detention. As Mr. Hugo explained:

This class of women is consigned by our laws entirely to the discretion of the police. The latter do what they please, punish them, as seems good to them . . .

. . .

He [Javert] judged and condemned. He summoned all the ideas which could possibly exist in his mind, around the great thing which he was doing. The more he examined the deed of this woman, the more shocked he felt. It was evident that he had just witnessed the commission of a crime. He had just beheld, yonder, in the street, society, in the person of a freeholder and an elector, insulted and attacked by a creature who was outside all pales. A prostitute had made an attempt on the life of a citizen. He had seen that, he, Javert.

(Victor Hugo, *Les Misérables*, Volume I, Fantine)

44. Furthermore, according to Mr. Hugo, all women raising their children alone were persecuted and the state was complicit in this persecution. The alleged risk is therefore corroborated by the objective evidence (*Kuccuk v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 500, 408 FTR 225).
45. Furthermore, Cosette was persecuted due to her mother's status. Abusing a child because of her social status at birth does not equal discrimination—this reaches the level of persecution. It is clear that Cosette would be at risk if she were forced to return to the country of the Miserable. Her own story will be subject to closer analysis below.
46. All of the acts experienced by Fantine and, incidentally, by her daughter, are due to her social status. It was on account of her status as a single mother that she was fired from her job, which subsequently led her to prostitute herself.
47. It is important to note that Fantine, who was exploited, lost her health to earn a living.
48. Her death was only softened thanks to Jean Valjean, who promised to return her daughter to her. Only he allowed himself to be moved by Fantine's humanity, which he perceived through the veil of social coercion. The distress of a mother separated from her child affected him on an emotional level. He was also the only one able to see, rationally, that Fantine was persecuted:

I have heard you. I knew nothing about what you have mentioned. I believe that it is true, and I feel that it is true. . . . You shall be honest and happy once more. And listen! I declare to you that if all is as you say,—and I do not doubt it,— you have never ceased to be virtuous and holy in the sight of God. Oh! poor woman.

(Victor Hugo, *Les Miserables*, Volume I, Fantine)

49. This suffering is all the more remarkable in that it was justified by her daughter's well-being. In fact, Fantine never stopped looking out for her daughter until her dying breath:

How happy we are going to be! We shall have a little garden the very first thing! Mr. Madeleine [alias Jean Valjean] has promised it to me. My daughter will play in the garden. She must know her letters by this time. I will make her spell. She will run over the grass after butterflies. I will watch her.

(Victor Hugo, *Les Miserables*, Volume I, Fantine)

50. Fantine was not one of the miserable from the country of the Miserable; rather, she was in a state of “misery.” This is attributable to how society saw her, the society that made her a prisoner of her social status.
51. Fantine died and her hope of seeing her daughter again was never realized. This is the ultimate proof of persecution, such that this Court is merely determining a symbolic claim with regard to her. However, this decision is intended to be a humble attempt to restore Fantine's human dignity. It also aims to relieve the feeling of injustice for the child by telling her that her mother should not have been treated in the manner she was treated. This decision is also necessary as a reminder of the duty to remember the vile acts committed against women, so that they are not committed again. By doing so, the Court is echoing the statements made in *Bayrak*:

[5] The inviolability of the human person is not an aspiration; it is a fact accepted by the majority of civilized countries, the States that have signed the United Nations' *Universal Declaration of Human Rights*, 1948, inspired by the most deeply held convictions of most of the civilized States after the Second World War with its gas chambers. The *Universal Declaration of Human Rights* was drafted by a team led by René Cassin, who remembered not only the genocide of the Second World War, but also the genocide of the Armenians in the early twentieth century in Turkey itself.

...

[10] Before the genocide of the Jews and the Romani reached its apex in the concentration camps, Adolph Hitler himself said that, if the world had forgotten the Armenians (their genocide by the Turks), it would also forget the Jews.

[11] The civilized world cannot turn a blind eye while these types of acts are perpetuated, lest its silence make it complicit in crimes against humanity involving gratuitous assaults on minorities.

52. The RPD therefore erred in assessing the applicant's fear, which is objectively well-founded.

2. Did the RPD err in its application of Guideline 3 relating to assessing Cosette's fear and with regard to her right to be heard?

53. The preceding conclusion is sufficient to refer the case back to the trial court because, on its own, the error flaws the entire decision. Nonetheless, as discussed earlier by the Court, it is addressing Cosette in this decision. This is a claim for refugee protection. Despite her young age, it is important to be transparent. She is a human being in her own right with fears and pain of her own. The Court owes it to itself all the more to pursue the analysis that Cosette was not heard by the tribunal decision maker, who also seems to have erred in the analysis of his own position.

