Federal Court  Cour fédérale

Date: 20180504

Dockets: IMM-3193-15
IMM-248-16
IMM-932-16
IMM-1354-16
IMM-1604-16

Citation: 2018 FC 481

Toronto, Ontario, May 4, 2018

PRESENT: The Honourable Madam Justice Heneghan

Docket: IMM-3193-15

BETWEEN:

REEM YOUSEF SAEED KREISHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-248-16

AND BETWEEN:

GIOVANI ACEVEDO ARANGO
(AKA GIOVANNI ACEVEDO ARANGO)
CRISTIAN CAMILO ACEVEDO GOMEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-932-16

AND BETWEEN:

MOHAMMED ZAKIR HOSSAIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1354-16

AND BETWEEN:

SUAD SULIEMAN ODEH ABU SHABAB
ABDALLA MAHMOUD ABOUSHABAB
MAHA MAHMOUD MOHAMED OUDAH
ALY MAHMOUD MOHAMED OUDAH
MOHAMED MAHMOUD OUDAH
TAGI MAHMOUD MOHAMED ABOSHABAB
AND THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1604-16

AND BETWEEN:

HUDA MARWAN KASHTEM
MHD NAZIR DEIRANI,
BARA'A DERANI, AND
THE CANADIAN ASSOCIATION OF
REFUGEE LAWYERS

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The within applications for judicial review challenge the constitutionality of paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27, ("the Act"). That provision limits access to the Refugee Appeal Division (the "RAD") of the Immigration and Refugee Board (the "IRB") for certain classes of asylum seekers who enter Canada from the United States of America, pursuant to the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* [2004] Can T.S. No 2, the "Safe Third Country Agreement" (the "STCA").

[2] The constitutional challenge is based upon section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, (the *"*Charter*"*).

[3] The Applicants served Notice of a Constitutional Question pursuant to section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, upon the Attorney General of Canada, as well as upon the Attorneys General of all the Provinces and Territories, and provided proof of such service.

[4] No Provincial or Territorial Attorney General chose to participate in the hearing of these matters.

[5] The Act was amended by the *Balanced Refugee Reform Act*, S.C. 2010, c. 8 (the "BRRA"). This statute implemented the RAD.

[6] The Act was further amended by the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17 (the "PCISA") which imposed limitations upon claimants who have a right of appeal to the RAD.

[7] The challenged section reads as follows:

110 (2) No appeal may be made in respect of any of the following:	110 (2) Ne sont pas susceptibles d'appel:
. . .	. . .
(d) subject to the regulations, a decision of	d) sous réserve des règlements, la décision de

the Refugee Protection Division in respect of a claim for refugee protection if	la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois :
(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and	(i) est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à un accord visé à l'alinéa 102(2)d),
(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;	(ii) n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c);

[8] The context for the limitation in subparagraph 110(2)(d)(i) is the STCA. That agreement was signed on December 5, 2002. On October 12, 2004, the United States was designated as a "safe third country" by the Governor in Council. The STCA came into effect on December 29, 2004.

[9] The purpose of the STCA is that refugee claimants must seek protection in the first country they have an opportunity to do so. Article 4 creates exceptions to that primary rule:

1. Subject to paragraphs 2 and 3, the Party of the country of last presence shall examine, in	1. Sous réserve des paragraphes 2 et 3, la partie du dernier pays de séjour

accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.

examine, conformément aux règles de son régime de détermination du statut de réfugié, la demande de ce statut de toute personne arrivée à un point d'entrée d'une frontière terrestre à la date d'entrée en vigueur du présent accord, ou par après, qui fait cette demande.

2. Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party of the receiving country, and not the Party of the country of last presence, where the receiving Party determines that the person:

2. La responsabilité de la détermination du statut de réfugié demandé par toute personne visée au paragraphe 1 revient à la partie du pays d'arrivée, non pas à celle du pays du dernier séjour lorsque la partie du pays d'arrivée établit que cette personne :

a. Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory; or

a. a, sur le territoire de la partie du pays d'arrivée, au moins un membre de sa famille dont la demande du statut de réfugié a été accueillie ou qui a obtenu un autre statut juridique que celui de visiteur sur le territoire de la partie du pays d'arrivée;

b. Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending; or

b. a, sur le territoire de la partie du pays d'arrivée, au moins un membre de sa famille âgé d'au moins dix-huit ans, n'est pas inadmissible à faire valoir une demande du statut de réfugié dans le cadre du régime de détermination du statut de réfugié de la partie du pays d'arrivée et à une telle demande en instance;

c. Is an unaccompanied minor; or	c. est un mineur non accompagné;
d. Arrived in the territory of the receiving Party:	d. est arrivée sur le territoire de la partie du pays d'arrivée :
i. With a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or	i. en possession d'un visa régulièrement émis ou d'un autre titre d'admission valide, autre qu'une autorisation de transit, émis par cette même partie;
ii. Not being required to obtain a visa by only the receiving Party.	ii. ou sans être requise d'obtenir un visa, uniquement par la partie du pays d'arrivée.
3. The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.	3. La partie du dernier pays de séjour n'est pas obligée d'accepter de reprendre un demandeur du statut de réfugié tant que la partie du pays d'arrivée n'a pas statué définitivement au regard du présent accord.
4. Neither Party shall reconsider any decision that an individual qualifies for an exception under Articles 4 and 6 of this Agreement.	4. Les parties ne peuvent ni l'une ni l'autre revoir une décision attestant qu'une personne peut faire l'objet d'une exception prévue par les articles 4 et 6 du présent accord.

[10] The *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") define the STCA in section 159.1 as follows:

Agreement means the Agreement dated December 5, 2002 between the Government of Canada and the Government	*Accord* L'Entente entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique pour la

of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. (Accord)	coopération en matière d'examen des demandes d'asile présentées par des ressortissants de tiers pays en date du 5 décembre 2002. (Agreement)

[11] Section 159.1 also includes a definition of "designated country" as follows:

designated country means a country designated by section 159.3. (pays désigné)	*pays désigné* Pays qui est désigné aux termes de l'article 159.3. (designated country)

[12] Section 159.3 of the Regulations is also relevant and provides as follows:

159.3 The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.	159.3 Les États-Unis sont un pays désigné au titre de l'alinéa 102(1)a) de la Loi à titre de pays qui se conforme à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture et sont un pays désigné pour l'application de l'alinéa 101(1)e) de la Loi.

[13] Section 159.5 of the Regulations sets out exceptions to the STCA, as follows:

159.5 Paragraph 101(1)(e) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(a) to (c) establishes, in accordance with subsection 100(4) of the Act, that	159.5 L'alinéa 101(1)e) de la Loi ne s'applique pas si le demandeur qui cherche à entrer au Canada à un endroit autre que l'un de ceux visés aux alinéas 159.4(1)a) à c) démontre, conformément au paragraphe 100(4) de la Loi, qu'il se trouve dans l'une ou l'autre des situations suivantes
(a) a family member of the claimant is in Canada and is a Canadian citizen;	a) un membre de sa famille qui est un citoyen canadien est au Canada;

(b) a family member of the claimant is in Canada and is

(i) a protected person within the meaning of subsection 95(2) of the Act,

(ii) a permanent resident under the Act, or

(iii) a person in favour of whom a removal order has been stayed in accordance with section 233;

b) un membre de sa famille est au Canada et est, selon le cas :

(i) une personne protégée au sens du paragraphe 95(2) de la Loi,

(ii) un résident permanent sous le régime de la Loi,

(iii) une personne à l'égard de laquelle la décision du ministre emporte sursis de la mesure de renvoi la visant conformément à l'article 233;

c) a family member of the claimant who has attained the age of 18 years is in Canada and has made a claim for refugee protection that has been referred to the Board for determination, unless

((i) the claim has been withdrawn by the family member,

(ii) the claim has been abandoned by the family member,

(iii) the claim has been rejected, or

(iv) any pending proceedings or proceedings respecting the claim have been terminated under subsection 104(2) of the

c) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et a fait une demande d'asile qui a été déférée à la Commission sauf si, selon le cas :

(i) celui-ci a retiré sa demande,

(ii) celui-ci s'est désisté de sa demande,

(iii) sa demande a été rejetée,

(iv) il a été mis fin à l'affaire en cours ou la décision a été annulée aux termes du paragraphe 104(2) de la Loi;

Act or any decision respecting the claim has been nullified under that subsection;

(d) a family member of the claimant who has attained the age of 18 years is in Canada and is the holder of a work permit or study permit other than

(i) a work permit that was issued under paragraph 206(b) or that has become invalid as a result of the application of section 209, or

(ii) a study permit that has become invalid as a result of the application of section 222;

d) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et est titulaire d'un permis de travail ou d'un permis d'études autre que l'un des suivants :

