Federal Court Cour fédérale

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Docket: IMM-12508-12

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Ottawa, Ontario, November 13, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

EMILIAN PETER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Intervener

JUDGMENT AND REASONS

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I. INTRODUCTION

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*" or the "Act") of a decision of the Canadian Border Services Agency (the "CBSA") dated December 5, 2012 refusing to defer the execution of the removal order against Emilian Peter (the "applicant"), a Sri Lankan Tamil. The applicant seeks a mandamus order compelling the Minister of Public Safety and Emergency Preparedness (the "Minister") to conduct an assessment of the risk that he will face upon return to Sri Lanka, or, in the alternative, that the CBSA's decision be overturned and that the matter be remitted for reconsideration. The application was heard December 3, 2013, with supplementary oral submissions from parties following two directions from the Court at a hearing on June 2, 2014, and submissions on certified questions provided August 30, 2014. Upon consideration of the Applicant's uncontested submissions regarding the applicability of subparagraph 20(2)(*b*) of the *Official Languages Act*, I agree that release of this judgment (and reasons) in both official

languages would occasion a considerable delay prejudicial to the public interest, and I am therefore releasing it immediately in English and then in French at the earliest possible time.

[2] This Court heard Mr. Peter's application together with the application in *Savunthararasa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1074 [*Savunthararasa*]. Both Mr. Peter and Mr. Savunthararasa (together the "applicants") were represented by the same counsel. In addition, Prothonotary Aalto granted leave to the Canadian Association of Refugee Lawyers ("CARL") to intervene and to file a factum. I allowed CARL to make submissions in both matters on the issues raised by the parties.

[3] Central to both cases are two common issues. The first is whether section 112(2)(b.1) of the *IRPA*, as added by section 15(3) of the *Balanced Refugee Reform Act*, SC 2010, c 8, is unconstitutional for infringing 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 ("*Charter*"). Subject to ministerial exemptions based on class or country, the relevant portion of section 112(2)(b.1) of the *IRPA* prohibits a Pre-removal Risk Assessment Protection ("PRRA") application from being brought within 12 months after the refugee protection claim was last rejected. Section 112(2)(b.1) is referred to throughout these reasons as the "PRRA bar".

[4] The second issue is whether the "removals process" applied by the Inland Enforcement Officer (the "removals officer" or the "officer") to determine whether to defer the applicant's removal from Canada pursuant to section 48 of the Act is unconstitutional for violating the principles of fundamental justice under section 7 of the *Charter*. This aspect of the applicant's

constitutional challenge encompasses the removals test as developed by the Federal Courts and applied by the officer, the officer's competency and authority to assess risk, and other related aspects of the removals process, including the role of the Federal Court in motions brought before it to stay an applicant's removal following rejection of a deferral request by the officer.

[5] These reasons determine the common issues and affect both applications. Accordingly, I direct that a copy of these reasons be placed in the *Savunthararasa* file.

[6] I dismiss Mr. Peter's application. I conclude that both the PRRA bar and the removals test are in compliance with section 7 of the *Charter*. I also reject the applicant's challenges to the officer's competency and related issues. Further, I conclude that the decision of the removals officer was reasonable. My reasons in support of these conclusions follow.

[7] For purposes of ease of terminology, when discussing the "refugee determination process" or other statements where the term refugee is not capitalized, I am referring to both sections 96 and 97 of the *IRPA* together as in the meaning of a person on whom refugee protection is conferred by section 95 of the *IRPA*. This usually is in reference to some form of shared "risk of harm" required for a successful claim, often common in nature and degree, emanating from the claimant's country of origin. This use of the term "refugee" is to be distinguished from references to a "Convention Refugee" or a "Refugee" in a capitalized form, which designates a specific connection to section 96 of the *IRPA*.

II. <u>BACKGROUND</u>

[8] The applicant is a 41 year old Christian Tamil from Mannar in northern Sri Lanka. He is married with five children. In November 2010, he left his wife and children in Sri Lanka and fled to the United States. He arrived in Canada on April 4, 2011 at the Quebec-United States border and made a claim for inland refugee protection at Citizenship and Immigration Canada's ("CIC") offices in Etobicoke, Ontario on April 13, 2011.