54. The RPD determined that Cosette could be sent back to the country of the Miserable.

The RPD's conclusion reads as follows:

The claimant has not demonstrated a well-founded fear of persecution based on one of the reasons in the Convention. As explained, her mother and she herself were victims of discrimination. With reference to section 97, while vague, I give the benefit of the doubt to the testimony of the designated representative that calls attention to possible abuse when Cosette was living with the Thénardiens. However, it is unlikely that the Thénardiens are still searching for her. She spent numerous years with her step-father Jean Valjean prior to his death, and she is not personally being sought by Javert.

55. At the end of its decision, the RPD still recommended that the child be allowed to submit a claim based on humanitarian and compassionate grounds because it is "presumably" in her best interests to stay in Canada. In fact, according to the RPD, "it is clear that she has no one to take care of her in the country of the Miserable" (RPD decision, at paragraph 20).

56. In the case of *Kim v. Canada (Minister of Citizenship and Immigration)* 2010 FC 149, [2010] F.C.J. No. 177, at paragraph 1, the Court quoted Janusz Korczak, a visionary in children's rights:

Children are not the people of tomorrow, but people today. They are entitled to be taken seriously. They have a right to be treated by adults with tenderness and respect, as equals. They should be allowed to grow into whoever they were meant to be—the unknown person inside each of them is the hope for the future." Janusz Korczak (Emphasis of the Court).

57. Janusz Korczak's appeal was heard in 1989 when the United Nations adopted the *Convention on the Rights of the Child*, which, for the first time, presented children as subjects of law, that is, human beings requiring protection, but also participants in the exercise of their rights. Therefore, Article 3 of the Convention decrees that "the best interests of the child shall be a primary consideration." Article 12 stipulates that a

child capable of forming his or her own views has “the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity,” and that the child must “be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.” As part of this application, it is also important to remember Article 2 of the Convention, which protects the principle of non-discrimination; Article 22, which accords specific protection to refugee children; and Article 7 of the Convention, which accords children the right to know and be cared for by their parents.

58. The *Convention on the Rights of the Child* is a binding international instrument, but has never been incorporated into Canadian law and, therefore, has no direct application. The Federal Court of Appeal has, however, decided in *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, that the IRPA must be interpreted and implemented in light of the *Convention on the Rights of the Child* (*de Guzman*, at paragraph 73). The same court also noted that a legally binding international human rights instrument “is determinative of how the IRPA must be interpreted and applied, in the absence of a contrary legislative intention” (emphasis added; *de Guzman*, at paragraph 87).
59. However, it is important not to lose sight of the context of this application. Therefore, this Court has found that the best interests of the child, as part of a refugee claim, does not have the character of substantive law. Best interests must only be considered procedurally. In other words, it cannot be the basis for a favourable decision on a

refugee claim. In fact, in *Kim v. Canada (Minister of Citizenship and Immigration)* 2010 FC 149, [2010] F.C.J. No. 177, the Court noted that:

[9] It is clear that Article 3(1) of the CRC does not state that the best interests of the child are to be a substantive consideration of every decision which affects children. The Court concludes that there is more than one manner by which decision-makers may consider the best interests of the child. Section 96 of the IRPA takes the best interests of the child into account because of the specific procedural and evidentiary considerations in the Guidelines. It is recognized that procedural and evidentiary considerations may be different for other determinations outside of the refugee framework; the key is to ensure that the best interests of the child are considered in context, within the framework of the determination to be made by a tribunal or entity deciding the case, dependent on its particular jurisdiction and legal purpose as set out in legislation. [Emphasis of the Court.]

60. The refugee claim therefore distinguishes itself from a decision based on humanitarian and compassionate considerations for which the decision-maker must be “alive, alert and sensitive” to the best interests of the child, because this is a principle that is enshrined in the IRPA. This type of application falls within the discretion of the executive. Best interests are then a factor that must be taken into account, but may not always be the leading factor under consideration (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at paragraph 12).
61. However, the RPD is expected to consider the international standards mentioned previously when applying *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues (Guideline 3)*, which requires that the procedural rules and evidence obtained be adapted to the child refugee.
62. Therefore, according to Guideline 3, a designated representative is appointed for the minor “to act in the best interests of the child” in procedural matters.