(i) un permis de travail qui a été délivré en vertu de l'alinéa 206b) ou qui est devenu invalide du fait de l'application de l'article 209,

(ii) un permis d'études qui est devenu invalide du fait de l'application de l'article 222;

(e) the claimant is a person who

(i) has not attained the age of 18 years and is not accompanied by their mother, father or legal guardian,

(ii) has neither a spouse nor a common-law partner, and

(iii) has neither a mother or father nor a legal guardian in Canada or the United States;

e) le demandeur satisfait aux exigences suivantes :

(i) il a moins de dix-huit ans et n'est pas accompagné par son père, sa mère ou son tuteur légal,

(ii) il n'a ni époux ni conjoint de fait,

(iii) il n'a ni père, ni mère, ni tuteur légal au Canada ou aux États-Unis;

(f) the claimant is the holder of any of the following documents, excluding any document issued for the sole purpose of transit through Canada, namely,

(i) a permanent resident visa or a temporary resident visa referred to in section 6 and subsection 7(1), respectively,

(ii) a temporary resident permit issued under subsection 24(1) of the Act,

(iii) a travel document referred to in subsection 31(3) of the Act,

(iv) refugee travel papers issued by the Minister, or

(v) a temporary travel document referred to in section 151;

(g) the claimant is a person

(i) who may, under the Act or these Regulations, enter Canada without being required to hold a visa, and

(ii) who would, if the claimant were entering the United States, be required to hold a visa; or

(h) the claimant is

f) le demandeur est titulaire de l'un ou l'autre des documents ci-après, à l'exclusion d'un document délivré aux seules fins de transit au Canada :

(i) un visa de résident permanent ou un visa de résident temporaire visés respectivement à l'article 6 et au paragraphe 7(1),

(ii) un permis de séjour temporaire délivré au titre du paragraphe 24(1) de la Loi,

(iii) un titre de voyage visé au paragraphe 31(3) de la Loi,

(iv) un titre de voyage de réfugié délivré par le ministre,

(v) un titre de voyage temporaire visé à l'article 151;

g) le demandeur :

(i) peut, sous le régime de la Loi, entrer au Canada sans avoir à obtenir un visa

,(ii) ne pourrait, s'il voulait entrer aux États-Unis, y entrer sans avoir obtenu un visa;

h) le demandeur est :

(i) a foreign national who is seeking to re-enter Canada in circumstances where they have been refused entry to the United States without having a refugee claim adjudicated there, or	(i) soit un étranger qui cherche à rentrer au Canada parce que sa demande d'admission aux États-Unis a été refusée sans qu'il ait eu l'occasion d'y faire étudier sa demande d'asile,
(ii) a permanent resident who has been ordered removed from the United States and is being returned to Canada.	(ii) soit un résident permanent qui fait l'objet d'une mesure prise par les États-Unis visant sa rentrée au Canada.

[14] Article 4, above, applies to a claimant or claimants who arrive at a land border port of entry only.

[15] Paragraph 101(1)(e) of the Act imposes a limitation on eligibility to seek refugee protection in Canada for persons entering from a designated country and provides as follows:

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	101 (1) La demande est irrecevable dans les cas suivants:
…	…
(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or	e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

Section 159.5 of the Regulations, quoted above, allow certain persons to seek refugee protection in Canada, even after entering from a designated country and codifies the exceptions to the general proposition that claimants should apply for protection in the first country of landing.

II. BACKGROUND

[16] Cause number IMM-3193-15 is the lead file in a proceeding that was consolidated with four other applications for judicial review, by Order dated December 8, 2016.

[17] By a Direction issued on January 13, 2017, cause number IMM-3193-15 was designated as the "lead" file in the consolidated proceedings.

[18] The facts below are taken from the materials contained in the Common Record filed by the Applicants and, in some cases, from the Certified Tribunal Records ("CTRs") relating to the individual Applicants.

[19] In cause number IMM-3193-15, Ms. Reem Yousef Saeed Kreishan (the "Applicant"), a Sunni Muslim woman of Jordanian nationality, sought protection on the grounds that she feared abuse from her father who was pressuring her to seek a divorce from her Canadian husband. The Applicant left Jordan on February 1, 2015 and travelled to the United States. She did not seek protection in that country and entered Canada on February 16, 2015, where she made a claim.

[20] The Refugee Protection Division (the "RPD") found that there was no serious possibility of persecution on a Convention ground nor that, on a balance of probabilities, the Applicant

faced personal risk to her life or cruel or unusual punishment if returned to Jordan. It determined that the Applicant was neither a Convention refugee nor a person in need of protection pursuant to section 96 or subsection 97(1), respectively, of the Act.

[21] The Applicant's appeal to the RAD was dismissed on jurisdictional grounds, that is pursuant to paragraph 110(2)(d) of the Act.

[22] In cause number IMM-248-16, Mr. Giovani Acevedo (aka Giovanni Acevedo Arango) (the "Principal Applicant") and his minor son Christian Arango, (collectively "the Applicants"), claimed protection in Canada on the basis of fear of the Revolutionary Armed Forces of Colombia (the "FARC"). The Applicants are citizens of Columbia. The Principal Applicant alleged that he had been subject to extortion, threats and harassment from the FARC. The son's claim relied on the allegations of risk made by his father.

[23] The Principal Applicant went to the United States of America on a tourist visa. On June 24, 2015, he attended at the Fort Erie Refugee Processing Unit to make a refugee claim. He was found eligible to make a refugee claim on the basis that he has a family member, an "anchor relative", in Canada.

[24] The minor son Christian presented himself at the Fort Erie Refugee Processing Unit on August 7, 2015, for the purpose of making a refugee claim. He had entered the United States under a tourist visa. He was allowed to enter Canada, to make a refugee claim, on the grounds that his father was in Canada as a refugee claimant.

[25] Following a hearing, the RPD found that the Applicants had failed to rebut the presumption of state protection in Colombia and their claims for protection were dismissed.

[26] Their appeal to the RAD was dismissed, on the basis of lack of jurisdiction, pursuant to paragraph 110(2)(d) of the Act.

[27] In cause number IMM-932-16, Mr. Mohammed Zakir Hossain (the "Applicant"), a citizen of Bangladesh and a non-practising Muslim, sought protection on the basis of fear of persecution at the hands of religious zealots. He left Bangladesh in April 2015 and went to the United States of America, in possession of a visa for entry. He claimed refugee protection in Canada on May 11, 2015. He was permitted to enter Canada on the basis that he had a brother in this country.

[28] The RPD rejected the Applicant's claim, on the grounds that his failure to seek protection in the United States undermined his credibility, his evidence was unreliable and that an Internal Flight Alternative ("IFA") was available to him in his home country.

[29] The Applicant's appeal to the RAD was dismissed, pursuant to paragraph 110(2)(d) of the Act.

[30] In cause number IMM-1354-16, Mrs. Suad Sulieman Odeh Abu Shabab (the "Principal Applicant"), Mr. Abdalla Mahmoud Aboushabab (the "Male Applicant"), and minor children Maha Mahmoud Mohamed Oudah, Aly Mahmoud Mohamed Oudah, Mohamed Mahmoud

Oudah, and Tagi Mahmoud Mohamed Oudah (collectively the "Applicants") are stateless Palestinians. They left the United Arab Emirates in August 2015, holding visitors' visas for the United States. The Principal Applicant's husband travelled with his family but due to the illness of his mother, he left the United Sates and returned to the United Arab Emirates.

[31] The Applicants entered Canada on September 15, 2015 and claimed protection. They had not sought protection while in the United States. The Applicants were permitted to make their claims due to the presence in Canada of a family member, that is a sister-in-law of the Principal Applicant.

[32] The RPD made negative credibility findings against the Applicants. It also found that elements of discrimination against them in the United Arab Emirates did not rise to the level of persecution. Their claims were dismissed.

[33] Upon appeal to the RAD, the appeal was dismissed for lack of jurisdiction, pursuant to paragraph 110(2)(d) of the Act.

[34] In cause number IMM-1604-16, Mrs. Huda Marwan Kashtem (the "Principal Applicant") and her minor children Mhd Nazir Deiraani and Bara'a Derani (collectively "the Applicants") sought protection against Syria, alleging fear of the Syrian military and the Syrian National Defence Forces. The RPD did not believe the evidence of the Applicants and commented unfavourably upon their failure to seek protection in the United States.

[35] The Applicants' appeal to the RAD was dismissed for lack of jurisdiction pursuant to paragraph 110(2)(d) of the Act.