[9] The applicant's first narrative described a previous history of being arrested and tortured in 2005 or 2006. He originally alleged being entangled, without intention or justification, in the affairs of a person called Ruban, who he alleged was arrested by the authorities. The applicant claimed that he feared being incarcerated and treated inhumanely based on his connection with Ruban because of an allegation that the applicant's card was found on Ruban's person.

[10] On March 29, 2012, the applicant's refugee claim was rejected by the Refugee Protection Division (the "RPD") on the basis that his evidence lacked credibility and that he had not established that his prospective fear of harm was well-founded.

[11] On April 20, 2012, Mr. Peter applied for leave and judicial review of the negative RPD decision.

[12] Pending the outcome on the leave application, the applicant filed for permanent residence on humanitarian and compassionate ("H&C") grounds on June 21, 2012. He continued to rely on similar facts as were before the RPD, which were later significantly varied before the removals officer.

[13] Leave to judicially review the RPD decision was denied by Justice Near, as he then was, on August 14, 2012.

III. DECISION UNDER REVIEW

[14] In his request for a deferral of removal, Mr. Peter alleged that he would face serious risk of harm upon return to Sri Lanka because of the work he had done as a driver for the non-governmental organization CARE. He explained that he had not included information about his past employment with CARE and the problems he experienced as a result of this employment in his Personal Information Form ("PIF") or at his RPD hearing because his interpreter insisted that he should not mention this. He also alleged that he would face risk because of his familial connection to his nephews, who had been detained by the Sri Lankan government on the basis of alleged involvement with the Liberation Tigers of Tamil Ealam (the "LTTE"). Furthermore, he claimed that he would face risk based on the fact that his wife and children had been forced to move frequently to avoid problems with the Sri Lankan government. He also asked that his removal be deferred until such time as his H&C application was determined.

[15] The request was supported by a large package of background information on the country conditions and a statutory declaration of Patricia Watts, a law clerk with the applicant's counsel. She deposed, among other things, that several of Mr. Peter's counsel's clients with similar risk profiles had been detained, abducted, and beaten after their arrival in Sri Lanka

[16] In examining the applicant's submissions, the officer noted that he was tasked with determining whether removal would subject Mr. Peter to risk of death, extreme sanction, or inhumane treatment.

[17] The officer indicated that he had carefully reviewed the news articles and country condition reports in the voluminous documentation submitted by the applicant on country conditions. The officer noted that most of them post-dated the RPD decision and that there was an emphasis on the alleged risks for returnees and failed asylum-seekers. The officer concluded that they referred broadly to general conditions in Sri Lanka and made no specific mention of the applicant. The officer also noted that many of the submitted materials were not from commonly known mainstream or impartial sources. Specifically with respect to alleged risks faced by failed asylum-seekers, the officer found that many of the presented circumstances were materially dissimilar to the situation of the applicant as they were actually discussing the removal of Sri Lankan Tamils from Europe rather than from Canada. He noted that Mr. Peter had no record of criticizing or protesting against the Sri Lankan government in Canada or while abroad. The officer concluded that the evidence provided by the applicant was insufficient to demonstrate that he faced a risk to his life upon return to Sri Lanka that was sufficiently personalized and that overall the statements of the applicant's counsel were speculative and not clearly established by any of the evidence provided in the deferral request.

[18] With specific reference to the alleged torture of a failed asylum seeker removed to Sri Lanka from Canada, the officer noted that no specific information was provided, such as

the identity of the alleged victim, which rendered the information too vague and insufficiently corroborated to be relied upon.

