

## HEALTH AND WELFARE

Judicial review of decision by Crawford – Class Action Services (Crawford), administrator and delegate of Minister of Health (Minister), finding applicant not eligible for financial support through Thalidomide Survivors Contribution Program (Program) — Applicant seeking statement that she is thalidomide victim eligible to receive assistance under Program; *mandamus* requiring Crawford and/or Minister to pay applicant \$125,000, annual payments set forth in Program; alternatively, *certiorari* setting aside decision, referring applicant's application to Minister for decision in compliance with instructions deemed appropriate by Court — Applicant arguing that her mother took Kevadon (thalidomide) throughout her pregnancy — Information regarding applicant's birth, diagnosis as victim of thalidomide lost in fire — Under 1991 Extraordinary Assistance Plan, applicants eligible for payments if meeting one of three criteria, including documentary proof of maternal use of thalidomide during first trimester of pregnancy — To be eligible for Program, individuals submitting application must have been declared eligible under 1991 assistance plan or meet one of three criteria for program eligibility — Applicant basing her application form to Crawford on second criteria requiring documentary proof — Medical evaluator reviewing applicant's file concluding no specific document showing that applicant's mother using thalidomide during specified timeframe — Main issues whether Minister's policies regarding eligibility to participate in Program subject to judicial review; whether Minister's application of policies to applicant breaching standard of reasonableness applying to review of policies — Minister's policies justiciable according to decision in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 — Controversy herein related to issue of whether exercise of executive power not justiciable because raising concerns of sort not amenable to judicial process or suitable for judicial analysis — Exclusion rule set forth in *Hupacasath* not applying in this case — Question whether case arising from categorical restriction regarding admissible proof required by Minister's policies to show that thalidomide cause of malformations was unreasonably egregious — Nothing preventing Court from reviewing reasonableness of standard of proof imposed by policies that prevent applicant from benefiting from Program — Applicant not questioning reasonableness of second criterion but challenging application of that criterion by Crawford — No need for applicant to mention decision in *Hupacasath* if goal simply to challenge application of second criterion to her situation — Policies used to assess proof of applicant's eligibility created by Minister, imposed by Crawford — Judicial review of case herein cannot encompass questions as to whether Treasury Board's policy decision fair or reasonable or whether policy's impact upon applicant just or unjust, if found unreasonable to point of being egregious to require setting aside decision — Case law not useful in verifying whether decision-making process unreasonable to point of being egregious — Court proposing two considerations: egregious decision should arise from convincing facts, related to unfortunate personal circumstances, prejudice or repercussions suffered by applicant resulting from decision; egregiousness having to be assessed in context, by comparing similar decision-making processes regarding same difficult issues or facts as reference when assessing egregiousness — Twofold analysis having to show unreasonable aberrant case assessed using comparable standards — First task herein consisting of assessing scope of exceptionally unfortunate circumstances applicant facing as result of policies — Fact that applicant placed in situation of being unable to establish her eligibility setting her circumstances apart as exceptional — Situation at issue stemming solely from fact that policies not adhering to regular standards of proof — Policies not meeting objectives of order because some thalidomide victims excluded from Program due to excessive restrictions imposed in terms of what constitutes acceptable proof of malformations — Applicant's case exceptional in that she cannot establish right to entitlement under policies, which only allow for direct medical proof in form of archive documents — This preventing consideration of other evidence likely to demonstrate on balance of probabilities that applicant victim of thalidomide — Respondent's justification of policies not accurately reflecting reaction that thalidomide victims would have to a person in applicant's situation — Evidence submitted by applicant sufficient to establish that her

mother probably used thalidomide — Imposing limits on type of evidence admitted more than simply unreasonable — Applicant meeting eligibility conditions under second criterion — Decision set aside, referred back to Crawford — Application allowed.

BRIAND V. CANADA (ATTORNEY GENERAL) (T-1584-16, 2018 FC 279, Annis J., judgment dated March 9, 2018, 37 pp.)