III. THE EVIDENCE

[36] The evidence of the parties was filed by affidavits. The Applicants filed a Common Record that included Affidavits filed on behalf of some of the individual Applicants, that is from Abdalla Mahmoud Aboushabab, sworn on April 26, 2016; Mrs. Suad Sulieman Odeh Abu Shabab, sworn on April 26, 2016; Mrs. Huda Marwan Kashtem, sworn on May 4, 2016; Mr. Mohammed Zakir Hossain, sworn on February 7, 2017, and Mr. Giovanni Acevedo Arango, sworn on February 10, 2017. Exhibits were attached to some of these affidavits, including for example in respect of Mrs. Abu Shabab and Mr. Hossain, copies of their Basis of Claim ("BOC") forms.

[37] Mr. Aboushabab, in his affidavit, described his experience in seeking refugee status.

[38] His mother, Mrs. Suad Sulieman Odeh Abu Shabab, described her journey to Canada. Attachments to her affidavit include her BOC narrative, the decision of the RPD and a copy of the affidavit that she provided to the RAD.

[39] Mrs. Kashtem, in her affidavit, described the travels of her family from Saudi Arabia, through the United States and their entry into Canada. Attachments to her affidavit include the decision of the RPD rejecting the claim for refugee protection.

[40] Mr. Hossain, a claimant from Bangladesh, described his exit from that country and travel to Canada via the United States. He also referred to his unsuccessful application for a stay of his removal from Canada, following the rejection of his claim before the RPD and subsequent dismissal of his appeal to the RAD.

[41] Mr. Hossain was deported from Canada to Bangladesh on March 11, 2016. He deposed that upon his return to his country of origin he was attacked by unknown assailants and received death threats. He described his feelings of insecurity resulting from the recent commentary and Executive Orders of President Donald Trump. He testified that he had suffered a heart attack on May 21, 2016.

[42] Mr. Arango attached, as an exhibit, a medical report from Dr. Parul Agarwal about a diagnosis of Post-Traumatic Stress Disorder ("PTSD") and the stress of the refugee claim process upon his mental health. That medical report is dated July 11, 2016 and was struck from the record by Order made on April 27, 2017.

[43] The Applicants also filed affidavits from Dr. Sean Rehaag, a professor at Osgoode Hall Law School, sworn June 3, 2016; Ms. Celina Kilgallen-Asencio, sworn May 31, 2016; Mr. Raoul Boulakia, June 1, 2016; Mrs. Turkan Goren, May 24, 2016; Mr. Henry Barragan Gonzalez, sworn June 2, 2016; Ms. Janet Dench, May 31, 2016; Dr. Cécile Rousseau, sworn July 28, 2016; Ms. Amanda Britton, sworn July 20, 2016; and Ms. Samira Remtulla, sworn March 16, 2017.

[44] The affidavit of Dr. Rehaag was tendered as expert evidence, addressing the history of the RAD, the difference between proceedings before the RAD and applications for judicial review, the RAD bars, Access to Information Request disclosure dealing with data about decisions made by the RAD, and an overview of the decisions made by the RAD in the first two years of its operations.

[45] Dr. Rehaag attached to his affidavit an article entitled, “Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System” (2016) 49:1 U.B.C. L. Rev. 203.

[46] The affidavit of Ms. Kilgallen-Asencio, a student-at-law with the Refugee Law Office, contains two exhibits. Exhibit A provides statistics about the number of refugee claims referred to the RPD through an exception to the STCA, from December 15, 2012 to December 31, 2015. 6,818 claims were referred and 4,995 were accepted. 1,639 negative decisions were delivered by the RPD. The statistics were further analyzed according to country of citizenship and the category of STCA exception.

[47] Exhibit B to the affidavit of Ms. Kilgallen-Asencio is a report from Immigration, Refugees and Citizenship Canada (“IRCC”) outlining the number of refugee claims received under an exception to the STCA according to country of citizenship and type of exception, from December 15, 2012 to December 31, 2015.

[48] Mr. Boulakia is a lawyer certified by the Law Society of Upper Canada as a specialist in Citizenship, Immigration and Refugee Protection Law. He describes the efforts of two of his clients to avoid deportation and the refusal of their motions to stay their deportation.

[49] Mrs. Goren is a failed refugee claimant from Turkey. In her affidavit, she describes her travel to Canada via a land port, from the United States, pursuant to the family exception to the STCA. Her claim for refugee protection was dismissed on the basis of negative credibility findings and her application for judicial review was dismissed, on the grounds that the decision of the RPD was reasonable. She is awaiting the determination of her Pre-Removal Risk Assessment ("PRRA").

[50] Mr. Gonzalez is a failed refugee claimant from Colombia. Following dismissal of his motion for a stay, he sought assistance from the United Nations Human Rights Committee ("UNHRC"). The UNHRC made a discretionary decision to grant him "interim measures"; the Government of Canada agreed not to deport him pending the UNHRC's final determination of his complaint.

[51] Ms. Dench is the Executive Director of the Canadian Council for Refugees. Her affidavit was tendered as an expert opinion based on her knowledge "of claimants impacted by s.110(2)(d)(ii)".

[52] Ms. Dench provided background information about the Canadian Council for Refugees, including its advocacy about the establishment of the RAD and the implementation of the STCA.

Among the exhibits to her affidavit is a statement from the Council entitled “New Bill Further Undermines Refugees”, addressing the Council’s concerns with several of the proposed amendments in the PCISA, encompassing the designation of countries of origin, shorter timelines for preparing for refugee hearings, and the RAD bar. Copies of country reports from the IRB and the RAD, as well as a copy of a U.S Department of State Country Reports on Human Rights Practice, were also attached as exhibits.

[53] Ms. Dench also attached a copy of submissions made to the Parliament of Canada by the United Nations High Commissioner for Refugees (the “UNHCR”) on Bill C-31 which introduced the RAD bars.

[54] Dr. Rousseau is a child psychiatrist and professor of psychiatry at McGill University in Montreal. She presented herself as an expert in refugee mental health, especially trauma. She addressed the difficulties faced by refugee claimants, especially trauma victims, people with mental health issue and unaccompanied minors, in effectively making claims to the RPD. She commented on the psychological consequences of negative refugee claims and the prospect of deportation. She also described various disorders and gave examples of the difficulty in providing evidence that will be found credible.

[55] Ms. Britton is a paralegal with the Refugee Law Office. Attached to her affidavit are the results of access to information requests made to the IRCC, seeking disclosure of briefing and consultation materials related to the decision to bar access to the RAD. These results include email correspondence between Citizenship and Immigration Canada employees’ discussing the

drafting of the bill and an excerpt of the questions and proposed answers arising from the amendments.

[56] Ms. Samira Remtulla is a Legal Assistant with the firm representing the Kashtem Applicants. Attached to her affidavits are correspondence between counsel for the Applicants and the Respondent relating to the satisfaction of undertakings made during the cross-examination of Ms. Vasavada. These questions include the amount of money spent on failed refugee claimants and the amount of time between a negative RPD decision and removal.

[57] The Respondent filed the affidavit of Unnati Vasavada, Assistant Director of the Asylum Policy Unit with IRCC. She described the role of her unit and gave a history of the STCA, as well as commentary on the policy context for that agreement.

[58] Ms. Vasavada also gave details about the number of claims made under the exceptions to the STCA and about the implementation of the RAD, including the purpose of the reforms to the refugee process. She specifically identified discouragement of "forum shopping" as an objective of the RAD bar.

[59] Exhibits attached to the Vasavada affidavit are submissions presented by the UNHCR to Parliament**,** specifically to the Standing Committee on Citizenship and Immigration, May 29, 2006. Those submissions addressed the role of the UNHCR in monitoring the implementation of the STCA, statistics relating to the number of claimants at American border crossings, the number of claimants applying under the exceptions to the STCA and the number of negative

RPD claims in total, compared to the number of refused claims for persons claiming under the STCA exceptions.

[60] The evidence filed also includes transcripts of cross-examinations.

[61] The Applicants cross-examined Ms. Vasavada. Among other things, she was questioned about the mechanisms for "manifestly unfounded" and "no credible basis" findings; the purpose of the STCA relative to Canada's "humanitarian tradition" and the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3. She was also questioned about the policy behind the RAD bar, as well as behind the PRRA bar.

[62] The Respondent cross-examined Dr. Rehaag, Ms. Dench and Dr. Rousseau.

[63] Dr. Rehaag was questioned about his statements concerning the objective of the STCA, whether it is to prevent forum shopping or some broader purpose. He was questioned about the information contained in the charts attached to his article, specifically the numbers relating to the success rate of STCA applicants in comparison with the general success rate of refugee claimants.

[64] Dr. Rehaag was also questioned as to whether he agreed with the general propositions made by the government witness, Ms. Vasavada, about unfounded claims, significant delays before the reforms were put in place, and how unfounded claims contribute to these delays to the detriment of successful refugee claimants. He did agree.