63. The designated representative can be of great assistance to the RPD. Thus, the case of *Canada (Minister of Citizenship and Immigration) v. Patel* also involved a child refugee claimant having difficulty expressing subjective fear of persecution. In this case, the Court accorded a probative value to the designated representative's testimony, describing him as "an excellent witness" who "has been very forthright [and] clearly understands the claim." The RPD described him as "a professional witness" (at paragraph 40). This witness has provided clarification regarding the child's fear and the conditions in the country of origin.

64. However, it is not so in this case because the RPD criticized the representative for the vagueness of his testimony.

65. Moreover, it must be said that appointing a designated representative does not prevent a child from providing testimony. According to Guideline 3:

[A] child claimant may be called upon to provide evidence through oral testimony about his or her claim. Like an adult claimant, a child claimant also has a right to be heard in regard to his or her refugee claim. An assessment should be made as to what evidence the child is able to provide and the best way to elicit that evidence from the child.

66. In this case, the RPD did not question whether the child had the ability and desire to provide testimony. It is not necessary to determine here whether the representative or the RPD prevented Cosette from testifying. The evidence in the case clearly shows that the RPD did not respect Guideline 3 despite stating that it was applying it.

However, it is undeniable that the child would have wanted to express herself.

Mr. Hugo submitted in evidence a letter written by Cosette, the day before the hearing before the RPD, which was not mentioned by her.

Cosette wrote the following:

I came to Canada thanks to my father who brought me on a boat that arrived in Canada. I hope I will be able to stay in this nice country. Sir, everyone talks to me about my interests. Your Honour, what are my interests? Is it my wish to stay in Canada? Is that why I came here?

Sir, I remember the warmth of my mother's embrace. I did not stay with her long. Three years, that's what my father, Jean Valjean, told me. I think that my mother was a sun. I was very small, you know, but I remember the warmth and the light. I do not remember her face. I smelled a nice smell, and I felt warmth on my back. I also heard muffled sounds. I believe she was carrying me. I was happy. When I feel happy today, I remember these feelings.

Afterwards, everything went dark. It's as though my eyes were always closed, you know, when the light goes out all of a sudden. I had sisters that I was not to call sisters and that I had to serve and who hit me. I also had a mother whom I was not to call mother and who yelled a lot. I had a Thénardier father whom I was not to call father and who often hit me. I also had a new name, "L'alouette," which I did not understand, but everyone would laugh when it was said.

They also told me that I was the result of a "fault." I was hurting. One day, the light returned. It came in the total darkness. I was carrying a very heavy pail and I was lost and I felt scared. I felt scared because I had gotten lost while going to get water at the well, and I especially must not spill it. That's the day when my Valjean father came.

After, we went to live in another city, in a big house where everyone was very nice. For a long time, my ears didn't hurt anymore, and every morning there were beautiful rays of sunshine. I learned to read and write. One day, my Valjean father told me that we had to leave. I got into the boat alone and I learned, here, that he died. I am all alone now.

67. These are startling words. This child has incredible maturity for her young age. It is impossible to justify the denial of a fundamental right held by every triable individual, including the right to be heard. Claiming otherwise amounts to undermining freedom of speech. In this instance, we have a serious lack of procedural fairness tarnishing the RPD's decision. As stated in *Abbasova v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 43, for decision-makers "at all levels,

procedural fairness sounds a rarely heard alarm, and that alarm must be heard if injustice is not to be done.”

68. The Court would also stress the child’s strength. Her words resonate powerfully and, when understood, reveal:

Worry, anxiety, anguish
sadness, depression, despair
frustration, irritation, impatience
resentment, pride, fear, concern,

69. She expresses herself with her own dictionary of terms, her gallery of portraits, and a background music that the decision-maker must be attentive to; this is the art of active listening. This letter held the voice of a child and warranted being discussed.

70. This case could not be more different than *Abbasova*, in which the Court found the applicant’s testimony to be flawed by her psychological state; the panel hearing her designated a representative for her. There is, however, a highly important similarity: in both cases, “the quasi-judicial and judicial system becomes the voice of those who have no voice” (*Abbasova*, at paragraph 68). In the present case, a subdued but strong voice was raised. Adults silenced it, but this Court must let it be heard.