[19] The officer noted that the applicant was questioned but not detained as a result of his CARE employment. He also found the evidence regarding the applicant's relationship to the mastermind of the assassination attempt unsupported. The officer concluded that there was insufficient, non-speculative documentation to demonstrate that the applicant would face risk in Sri Lanka based upon his former work as a driver for CARE. Despite the fact that this particular risk was not raised to the RPD, which the applicant now claims was due to the advice given to him by his interpreter, the officer noted that both the Refugee Intake Form and the PIF that the applicant signed contain a statement that the information provided was "complete, true and correct." In addition, the officer did not find it credible that the applicant followed the advice of his interpreter in not raising his work for CARE to the RPD instead of following the advice of his legal counsel. The officer concluded that the applicant had not provided a sufficiently credible explanation as to why these risks had not been presented to the RPD for consideration. Moreover, he was not satisfied that the new evidence presented was even eligible for consideration in light of section 113(a) of the Act, which limits the officer's consideration to be given to new evidence that arose after the rejection or that was not reasonably available, or that the applicant could not have reasonably been expected to present in the circumstances, at the time of rejection.

[20] The officer went on to conclude that there was insufficient evidence that the applicant would be at risk due to his family's profile, and that in any case, the information provided pre-dated the RPD hearing.

[21] The officer examined an affidavit provided by a social worker and law clerk from the office of the applicant's legal counsel. The affidavit provided personal testimony as to the dangers that Tamils face upon return to Sri Lanka. The officer concluded that the information provided in the affidavit was uncorroborated, anecdotal, and insufficiently detailed regarding the risk profile of the persons allegedly subject to risk upon return to Sri Lanka to have any probative value.

[22] The officer concluded that his discretion as an Inland Enforcement Officer is very limited and that it did not permit him to defer the applicant's removal to Sri Lanka based on the evidence provided

[23] In regard to the applicant's request that his removal be deferred until such time as his application for permanent residence on H&C grounds was decided, the officer noted that both the "Inland Processing Manual 5" and the "Instruction Guide IMM 5291 – Applying for Permanent Residence from Within Canada – Humanitarian and Compassionate Considerations" make it clear that the submission of a request for permanent residence on H&C grounds does not delay an applicant's removal from Canada. The officer did not accept the evidence in the affidavit of the applicant counsel's law clerk, Ms. Watts, stating that the acceptance rate of H&C applications for applicants who are not in Canada is virtually nil. The officer determined that

there was no documentary evidence or proof supporting these contentions. Further, he noted that it was beyond his authority to carry out H&C assessments. The officer noted that the evidence from the affiant Watts was largely anecdotal and not authenticated by any objective evidence.

[24] As a result, the officer refused the applicant's request for a deferral of removal.

IV. PARTY PLEADINGS

A. *Applicant*

[25] The applicant submits that there is an obligation on the removals officer to consider risk which arises from the constitutional obligation to protect human rights and that this obligation can be met by providing a fresh risk assessment on the basis of evidence not previously considered.

(1) The Minister's Obligations under Section 7 of the *Charter*

[26] The applicant alleges that section 7 of the *Charter* is engaged where a person claims a risk of harm upon removal to another state jurisdiction. This gives rise to an obligation to determine the existence of risk prior to removing the person to the country where he or she could potentially face a risk. The Supreme Court in *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR (4th) 422 [*Singh*] recognized that section 7 is engaged where a non-citizen claims a well-founded fear of persecution in her country of nationality or former habitual residence and where she claims a substantial risk of torture or other such treatment.

[27] The Court in *Németh v Canada (Minister of Justice)*, 2010 SCC 56, [2010] 3 SCR 281 [*Németh*] has also noted Canada's international obligation to respect the principle of non-refoulement, though this principle does not commit Canadian authorities to any particular procedural scheme for its application in extradition matters. The Federal Court has on numerous occasions recognized that Canada would be in breach of its international obligations and section 7 of the *Charter* if it were to execute deportation orders in circumstances which put the life, liberty, or security of person in peril (see *Orelien Canada (Minister of Employment and Immigration)*, [1992] 1 FC 592, 135 NR 50 (CA) [*Orelien*]; *Nguyen v Canada (Minister of Employment and Immigration)*, [1993] 1 FC 696, 100 DLR (4th) 151 (FCA); *Farhadi v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 646 (QL) at para 3, 257 NR 158 (FCA)).