[65] Ms. Dench was questioned about the role of the Canadian Council of Refugees as an intervenor and as an advocate for refugees. She commented upon the access by refugee claimants to legal aid and lawyers, generally. She was questioned as to whether she agreed with the general propositions made by Ms. Vasavada. She did agree.

[66] In her cross-examination, Dr. Rousseau described the system by which refugee claimants get access to psychological care and the difficulties experienced by psychiatric professionals in producing reports that are helpful to the IRB and to the Court. She also described distortions to claimants' evidence that can be caused by PTSD and the psychological impact upon claimants when informed of removal, that is becoming suicidal and homicidal.

[67] Dr. Rousseau also described situations in which a rejected claimant may or may not seek psychological help.

IV. ISSUES

A. Preliminary Issues

[68] There are three preliminary points raised by the Respondent to be addressed before consideration of the substantive issues raised in these applications.

[69] The Respondent raises, as preliminary issues, mootness of the applications for judicial review filed by Suad Sulieman Odeh Abu Shabab et al in cause number IMM-1354-16, Huda Marwan Kashtem et al in cause number IMM-1604-16 and Mohammed Zakir Hossain in cause

number IMM- 932-16. He also argues , as a preliminary matter, that the affidavit of Ms. Dench not be accepted as expert evidence and in any event, be afforded little weight since it is more a statement of advocacy than an opinion which may assist the Court.

[70] In causes IMM- 1354-16 and IMM- 1604-16, the Applicants were successful in obtaining leave to judicially review their initial negative RPD decisions. The negative decisions were set aside and sent back to the RPD for redetermination. The Respondent argues the decision of this Court in the present proceeding will not resolve a "live controversy" which affects their current rights.

[71] The Respondent argues that the within applications for judicial review on behalf of Ms. Abu Shabab and her family and Mrs. Kashtem and her children are moot since their prior applications for judicial review relative to the original decisions of the RPD were successful; the original decisions were set aside and remitted for redetermination. He submits that there is no live issue for determination now, with respect to an appeal before the RAD.

[72] The Applicants disagree and argue that a "live controversy" exists whenever a judgment affects or may affect the rights of an individual, citing *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at paragraph 15. They argue that in the cases of the Abu Shabab and Kashtem families, a live controversy still exists as there is the potential that their claims will be denied at the RPD and the RAD bar will still apply.

[73] I agree with the submission of the Respondent on this issue. The Abu Shabab and Kashtem Applicants have already obtained a remedy, that is a new hearing before the RPD.

[74] If the re-determination before the RPD leads to a positive decision for the Abu Shabab and Kashtem claimants, there will no longer be a "live controversy" between those Applicants and the Respondent.

[75] In *Borowski, supra*, the Supreme Court of Canada commented on the doctrine of mootness, at paragraph 353, as follows:

> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot…
>
> 16 The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case... In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[76] In *O. (N.) v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 214, the Federal Court of Appeal considered the doctrine of mootness. The applicant had sought judicial

review of a decision of the RPD refusing an application to reconsider an application seeking to re-open a claim for refugee protection. The application for judicial review was dismissed and the applicant appealed.

[77] Between the filing of her appeal before the Federal Court of Appeal and the hearing of that appeal, N.O was granted status. The respondent moved to strike the appeal on the grounds of mootness. The Federal Court of Appeal said the following at paragraphs 2 and 4:

> 2 N.O. opposes the Minister's motion, arguing that the appeal is not moot because she could still be subject to deportation if, for whatever reason, she lost her permanent resident status. At that point, the bar on the reopening of refugee claim found at section 170.2 of the Immigration and Refugee Protection Act S.C. 2001, c. 27(the Act) would apply so that she would be subject to deportation without having her refugee claim adjudicated. N.O. finds herself in this position because her original refugee claim, which was dismissed, was not based on the true facts for her flight from her country of origin, facts which she suppressed for reasons which are not material to this motion.
>
> …
>
> 4 The fact that N.O. is now a permanent resident makes this appeal moot. She no longer has the threat of deportation hanging over her. The outcome of this appeal, one way or the other, will have no practical effect on her situation. It is true that N.O. could lose her permanent resident status at some point but this is speculative and would not justify proceeding with an appeal which is moot: *Nazifpour v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 35, [2007] F.C.J. No. 179 (F.C.A.), at para. 4.

[78] If the Abu Shabab and Kashtem claimants are successful before the RPD after the redetermination of their claims, there will no longer be a live controversy. If they are unsuccessful, they will be subject to the terms of paragraph 110(2)(d), in accordance with the disposition of the present application.

[79] The Respondent also submits that the application for judicial review, in cause number IMM-932-16 on behalf of Mr. Hossain, should be dismissed since he was lawfully removed from Canada, pursuant to a Removal Order that was not stayed upon a motion before the Federal Court. The Respondent argues that in his case, the appropriate remedy is to an Order quashing the decision of the RAD, with no redetermination of the matter since a claim for protection, either as a Convention refugee or a person in need of protection, can only be made from within Canada.

[80] In response, the Applicants argue that as long as Mr. Hossain is outside of Bangladesh when a decision is made, he can still be considered a Convention refugee. They refer to the decision of Justice Gibson in *San Vicente Freitas v. Canada (Minister of Citizenship & Immigration)*(1999), 161 F.T.R. 310, where he remitted the decision for redetermination, despite the fact that the applicant was no longer in Canada, and ordered that in the event that the application was successful, the Minister of Citizenship and Immigration Canada make her best efforts to return him at the Government's expense.

[81] Again, I agree with the submissions of the Respondent.

[82] Mr. Hossain made his claim for protection. He received a hearing before the RPD where he had the opportunity to present evidence to support his claim. The RPD found that he was not credible and had a viable IFA in his home country of Bangladesh.

[83] In my opinion, the decision in *San Vicente Freitas v. Canada (Minister of Citizenship & Immigration), supra* is exceptional, discretionary relief that was granted due to concerns about procedural fairness in the handling of that applicant's claim. The same concerns do not exist in Mr. Hossain's case.

[84] Finally, the Respondent objects to the affidavit of Janet Dench, submitted by the Applicants to address her knowledge about the impact of the RAD bar upon claimants. He argues that the affidavit is not proper expert evidence, on the basis that Ms. Dench, the Executive director of the Canadian Council for Refugees for 20 years is neither unbiased nor neutral in her opinion. He characterizes her evidence as advocacy and pleads that her affidavit not be qualified as expert evidence or alternatively, be given little weight.

[85] For their part, the Applicants argue that the Respondent has not raised specific issues with the content of Ms. Dench's affidavit and in any event that the facts presented by her are not controversial.

[86] I am not prepared, at this stage, to reject the Dench affidavit as "expert" evidence. To the extent that the evidence strays into the realm of advocacy, it will not be considered. Where the Dench evidence departs from the standards of neutrality, that evidence will be given little weight.

[87] Otherwise, the principal issues raised in the application are whether paragraph 110(2)(d) of the Act violates section 7 of the Charter, as depriving the Applicants of their rights to life,

liberty and security of the person without accordance with the principles of fundamental justice, and if so, can that breach be justified under section 1 of the Charter.

V. SUBMISSIONS

i. The Applicants' Submissions

[88] The Applicants argue that paragraph 110(2)(d) engages section 7 of the Charter because the lack of access to an appeal before the RAD increases the risk that life, liberty or security of the person will be infringed. They rely on the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, where that Court said that the inquiry must ask if there is a sufficient causal connection between the impugned law and the prejudice suffered; a law will "engage" section 7 if the risk to life, liberty or security of the person is increased.

[89] The Applicants submit, relying on the decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, that the Supreme Court of Canada has found that fear of *refoulement* engages section 7. They argue that denial of a RAD appeal increases this risk and that judicial review of a negative RPD decision does not lead to a stay of removal, which happens with a RAD appeal.

[90] The Applicants note that the RAD conducts a review on the standard of correctness, not reasonableness. This higher standard affords greater protection and further, the RAD process

allows for the introduction of new evidence. Further, the RAD can grant protection rather than simply return a decision for redetermination before the RPD.

[91] The Applicants also argue, relying on the evidence of Dr. Parul Agarwal and Dr. Rousseau, that the psychological harm caused by denial of an appeal to the RAD is another basis favouring the engagement of section 7. The report of Dr. Agarwal relied on here is an exhibit to the affidavit of Mrs. Suad Suleiman Odeh Abu Shabab.