71. In his address, Mr. Hugo also spoke to us of the disarray into which the child was thrown during the refugee claim process. Cosette described her first impression to him, contained in an affidavit submitted with this claim. The Court will quote the statement here to attempt to stay true to the words of the child. Cosette explained to Mr. Hugo that she had entered a room and introduced herself to “a man everyone was calling Monsieur le Commissaire.” He was seated on the other side of a piece of furniture separating him from the others, “a strange piece of furniture,” she would have said, never having seen anything similar before. The “monsieur” seemed nice,

and she said he smiled at her. She told him her name and age, and he asked her how she was doing. The “monsieur” said hello to everyone who was there, including her representative who “has her best interests in mind,” and told her that he was here to “decide” her refugee claim. Perplexed, the child spoke here about a knife, and said she asked herself what the “monsieur” meant. Then, this same man told her that she would be escorted outside the room, because her representative was going to testify for her.

72. In concrete terms, at this point the child described the usual preliminary remarks during a hearing. The child from the country of the Miserable, which is so different from our own, must have been amazed by the sight of the hearing room. However, Guideline 3 provides that the environment in which the young claimant testifies should be informal.

73. This denial to be heard left an indelible mark on Cosette. In fact, Mr. Hugo explained to the Court that the first time he met Cosette, she did not understand the process she was in, nor the reason for which she was to return to the country of the Miserable.

The child had developed a level of cynicism toward adults. They did not listen to her. They did not bother to understand, not wanting to traumatize her again. However, a few moments of actual listening would have sufficed to comfort the child, to understand what she was experiencing, to allow the adults to set the legal conditions for her situation.

I had a lot of difficulty in getting her to trust me so that she could tell me her story. This trust returned over time, and Cosette has opened up and speaks to me about her past worries and her happy memories with Jean Valjean. She draws a lot. Her first drawings depicted the night. There was black everywhere. She also draws suns. One of her drawings is of a sun in the middle of the night, she told me. I am not an expert, but I believe that this is a representation of her first meeting with Jean Valjean, that is what she is explaining.

Since I have had custody of her, Cosette has been seeing a psychologist.

(Mr. Victor Hugo, Applicant's file)

74. It is important to note that the Court is carrying out an exercise here belonging to the trier of fact, the RPD, namely the delicate task of carefully listening to the claimant, and assessing her testimony. Through the various documents submitted to the RPD, the Court reveals the voice of the child.

75. Then, according to *Patel*, in a refugee claim submitted by a child, it is important to assess the testimony in the light of the documentary evidence. Guideline 3 indicates that the objective evidence can be given preponderance when the subjective character of the fear is not articulated. Thus, the RPD needed to assess the documentary evidence that was submitted to it to understand the basis of Cosette's fear.

Children abandoned in the country of the Miserable have difficult living conditions. The state provides no functional structure. Moreover, illegitimate children born outside marriage or raised by single mothers in the country of the Miserable are stigmatized and at a high risk of being victims of abuse. They cannot attend school and they work as servants. The situation is even more arduous for young girls lacking the protection of a male family member. They run the risk of being trafficked.

(Documentation package from the country of the Miserable)

76. This excerpt substantiates the risk facing Cosette of suffering the same persecution as her mother. The little girl was also exposed to this abuse when she was boarding with the Thénardiens.

77. Moreover, Jean Valjean's notarized letter contains excerpts that could have shed light on the nature of the persecution for the RPD:

The child was abused. Abused because this poor child was not born within the standards of acceptable behaviour. Cosette never complained. Having always lived this way, her situation appeared normal to her. Still, she suffered. Oh how she suffered from lack of care and love. Dressed in rags,

when her mother had used up all of her nice material to clothe her. Cosette was her last point of pride.

Cosette. Neglected and enslaved, she did not know she was in chains. Chains put in place by her masters and forged by society. I will never forget her eyes and her smile. Gentle child. I hope with all of my heart that her new country will protect her.

As for me, I have done my best to keep my promise to Fantine. I am sadly condemned to break it, and my end is near. I have sold everything that was in my possession to pay for Cosette's voyage to Canada.

This is my final attempt to honour my promise to Fantine. I hope that this country will be able to see Cosette for what she truly is, a human being with dignity and rights, a child, too, who needs protection. I hope that she will be forever freed from the stereotype of the child of a single mother.

I hope that she will quench her thirst for learning by educating herself, that she will have freedom from want, from terror and from violence. I hope that she will find caring people on her path. Without love we do not live, we only exist. I hope that she will grow while keeping her ability for wonder intact. I hope that she will smile and laugh out loud in the face of the beauty of the world. I hope that she will fully develop in kindness and solidarity, that she will understand the fragility of life. Cosette is my hope for a better world.

78. It has been acknowledged that the panel did not discuss all of the evidence submitted.

However, remaining silent on evidence contradicting its conclusions makes it possible to assume that this was not taken into account (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1988), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264).