[28] The Federal Court has recognized that a timely risk assessment is Canada's safeguard against deportation to torture or similar treatment (see *Ragupathy v Canada (Minister of Public Safety & Emergency Preparedness)*, 2006 FC 1370, 303 FTR 178 at para 27 [*Ragupathy*]) and the fact that the person is excluded from a determination or that there has been a prior determination, successful or not, of whether a person is at risk in returning to a particular country has not been a bar to a timely determination (see *Saini v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 325, [1998] FCJ No 982 (QL) at para 25; *Jayasundararajah v Canada (Minister of Public Safety & Emergency Preparedness),* 2010 FC 1169 at paras 25-26, 195 ACWS (3d) 224 [*Jayasundararaja*]; *Arunachalam v Canada (Minister of Citizenship and Immigration)*,150 FTR 289. 81 ACWS (3d) 323.

(2) The Scope of the Risk

[29] Further, the applicant claims that the concept of 'risk' is broader than "the risk of death, extreme sanction or inhuman treatment," which is the test applied by removals officers as first enunciated by Justice Pelletier in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 [*Wang*].

[30] The test reflected the wording of section 2(1) of the *Immigration Regulations*, as amended by SOR/93-44, s. 1 [*Immigration Regulations*] that predated the *IRPA*. The wording taken from the *Immigration Regulations* was used for the purpose of conducting a form of pre-removal risk assessment of unsuccessful Convention refugees who were members of the Post-Determination Refugee Claimant Class (the "PDRCC"). The factors in the *Immigration Regulations* were subsequently reformulated in section 97(1)(b) in the *IRPA*, now describing persons in need of protection who, upon removal, would be subject to a risk of "life or to a risk of cruel and unusual treatment or punishment."

[31] Moreover, *Wang* involved a removal where the underlying procedure was an application for permanent residence on humanitarian and compassionate grounds [H&C], as opposed to a risk assessment. The test in *Wang* was then adopted by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 [*Baron*] and *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, 343 DLR (4th) 128 [*Shpati*]. However, the applicant contends that both the *Wang* test and its adoption by the Federal Court of Appeal is *obiter dicta*.

[32] The applicant argues that the risk which must be assessed at the time of removal is not limited to the factors in section 97 of the *IRPA* and that this broader conception of risk is supported by jurisprudence of the Supreme Court and the Federal Courts. He advances that the concept of risk must, at a minimum, be the risk which has already been recognized by Canadian courts, including persecution of a Convention refugee (*IRPA*, s 96), torture (*IRPA*, s 97), the concept of cruel and inhuman treatment under Article 7 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976, No 47, 6 ILM 368, and the concept of cruel and unusual treatment or punishment under section 12 of the *Charter*. The applicant did not pursue the section 12 *Charter* argument. The applicant argues that narrowing the parameters to exclude real risks, as the officer did in both of the applicants' cases, is inconsistent with the principles of fundamental justice.

[33] The applicant argues that that the object of the amendment creating the PRRA bar is "resource efficiency," as the significance of the PRRA in the refugee claim process is still recognized. The PRAA should be based upon the recognition and commitment to the principle that persons should not be removed from Canada to a country where they would be at risk of persecution, torture, risk to life, or risk of cruel and unusual treatment or punishment. Such a commitment requires the risk be reviewed prior to removal.

(3) The Illegality of the PRRA Bar

[34] The applicant argues that non-refoulement is a rule of customary international law because of its normative character and consistent state practice and that Canada is bound by principles of customary international law in the absence of conflicting domestic legislation

(see *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292). Further, constitutional principles in Canada accord with Canada's international human rights obligations. The applicant also points out that section 3(3)(f) of the *IRPA* indicates that the Act should be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory. The applicant argues that international human rights law does not have to have been incorporated explicitly into Canadian law to apply to the interpretation of the *IRPA* (see *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, 262 DLR (4th) 13 at paras 82-107).