[92] The Applicants submit that the lack of an independent right to an appeal is not dispositive of an alleged section 7 breach, referring to the decision in *Z. (Y.) v. Canada (Minister of Citizenship and Immigration)*, [2015] 35 Imm. L.R. (4th) 217. Relying on the decision in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, they argue that when the government provides a statutory right of appeal, access to that right must be Charter compliant.

[93] The Applicants contend that the objectives of paragraph 110(2)(d) is to prevent forum shopping and to expedite the removal of persons who are not in need of removal or who abuse Canada's refugee determination system. However, they contend that the provision is fatally flawed because it is arbitrary, overbroad and grossly disproportionate to the achievement of the objectives.

[94] The Applicants submit that paragraph 110(2)(d) is arbitrary since it is not rationally connected to the well-foundedness of a refugee claim. They rely upon the decision of the

Supreme Court of Canada in *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at paragraph 83 for the definition of arbitrariness:

> The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: Bedford, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.

[95] They say there is no evidence that claimants arriving from the United States have less meritorious claims than claimants coming from other countries.

[96] Further, the Applicants argue that the provision ignores the stated objectives in the Act of family reunification and consideration of the best interests of the child; see paragraph 3(1)(d) and subsection 3(2) of the Act. In view of these objectives, the Applicants argue it is irrational to treat the claims of persons relying on the STCA exemptions as more likely to be abusive or unfounded than the claims of other persons.

[97] The Applicants claim that the provision is overbroad since it applies to a large class of refugees whose claims are not abusive. They rely again upon the decision in *Bedford, supra*, at paragraph 112, where the Supreme Court said that a law is void for overbreadth "where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts" (emphasis in original).

[98] The Applicants rely upon the evidence of Dr. Rehaag and Ms. Vasavada to argue that the overall rate of acceptance of claims from persons entering Canada via the STCA exception is

higher than the overall acceptance rate for all new refugee claims, showing that these claimants had well-founded claims.

[99] Finally, the Applicants submit that paragraph 110(2)(d) is grossly disproportionate because a mistake in returning a genuine refugee can lead to torture or death. They argue that the Act already has a means to deal with false claims, that is by finding them to be without a "credible basis" or "manifestly unfounded", pursuant to subsection 107(2) and section 107.1, respectively. Those claims are barred from a RAD appeal pursuant to paragraph 110(2)(c).

[100] The Applicants argue that the gross disproportionality analysis must take account of the vulnerability of claimants, as well as the vulnerability of children.

ii. The Respondent's Submissions

[101] The Respondent does not concede that section 7 of the Charter is engaged by paragraph 110(2)(d) of the Act but in any event, he argues that the provision does not infringe section 7 since there is no "right" of appeal pursuant to section 7 of the Charter. He submits that the Act provides for two review mechanisms of decisions of the RPD: one is by way of the RAD, the other is by application for leave and judicial review to the Federal Court. He contends that both processes are Charter compliant.

[102] The Respondent argues further that paragraph 110(2)(d) is in accordance with the principles of fundamental justice.

[103] He submits that one goal of the STCA is to coordinate with the United States and paragraph 110(2)(d) supports this purpose. The provision is not limited to deterring abusive claims, it also has the goal of reducing incentives to those who had access to protection in another state. In this regard, the Respondent relies upon the affidavit of Ms. Vasavada at paragraph 32.

[104] The Respondent argues that the provision is not overbroad. The reduction of the burden upon the Canadian system is rationally connected to the purpose of streamlining that system.

[105] As well, the Respondent submits that the provision is not arbitrary. It encourages sharing the burden of refugee determination with the United States, which is a goal of the provision, together with controlling the caseload of the RAD. Both aims are rationally connected to paragraph 110(2)(d).

[106] Finally, the Respondent argues that paragraph 110(2)(d) is not grossly disproportionate. The provision must be considered in the context of the general scheme of refugee determination. That scheme includes the STCA which encourages refugee claimants to claim in the first safe country of arrival. Parliament designed the refugee determination process with this aim in mind; see the decision in *Canadian Council for Refugees v. Canada*, [2009] 3 F.C.R. 136 (FCA) at paragraphs 74-75.

[107] The Respondent notes that the system does not have to be at zero risk in order to be Charter compliant. The current system for exceptions to the STCA is the system that was found

to be Charter compliant prior to the establishment of the RAD and it is still compliant; see the decision in *Krishnapillai v. Canada*, [2002] 3 F.C 74 (FCA). He submits that the fact that the RAD has a wider choice of remedies than are provided by the Federal Court does not make the range of Federal Court remedies unconstitutionally narrow.

[108] The Respondent further argues that the Act balances competing goals, including family reunification and the best interests of the child. The fact that some claims raise these issues does not make paragraph 110(2)(d) non-compliant with the Charter.

[109] Finally, on the issue of gross disproportionality, the Respondent submits that the removal process is stressful but there is no evidence that the stress was related to the particular path followed by a failed refugee claimant after his or her hearing.

[110] The Respondent then argues that any alleged infringement of section 7 is saved by section 1. In the first place, any limits on the RAD bar for STCA exemptions are "prescribed by law", relying on the decision in *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, [2009] 2 S.C.R. 295 at paragraphs 50-55.

[111] He submits that the provision meets the requirements of pressing and substantial objectives that are achieved in a proportional manner. The pressing and substantial objectives are to balance fairness and efficiency while securing borders and co-operating with the United States. Paragraph 110(2)(d) also reduces delays and streamlines the process of refugee determination.

[112] The Respondent argues that these objectives are achieved in a proportional manner.

[113] First, he says that the means used are rationally connected to the objectives. Second, the impairment of paragraph 110(2)(d) is minimal since STCA claimants still have access to the RPD and can seek judicial review in the Federal Court. Refused claimants can seek a judicial stay of their removal while pursuing other relief, such as a PRRA and applications for judicial review. Third, he submits that the effects of paragraph 110(2)(d) are proportional; refugee claimants have their claims fairly assessed before the RPD . Reducing delays and encouraging claimants to first claim in the United States is proportional to the alleged infringement of section 7.

[114] Finally, the Respondent submits that deference should be shown to Parliament. Statutory rights of appeal are creatures of statute; see the decision in *Kourtessis v. Minister of National Revenue,* [1993] 2 S.C.R. 53 at paragraph 17. The restriction on access to the RAD is reasonable.

iii. The Applicants' Reply Submissions

[115] The Applicants, in their written argument, reserved the right to respond to the arguments of the Respondent about the justification of any section 7 breach under section 1 of the Charter.

[116] The Applicants submit that the Respondent provided no evidence that the RAD bar was necessary to meet the legislative objectives.

[117] They argue that the Respondent has not shown that the RAD bar is minimally impairing. They submit that the refugee determination system could be streamlined with a RAD bar that allows for a statutory stay when judicial review is sought. They say that the Respondent has provided no evidence to show why this option would not satisfy the statutory objectives.

[118] The Applicants further submit that the Respondent has not adduced any evidence to support his argument about proportionality.

[119] The Applicants refer to the decision in *R. v. Michaud*, [2015] 328 C.C.C. (3d) 228, as being the only case in "Canadian judicial history" where a breach of section 7 was saved under section 1 and only because the legislative objective was to save lives.

VI. DISCUSSION AND DISPOSITION

[120] The within proceeding is about a constitutional challenge to a RAD bar for refugee claimants who enter Canada from a country that has been designated as a "safe third country", pursuant to section 159.3 of the Regulations. For present purposes, that country is the United States of America. The Applicants claim that the bar breaches their rights pursuant to section 7 of the Charter, which provides as follows:

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.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[121] According to the decision in *Bedford, supra*, at paragraphs 58, 93 and 97, such a challenge invites a two-step inquiry. First, is section 7 engaged and second, is it breached on the grounds of arbitrariness, overbreadth, or gross disproportionality.

A. Security of person

[122] At this stage of a constitutional challenge, the burden lies on the Applicants to show that section 7 is "engaged".

[123] The Respondent does not concede that section 7 is engaged in this case.

[124] The Applicants argue that section 7 is engaged because denial of a RAD appeal increases the risk of *refoulement*. They also submit that the psychological stress in the face of deportation meets the test for serious state-imposed psychological stress as stated by the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraphs 55-57.

[125] The Applicants argue that the RAD bar increase their risk of *refoulement* and consequently, breaches their rights under section 7 of the Charter.

[126] In my opinion, this submission is ill-founded.

[127] The principle of *refoulement* is acknowledged in the Act; see section 115 which provides as follows:

115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	115 (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

[128] *Refoulement* is a concept that applies to persons who have been found to be Convention refugees. In my opinion, it does not apply to persons seeking that status.