79. As stated in *Patel*, it is not a child's responsibility to legally qualify his or her story.

A child will not say that he or she has a reasonable apprehension for reasons listed in section 96 of the IRPA. Nor is it a child's responsibility to determine whether all of his or her suffering reaches the level of persecution. The child can say that he or she

is hurting. In this case, Cosette even used the term “fault” that she had heard. It is then up to the decision-maker to decipher the testimony.

80. Cosette, however, was crying out. She was clearly stating that she had been scared.

Will she say that a dialogue between herself and the RPD could have occurred? Such a dialogue is possible. In *Baranyi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1064, a young applicant accompanying his parents was refused refugee protection. However, the Court echoed the child’s testimony before the decision-maker at the trial, in its reasoning, by explaining the reasons why her voice carried so little weight:

32 In light of the available evidence, this Court cannot reverse the RPD’s decision without overstepping its role of review in doing so, although it is sensitive to the voice of young Richard, seventeen years old, in secondary II in Quebec, who dreams of becoming a security guard “to protect people” (Tribunal Record at page 228).

81. Whereas in *Kim*, the documentary evidence pointed to some measure of availability of state protection, in this case, everything pointed to a risk of persecution for children born outside of marriage. Consequently, a claim on humanitarian and compassionate grounds is not an adequate remedy.

82. Accordingly, the RPD erred in hastily eliminating a risk of persecution based on section 96. This error was exacerbated by the fact that the RPD did not listen to the child.

83. In scrutinizing this point of the judgment, the Court wishes to address the child’s questions, to tell her that she has been heard and understood, that her interests as well as her rights must be respected.

84. Today, with Mr. Hugo's support, Cosette has been able to build a new life. She is being educated. The family has also grown. The Court has learned from Mr. Hugo that Marius, another of his clients from the country of the Miserable, was accepted as a refugee in Canada on account of his political opinions.

85. For these reasons, the Court finds that the panel erred in law on the merits of Cosette's fear of persecution. This error is in addition to the one relating to the failure to deal with the cumulative effect of the discriminatory acts suffered by Fantine. The Court also found a lack of procedural fairness, because the child was unable to make herself heard.

86. Here, the Court addresses Cosette by telling her that her claim has been heard. Cosette was also present in the hearing room before this Court. While she was unable to testify due to the role of the judicial review which this Court is invested with, Mr. Hugo and this Court explained the nature of the claim to her.

87. This decision explains to Cosette that her mother loved her deeply, that she was separated from her as a result of social constraints, that it was an act of courage, that she had been persecuted:

In a confused way she perceived the necessity of a separation which would be more painful than the first one. Her heart contracted, but she took her resolution. Fantine, as we shall see, had the fierce bravery of life.

(Victor Hugo, *Les Miserables*, Volume I, Fantine)

88. This Court also says to Cosette that it has heard her cry, that she had the right to cry out and that, under the circumstances, this cry must be weighed in the decision-making process.

Conclusion

89. For the reasons discussed above, the RPD's decision is not correctly based in law and must be set aside. The case is therefore referred back for reconsideration by a different panel.

90. With this decision, Fantine's dream has come true through her daughter, Cosette, who will be able to grow and develop here, just as her mother had so resolutely hoped on her deathbed. Her daughter knows now that both she and her mother deserved a place in the world. Fantine was a young girl whose earliest aspirations were trampled. She had her youth stolen. Her right as a mother to raise her child was overridden. It is virtually impossible to give refuge to individuals who are felled by violence, those who never make it to the border, but who appear to be refugees. When the place of refuge is not reached, it is too late. Cosette is the hope for a better world. Out of respect for her future, we must still see to the safeguarding of the child's present, as Janusz Korczak insisted. However, this safeguarding of children's present begins with respect for their interests, but also their rights, including that of being heard when they denounce injustice.

**FEDERAL COURT
SOLICITORS OF RECORD**

DOCKET: IMM-2013-ESPOIR

STYLE OF CAUSE: FANTINE AND COSETTE v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: The Université du Québec à Montréal (UQÀM)
Montréal, Quebec

DATE OF HEARING: NOVEMBER 26, 2013

AUTHORS OF THE REASONS: JUSTICE SHORE, ME SARAH DENNENE

DATED: NOVEMBER 26, 2013

APPEARANCES:
Victor Hugo FOR THE APPLICANT
Eponine FOR THE RESPONDENT

SOLICITORS OF RECORD:
Victor Hugo
Lawyer
Montréal, Quebec
FOR THE APPLICANT

Eponine
Lawyer
Deputy Attorney General of Canada
FOR THE RESPONDENT