[35] According to the applicant, the PRRA bar is illegal, in that various unsuccessful refugee claimants will be deported before they can seek the protection that the PRRA mechanism was intended to offer, returning them to places where their lives and freedom could be threatened and thereby contradicting the principle of non-refoulement. The applicant contends that this possibility means that section 112 of the *IRPA* is an illegal provision.

(4) Alternative Test

[36] The applicant submits that the role of the removals officer is not defined in the legislation and should be limited to that of a 'gatekeeper,' such that he or she cannot decide the merits of the case but only whether there is evidence before him which, if accepted as credible, might lead a competent decision maker to determine that the person has a well-founded fear of persecution or other form of cruel and inhumane treatment on return to a particular country.

[37] According to the applicant, it cannot be the case that the removals officer is meant to apply a narrower concept of risk than that which would be applied if the person passed to the

next assessment and was eligible for a review of risk in the context of the engagement of section 7 *Charter* interests.

[38] The applicant also alleges that there does not appear to be a consistent standard articulated for the officer's assessment of the evidence. In *Wang*, the Court stated that the officer could determine the *bona fides* of the request, while in *Toth v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1051, 417 FTR 279, Justice Zinn applied a test of "clear and convincing" evidence. The applicant cites *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680, (1989) 57 DLR (4th) 153 (FCA) for the proposition that the foregoing are not the tests used for a determination of the need for protection from persecution, which should be whether there is a well-founded fear (i.e. a serious or reasonable chance) based on evidence accepted on a balance of probabilities.

[39] The applicant further advances that the risk does not need to be personalized (see *Orelien, Yaliniz v Canada (Minister of Employment and Immigration),* 9 ACWS (3d) 369, 7 Imm L R (2d) 163 (FCA), *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250, 73 DLR (4th) 551 (FCA) at paras 17-18 [*Salibian*]).

(5) Competent Decision Maker

[40] The applicant argues that where a non-citizen claims a need of Canada's protection from risk in another state jurisdiction, there must be an oral hearing where credibility is considered before a competent, independent, and impartial decision maker in order to determine the existence of risk and whether protection should be provided. The applicant cites *Chieu v Canada*

(Minister of Citizenship and Immigration), 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*] and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 1222, 160 DLR (4th) 193 at para 70 [*Pushpanathan*] for the proposition that the requirements of natural justice are met when removing individuals from Canada by providing for an oral hearing, tendering evidence, giving reasons, etc.

[41] The applicant further argues that the role of making risk determinations, because of its vital importance in light of section 7 of the *Charter* and Canada's international obligations, cannot be filled by removals officers. The removals officers exceed their jurisdiction in such cases by taking on the role of a final decision maker in their assessment of evidence and conclusions on the narrow concept of risk which they apply to the facts (risk of death, extreme sanction, or inhumane treatment).

[42] In addition, the applicant claims that because the removals officers' role is to remove applicants, they cannot be seen as independent and impartial to the degree necessary to meet the requirements of fundamental justice. Their "singular focus" on effecting removal does not meet fairness requirements given the potentially grave consequences of a wrong decision in terms of risk assessment and removal.

[43] The applicant cites various Federal Court decisions for this proposition about the role of removals officers including *Dhurmu v Canada (Minister Of Public Safety And Emergency Preparedness)*, 2011 FC 511, 219 ACWS (3d) 188 at para 38, *Lin v Canada (Minister of Public*

Safety and Emergency Preparedness), 2011 FC 771, 391 FTR 315 at para 12, and *Jayasundararajah* at para 15.

[44] He also argues that the Court's analysis in *Wang* was premised on the recognition that the removals officer is not the decision maker but rather is determining whether to defer removal for another decision maker to address an outstanding application. In the applicant's opinion, for purpose of making risk determinations, competent decision makers include designated CIC immigration officers and members of the RPD.