[129] The Act sets out the process by which persons can seek refugee status in Canada. That process can include a hearing before the Board, first the RPD and for those who qualify, before the RAD. Recognition as a Convention refugee or as a person in need of protection can eventually lead to permanent residence in Canada. I refer to sections 99 to 111 of the Act, found in Part 2, Division 2 of the Act. Part 2 is entitled “Convention Refugees and Persons in Need of Protection”.

[130] Unless and until a person seeking status as a Convention refugee or a protected person has obtained that status, I see no basis for reliance upon the principle of non-*refoulement.*

[131] The Supreme Court, in *Kazemin (Estate) v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176 at paragraph 125, said that the Constitutional right of security of person does not protect against

ordinary stress and anxiety. As explained in the Supreme Court's earlier decision in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paragraph 59:

> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action

[132] The Applicants are arguing that the lack of an appeal is unconstitutional because it increased the risk of *refoulement* and consequently, engages section 7. They submit that the risk is increased for several reasons:

> 1) the RAD was created because the RPD makes errors;
>
> 2) lack of access to a review mechanism that suspends removal;
>
> 3) review by the RAD on the standard of correctness, unlike judicial review that proceeds, generally, on the standard of reasonableness;
>
> 4) the RAD can receive and admit new evidence;
>
> 5) the RAD can conduct oral hearings;
>
> 6) the RAD can grant refugee protection, the Federal Court cannot; and
>
> 7) the introduction of a 12 month waiting period for failed refugee claimants to seek a PRRA, as a result of PCISA.

[133] The unavailability of a right of appeal does not, per se, amount to a breach of section 7; see the decision in *Kourtessis, supra*. The heart of the Applicants' arguments is not the lack of an appeal but the consequences of that lack.

[134] One consequence of the RAD bar is that there is no statutory stay of removal. Without a stay, removal orders become enforceable after a negative decision of the RPD.

[135] Subsection 48(2) provides that removal Orders are to be executed as "soon as possible", as follows:

48(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	48(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

[136] Section 49 of the Act is relevant and provides as follows:

49 (1) A removal order comes into force on the latest of the following dates: (a) the day the removal order is made, if there is no right to appeal; (b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and (c) the day of the final determination of the appeal, if an appeal is made	49 (1) La mesure de renvoi non susceptible d'appel prend effet immédiatement; celle susceptible d'appel prend effet à l'expiration du délai d'appel, s'il n'est pas formé, ou quand est rendue la décision qui a pour résultat le maintien définitif de la mesure.

[137] The Regulations allow for a statutory stay when a person files an application for judicial review in respect of a decision made by the RAD. Section 231 of the Regulations provides as follows:

231 (1) Subject to subsections (2) to (4), a removal order is stayed if the subject of the order makes an application for	231 (1) Sous réserve des paragraphes (2) à (4), la demande d'autorisation de contrôle judiciaire faite

leave for judicial review in accordance with section 72 of the Act with respect to a decision of the Refugee Appeal Division that rejects, or confirms the rejection of, a claim for refugee protection, and the stay is effective until the earliest of the following:

conformément à l'article 72 de la Loi à l'égard d'une décision rendue par la Section d'appel des réfugiés rejetant une demande d'asile ou en confirmant le rejet emporte sursis de la mesure de renvoi jusqu'au premier en date des événements suivants :

(a) the application for leave is refused,

a) la demande d'autorisation est rejetée;

b) the application for leave is granted, the application for judicial review is refused and no question is certified for the Federal Court of Appeal,

b) la demande d'autorisation est accueillie et la demande de contrôle judiciaire est rejetée sans qu'une question soit certifiée pour la Cour fédérale d'appel;

(c) if a question is certified by the Federal Court,

c) si la Cour fédérale certifie une question :

(i) the appeal is not filed within the time limit, or

(i) soit l'expiration du délai d'appel sans qu'un appel ne soit interjeté,

(ii) the Federal Court of Appeal decides to dismiss the appeal, and the time limit in which an application to the Supreme Court of Canada for leave to appeal from that decision expires without an application being made,

(ii) soit le rejet de l'appel par la Cour d'appel fédérale et l'expiration du délai de dépôt d'une demande d'autorisation d'en appeler à la Cour suprême du Canada sans qu'une demande soit déposée;

(d) if an application for leave to appeal is made to the Supreme Court of Canada from a decision of the Federal Court of Appeal referred to in paragraph (c), the application is refused, and

d) si l'intéressé dépose une demande d'autorisation d'interjeter appel auprès de la Cour suprême du Canada du jugement de la Cour d'appel fédérale visé à l'alinéa c), la demande est rejetée;

(e) if the application referred to in paragraph (d) is granted, the appeal is not filed within the

e) si la demande d'autorisation visée à l'alinéa d) est accueillie, l'expiration du délai

time limit or the Supreme Court of Canada dismisses the appeal.	d'appel sans qu'un appel ne soit interjeté ou le jugement de la Cour suprême du Canada rejetant l'appel.

[138] In the absence of a statutory stay, a person who has not been granted protection in Canada, pursuant to either section 96 or 97 of the Act, must seek relief from the Federal Court by means of a motion for a stay.

[139] In such case, the individual must commence an application for judicial review and meet the tri-partite test set out in *Toth v. Canada (Minister of Employment & Immigration)* (1988), 6 Imm L.R (2d) 123, 86 N.R 302 (F.C.A.), that is a serious issue for trial arising from the underlying application for judicial review; that irreparable harm will result if the relief sought is denied; and that the balance of convenience lies in his or her favour.

[140] The *Federal Courts Act, supra,* authorizes the Court to grant a stay, pursuant to section 18.2 which provides as follows:

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.	18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[141] Such a stay involves the exercise of the equitable jurisdiction of the Court. It serves to preserve the *status quo*; see the decision in *Apotex Inc. v. Sanofi-Aventis Canada Inc.* (2007), 54 C.P.R. (4th) 402 at paragraph 28.

[142] A stay, either pursuant to a Court Order upon motion or pursuant to the Regulations, is a temporary remedy. In *Z. (Y.)*, *supra* at paragraph 167, Justice Boswell characterized the statutory stay as a "benefit" and commented upon the uncertainty related to seeking a judicial stay from the Court.

[143] I note that in *Z. (Y.)*, *supra*, the Court heard a challenge to the RAD bar related to claimants from a Designated Country of Origin ("DCO") as set out in paragraph 110(2)(d.1) of the Act. The Court found a breach of section 15 but in that case, the Respondent conceded the engagement of section 7. No such concession is made in the present case.

[144] Assuming, but without deciding, that section 7 of the Charter is engaged, the next question is whether the lack of a RAD appeal abrogates the rights guaranteed by that provision.

B. Principles of fundamental justice

[145] The test for finding a breach of section 7 was discussed by the Supreme Court of Canada in its decision in *Bedford*, *supra* at paragraph 57, where the Court said a statutory provision will violate section 7 if it is overbroad, arbitrary or grossly disproportionate to its objectives.

i. Objectives of the legislation

[146] I will begin with consideration of the objectives of the challenged legislation.

[147] The Applicants submit that the purposes of paragraph 110(2)(d) are to deter abusive and unfounded claims, and to protect the integrity of the Canadian refugee system.

[148] The Respondent, for his part, argues that the RAD bar was intended to reduce incentives that could encourage persons with unfounded claims or those with access to protection in other countries from seeking protection in Canada.

[149] Ms. Vasavada, in her affidavit filed on behalf of the Respondent, addresses the question of the objectives of the RAD bar set out in paragraph 110(2)(d) of the Act. The Applicants generally address the objectives of the RAD bar on the basis of the principle of statutory interpretation.

[150] In my opinion, the Respondent has given a defensible position about the objectives of the provision. This position is consistent with the general overriding power of the federal Government to regulate the entry into Canada of persons who otherwise have no right of entry. In this regard, I refer to the decision in *Vong v. Canada (Minister of Citizenship & Immigration)*, [2006] 1 F.C.R. 404 at paragraph 13:

> 13 The purpose of the Act is to regularize the admission of persons into Canada who, otherwise, have no right of admission. In this regard, I refer to *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 (S.C.C.) where the Supreme Court of Canada said the following at pages 733-734:
>
> Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act*. Section 5 of the Act provides that no person other than a citizen, permanent resident, Convention refugee or Indian registered under the Indian Act has a right to come to or remain in Canada. The qualified nature of the rights of

> non-citizens to enter and remain in Canada is made clear by s. 4 of the Act. ...

(1) Arbitrary

[151] According to the decision in *Bedford, supra,* at paragraph 111, "Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose."

[152] The Applicants argue that the provision is arbitrary because there is no rational connection between the RAD bar and the well-foundedness of a refugee claim.

[153] In reply, the Respondent submits that it is not arbitrary since the goals of sharing the burden of refugee determination with the United States and controlling the caseload of the RAD are rationally connected with the objectives of paragraph 110(2)(d) of the Act.

[154] In my view, the Respondent has answered the objections of the Applicants. It is within the authority of the federal Government to negotiate international agreements that promote both national and international interests. I refer to the decision in *Thomson v. Thomson,* [1994] 3 S.C.R 551 at 610, where the Supreme Court of Canada referred to the treaty-making powers conferred by section 132 of *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c. 3, in the context of family law.

[155] Paragraph 110(2)(d) of the Act is a means of giving effect to the provisions of the STCA.

(2) Overbroad

[156] According to the decision in *Bedford, supra,* at paragraph 101, overbreadth arises when "the law goes too far and interferes with some conduct that bears no connection to its objective."

[157] The Applicants submit that paragraph 110(2)(d) offends on the grounds of overbreadth because it applies to a large class of refugees whose claims are not abusive. They allege that all safe third country exemptees are put at risk no matter the relative merits of their claims. Relying on statistics produced in the evidence of Dr. Rehaag and Celina Kilgallen-Asencio, they observe that STCA claimants have high rates of acceptance as refugees.

[158] The statistics relied upon by the Applicants are found in an article attached to the affidavit of Dr. Rehaag. That article, entitled "Unappealing: An assessment of the limits on appeal rights in Canada's new refugee determination system", *supra,* purports to examine "…all RAD appeals brought by refused claimants that were assessed on the merits during the first two years of the RAD's operation."

[159] The Applicants rely on the statistics provided by Dr. Rehaag to argue that persons claiming under the STCA exception are more likely to have *bona fide* claims. They submit that the statistics about the appeals granted by the RAD show that the RPD makes mistakes when dismissing claims for protection and the rate of appeals granted by the RAD shows that the RAD is "correcting" those mistakes. Against this background, the Applicants claim that the bar in paragraph 110(2)(d) is overbroad.

[160] I am not persuaded by these arguments.

[161] The primary aim of the STCA is to encourage claimants to seek protection in the first country of entry. This goal is consistent with fundamental principles of refugee law in Canada.

[162] While the Act does not impose a requirement to seek protection in the first country of entry, the failure to do so has been found to undermine the subjective basis of fear. According to the decision in *Ward v. Canada (Minister of Employment and Immigration)*, [1993] 2 S.C.R. 689 at 723 where the Supreme Court said that a person seeking protection must establish both a subjective and objective basis of fear. I refer also to the decision in *Kurtkapan v. Canada (Minister of Citizenship & Immigration)*, (2002) 24 Imm. L.R. (3d) 163 at paragraph 29 as follows:

> 29 The Applicant sought recognition as a Convention refugee when he came to Canada in 2000. In *Ward, supra*, the Supreme Court of Canada set out the test to be met by a person seeking status as a Convention refugee. The Court held that the definition of "Convention Refugee" necessarily includes two elements, that is, a subjective fear of persecution and an objective basis for that fear.

[163] The decision in *Huerta v. Canada (Minister of Employment & Immigration)*, 157 N.R. 225, among others, comments on the delay in seeking protection at paragraph 4 as follows:

> 4 Although the members did not expressly refer to it in their decision, it is clear from the transcript of the discussion at the hearing that they found it hard to see the appellant's conduct as consistent and to reconcile it with the conduct of a person who says she fears for her life and fled her country to seek protection from the Canadian government. The delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant.

[164] The Respondent denies that the provision is overbroad since the aim of reducing the burden on the Canadian refugee system is rationally connected to the purpose of streamlining that system.

[165] Ms. Vasavada, a deponent on behalf of the Respondent, commented on statistics relating to the number of claimants arriving per year at a land border from the United States. She provided three charts.

[166] The first chart enumerates the number of claimants entering Canada from the United States at a land border, whether or not they entered pursuant to the STCA, as well as the number of claimants who entered Canada in general, from the coming into force of the STCA until June 30, 2016. The STCA came into effect on December 29, 2004.

[167] Ms. Vasavada provided a second chart showing the number of claimants under the STCA who entered at a land port. This chart covers the period from the time the STCA came into force until June 30, 2016. This chart shows a break-down according to the STCA exception relied upon and the country of citizenship.

[168] Finally, Ms. Vasavada provided a chart showing the total number of claims rejected by the RPD and the number of STCA claims rejected by the RPD after the coming into force of the PCISA, until June 30, 2016. The PCISA imposed limits on those claimants who have a right of appeal to the RAD.

[169] The Applicants place high reliance on statistics that show a higher rate of success before the RAD, allowing appeals from negative decisions made by the RPD. They also rely on statistics showing a low rate of success, under 10%, in applications for judicial review before the Federal Court. The Applicants suggest that these statistics show that the RAD is better at correcting mistakes than the Federal Court.

[170] The Applicants note that statistics attached to the affidavit of Ms. Kilgallen-Asencio, for the period December 15, 2012 to December 31, 2015 show a 73.2% recognition rate for persons who entered Canada under the STCA exemption, following the activation of the RAD. They highlight the admission of the Respondent, during the cross-examination of Ms. Vasavada, that these statistics show that the claims in questions were well-founded.

[171] The statistics, by themselves, do not prove that the RAD bar is overbroad. Justice Mactavish in *Canada (Attorney General) v. Walden*, (2010) 368 F.T.R. 85 (Eng.) at paragraph 109, said

> I agree with the Government that statistical evidence of professional occupational segregation, by itself, is not sufficient to establish a *prima facie* case of sex discrimination under either section 7 or section 10 of the *Canadian Human Rights Act.* …

[172] I acknowledge that Justice Mactavish was adjudicating upon a matter arising in the context of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Nonetheless, her observation about the case of statistical evidence is relevant.

[173] Statistics provided by the Applicants showing that certain claims are well-founded do not mean that the RAD bar is overbroad. The objective of the legislation is not only to reduce incentives for unfounded claims but also to promote the principal aim of the STCA, that persons should claim in the country of first entry. The well-foundedness of certain claims do not, *per se*, establish overbreadth.

[174] In *Atawnah v. Canada (Public Safety and Emergency Preparedness,* (2015) 36 Imm. L.R. (4th) 262, aff'd 397 D.L.R. (4th) 177 (F.C.A.) at paragraph 60, Justice Mactavish found the that paragraph 112(2)(b.1) of the Act was not overbroad as it was rationally connected to the Government's goal of expediting removals and simplifying the refugee process.

[175] As in *Atawnah, supra,* I find that the RAD bar in paragraph 110(2)(d) is rationally connected to the objectives of simplifying the refugee determination process including the acceleration of the removal of unfounded claims. Justice Mactavish found that paragraph 112(2)(b.1) of the Act, barring claimants from a PRRA if their applications had deemed to be abandoned, was rationally connected to the Government's goal of expediting removals and simplifying the refugee process.

[176] In my opinion, the Applicants have not shown that the provision is overbroad. The objectives of the Respondent are rational and justifiable, and fall within his power to administer the Canadian refugee system.

(3) Grossly disproportionate

[177] Finally, there is the question of gross disproportionality. Does paragraph 110(2)(d) violate section 7 on the basis of disproportionality?

[178] Again, I refer to the decision in *Bedford, supra,* at paragraph 103 where the Supreme Court of Canada stated a general principle: “Laws are also in violation of our basic values when the effect of the law is grossly disproportionate to the state’s objective.”

[179] The Applicants submit that paragraph 110(2)(d) is grossly disproportionate because an error in a decision can lead to the return of a genuine claimant to a country where he or she may face torture or death. They refer to provisions of the Act that allow for the disposition of false claims, that is section 107.1 dealing with claims found to be “manifestly unfounded” or section 107(2), for claims found to be of no credible basis. In such cases access to the RAD is barred by paragraph 110(2)(c) of the Act.

[180] The Applicants argue that the RAD bar in paragraph 110(2)(d) ignores the vulnerability of the Applicants, including that of the minor claimants.

[181] The Applicants rely on the evidence of Dr. Rousseau and Mrs. Dench in addressing the issue of vulnerability, as well as the issue of stress.

[182] The Respondent submits that paragraph 110(2)(d) is not grossly disproportionate when considered in context of the overall scheme designed by Parliament for determination of refugee protection. That general scheme is the regulation of the recognition of refugees as protected

persons in Canada. That subject lies within the competence of the Federal Government. Relying on the decision in *R v. Lyons*, [1987] 2 S.C.R. 309, the Respondent argues that compliance with the Charter does not require development of the best possible system that can be imagined.

[183] As well, the Respondent submits that the system need not be risk-free in order to satisfy the Charter. The process available to those subject to the safe third country exceptions, that is a hearing before the RPD with the opportunity to seek judicial review in the Federal Court, has been found to be Charter compliant; see the decisions in *Krishnapillai*, *supra* and *Z. (Y.), supra.*

[184] Further, the Respondent notes that the Act requires a balance between competing goals including family reunification and the best interests of the child. The fact that some claims raise these issues does not make paragraph 110(2)(d) non-compliant with the Charter.

[185] Finally, the Respondent acknowledges that removal is stressful but there is no evidence that the stress is related to the particular procedural route chosen by the Applicants or any person seeking protection.

[186] I prefer the arguments of the Respondent on this issue.

[187] Insofar as the objectives of the provision are to be gleaned from the Act, that is a matter of statutory interpretation. The Supreme Court of Canada has consistently spoken about the need to interpret legislation in a contextual, purposive manner; see the decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21.

[188] The Applicants rely on the evidence of Mrs. Dench in support of their submissions on this issue, that is her affidavit. They also rely on the evidence of Dr. Rousseau and the evidence of Ms. Vasavada, being her affidavit and cross-examination.

[189] The Respondent refers to the cross-examination of Dr. Rehaag, Ms. Vasavada, Mrs. Dench and Dr. Rousseau.

[190] There is no doubt that the refugee process must be stressful, involving departure from a person's country of nationality or residence to seek protection elsewhere. Children are vulnerable by nature. Dr. Rehaag commented that unaccompanied minors were among the largest group of STCA exceptions.

[191] One effect of the RAD bar implementation is to accelerate the Canadian refugee determination process. According to the evidence of Ms. Vasavada, up to September 30, 2015, the time frame for determination of refugee claims until removal was reduced from an average of 420 days to 146 days. The Applicants argue that this reduction in removal time applies to non-STCA claimants as well and therefore cannot be attributed to the RAD bar.

[192] The reduction in time for processing claims from beginning to end can indeed be attributed to the RAD bar. The reduction in that processing shows that the RAD bar is working. Part of the Canadian refugee determination system necessarily involves the timely removal of unsuccessful claimants.

[193] It is part of that refugee determination system that claims will be rejected on the grounds of lack of credible evidence or the availability of refuge in the country of origin. It is inherent in the refugee determination system that persons must first seek the protection from their home government before looking for surrogate protection abroad.

[194] A claim for protection will yield one of two results: either it is accepted or it is not. The removal of unsuccessful claimants is a necessary, if difficult, part of the Canadian refugee determination system.

[195] Dr. Rousseau and Ms. Dench spoke about increased stress on claimants who faced an earlier removal, since those persons without access to the RAD do not enjoy a statutory stay as mentioned above.

[196] Nonetheless, it must be remembered that Canada has the right to decide how refugee claims, including appeal processes, will be determined. The refugee determination process does not depend upon self-assessment that a particular person is a refugee or person in need of protection.

[197] I note that in oral argument, the Applicants were frequently and consistently referred to as “refugees”. This characterization was used in conjunction with arguments about *refoulement*.

[198] This is not correct. The Applicants were not successful in establishing their claims before the RPD and do not become “refugees” simply by assertion.

[199] In the course of oral submissions, the Respondent referred to the decision of the Supreme Court of Canada in *Suresh, supra*. In that decision the Supreme Court of Canada entertained a challenge to the constitutionality of a provision of the former *Immigration Act,* R.S.C. 1985, c. I-2, on the grounds that it breached section 7 of the Charter. The provision in question, that is paragraph 53(1)(b), reads as follows:

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless	53.(1) Par dérogation aux paragraphes 52(2) et (3), la personne à qui le statut de réfugié au sens de la Convention a été reconnu aux termes de la présente loi ou des règlements, ou dont la revendication a été jugée irrecevable en application de l'alinéa 46.01(1)a), ne peut être renvoyée dans un pays où sa vie ou sa liberté seraient menacées du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, sauf si, selon le cas.
. . .	. . . .
(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;	b) elle appartient à l'une des catégories non admissibles visées aux alinéas 19(1)e), f), g), j), k) ou l) et que, selon le ministre, elle constitue un danger pour la sécurité du Canada;

[200] The Supreme Court decided that the provision does not breach section 7 but allowed the application for judicial review on other grounds.

[201] The Respondent submits that in *Suresh, supra,* the Supreme Court of Canada reviewed the statutory scheme and confirmed that it is Charter compliant. He argues that the RAD bar does not change the fundamentals of the refugee determination system which was in issue in *Suresh, supra.*

[202] The submission is sound. The fact that the Parliament of Canada has introduced new legislation addressing immigrants and refugees does not change the fundamental thrust of Parliament's intention, that is to regulate the entry of refugee claimants into Canada and establishing a process by which claims for protection can be determined.

VII. MERITS OF THE RAD DECISIONS

[203] All of the Applicants in the within applications for judicial review filed appeals with the RAD. All the appeals were dismissed by the RAD on the basis of lack of jurisdiction, pursuant to paragraph 110(2)(d) of the Act.

[204] Whether those decisions are reviewable the standard of correctness or upon the standard of reasonableness, the result will be the same.

[205] Paragraph 110(2)(d) is constitutionally valid and the RAD did not err in dismissing the Applicants' appeals on the basis of lack of jurisdiction. It is not necessary for me to review the

individual circumstances of the Applicants nor the arguments initially filed on the merits of their respective appeals.

VIII. CONCLUSION

[206] In conclusion, I am not satisfied that the Applicants have discharged their burden to show that the RAD bar set out in paragraph 110(2)(d) of the Act infringes section 7 of the Charter. Accordingly, it is not necessary for me to address the arguments relating to section 1 of the Charter.

[207] In enacting the Act, Parliament undertakes to give refugee claimants the benefit of having claims for protection determined administratively or judicially, before removal from Canada.

[208] Administrative determination takes place before the RPD. The Act provides the opportunity for an appeal, except where that opportunity is prohibited.

[209] That prohibition, in this case, arises pursuant to the STCA. Under that agreement, the United States of America is a “designated safe third country” and persons seeking to traverse that country without seeking protection in the United Sates, in order to seek protection in Canada, are barred from making such claim. This limitation arises under paragraph 101(1)(e) of the Act .

[210] However, section 159.5 of the Regulations provides an exception to this general prohibition to the effect that certain classes of claimants can have their claims for protection

determined in Canada before the RPD. In exchange for this exemption, the right of appeal to the RAD is removed.

[211] Loss of a right of appeal to the RAD has consequential effects, including the lack of a statutory stay of removal pending disposition of an appeal and pending the outcome of any application for judicial review taken in that regard.

[212] If a claimant from a safe third country is unsuccessful before the RPD, there remains the opportunity to seek judicial review before the Federal Court. The opportunity to seek a judicial stay of removal is also available.

[213] Access to the RAD and access to the Federal Court are different remedies. However, the difference in those remedies does not make them non-compliant with section 7 of the Charter.

[214] The statutory scheme respecting the determination of status as a refugee or a protected person must always be viewed in relation to the authority of the Government of Canada to determine who enters the country.

[215] The exemptions to the STCA, provided by section 159.5 of the Regulations, are a benefit to those persons who would otherwise not have the opportunity to seek protection in Canada. Parliament is entitled to create different classes and to impose limitations upon access to the refugee determination system in Canada.

[216] In the result, the applications for judicial review are dismissed.

[217] Counsel for the parties proposed the following question for certification:

> Does paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 infringe section 7 of the *Canadian Charter of Rights and Freedoms*, *Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, and, if so, is this infringement justified by section 1?

[218] I acknowledge the direction set out in *Zazai v. Canada (Minister of Citizenship and Immigration)*, (2004) 318 N.R. 365, that no question should be certified pursuant to subsection 74(d) of the Act unless it raises a serious question of general importance that would be dispositive of an appeal.

[219] I am satisfied that the proposed question meets that test and the question will be certified.

JUDGMENT in Dockets
IMM-3193-15, IMM-248-16, IMM-932-16, IMM-1354-16 and IMM-1604-16

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed and the following question is certified:

> Does paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 infringe section 7 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11,* and, if so, is this infringement justified by section 1?

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3193-15
STYLE OF CAUSE:	REEM YOUSEF SAEED KREISHAN v. MCI
AND DOCKET	IMM-248-16
STYLE OF CAUSE	GIOVANI ACEVEDO ARANGO ET AL v. MCI
AND DOCKET	IMM-932-16
STYLE OF CAUSE	MOHAMMED ZAKIR HOSSAIN V. MCI
AND DOCKET	IMM-1354-16
STYLE OF CAUSE	SUAD SULIEMAN ODEH ABU SHABAB ET AL V. MCI
AND DOCKET	IMM-1604-16
STYLE OF CAUSE	HUDA MARWAN KASHTEM ET AL V. MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 26-27, 2017
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	MAY 4, 2018

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