(6) Arbitrariness

[45] The modifications to the *IRPA* mean that a claimant can no longer apply for a risk assessment in the form of a PRRA until a year has passed since the refusal of his or her claim. The applicant contends that even with the 12-month bar on PRRA applications, where a credible claim to risk is made out, there must be an assessment of this by a competent officer. The 12-month bar is, in some instances, a breach of section 7 of the *Charter*, as it is arbitrary and not based on the reality of changing country conditions.

[46] The applicant also claims that the PRRA bar does, in some instances, breach section 7 of the *Charter* by preventing the consideration of relevant "new" evidence of risk. In support of this submission, the applicant filed an affidavit of expert witness Professor Okafor who opined that given the difficulties in obtaining reliable and accessible information about country conditions, accurate human rights reporting may take longer than 12 months to be published.

B. *Respondent*

(1) Automatic Right to the PRRA Process is Not a Foundational Norm

[47] The respondent argues that a second PRRA is not a "foundational requirement for the dispensation of justice" where the applicant is an unsuccessful refugee as determined by a thorough and fair "refugee determination process" before the RPD, where his removal occurs within a year of the RPD decision, where the applicant may make a deferral request based on new evidence of risk (and other factors) and where he may seek a stay of removal from the Federal Court.

[48] The respondent argues that the applicant has not met the second criterion to establish the existence of a principle of fundamental justice, which has been described as a principle for which there is sufficient consensus that it is vital or fundamental to our societal notion of justice (*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 at para 8 [*Canadian Foundation*]).

[49] The respondent contends that the applicant confuses the *Charter*-compliance of the *refugee process*, which it recognizes is an inviolate part of the legislative scheme, with the constitutionality of the *removals process* of an unsuccessful refugee claimant. The entirety of the removals scheme is to be considered when determining *Charter*-compliance in the removal of an individual asserting a risk.

[50] The jurisprudence relied on by the applicant is of little assistance beyond supporting that some form of risk assessment is required at the time of removal. Indeed, *Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*] stands for the proposition that no special form of assessment is required. Similarly, *Singh* is a decision regarding the refugee process that upheld the proposition that refugee claimants are entitled to fundamental justice in the determination of whether they are refugees under the 1951 *Convention Relating to the Status of Refugees*, Can TS 1969 No 6 (the "Convention") or not. The respondent relies on *Singh* for the proposition that procedural fairness may demand different requirements in different contexts.

[51] The respondent contends that the decisions of *Suresh*, *Ragupathy*, *Farhadi*, and *Németh* are distinguishable. The applicants in those cases had Convention refugee status but were being removed based on a finding of criminality. As a result, the requirement for the risk assessment involved a balancing exercise of discretion, considering their criminality against their risk upon removal, a test which was upheld by the Supreme Court.

[52] The respondent rejects the bare assertion of the applicant that the purpose of the PRRA bar is "resource efficiency." It contends that the purpose of the PRRA bar (and other amendments) is designed to counter the many abuses inherent in the pre-existing refugee system and to bring finality to the refugee determination process.

[53] The respondent submits that the extensive extrinsic evidence demonstrates that Parliament was reacting to criticism of the extreme delays in removing unsuccessful refugee

claimants. The PRRA process was a major factor contributing to these delays, as demonstrated by the slow rate of removal of refused refugee claimants (Officer of the Auditor General of Canada, *Report of the Auditor General to the House of Commons*, ch 1 – 8 (Ottawa: Office of the Auditor General, 2008)). This slowness was identified as an abuse of Canada's refugee system and a factor which eroded the integrity of Canada's refugee and immigration systems. These factors were echoed in the Minister's opening remarks upon the introduction of the legislation providing for the amendments to the Act, including the PRRA bar.

[54] The testimony given at the Parliamentary Committee meetings demonstrated that the existence of the PRRA was not considered essential by numerous stakeholders, provided that there was some mechanism to account for exceptional circumstances and review new evidence of risk, which the respondent argues is amply satisfied by the availability of a deferral request and a motion to stay removal in the Federal Court.

[55] The respondent referred to evidence provided by the United Nations High Commissioner of Refugees (the "UNHCR") representative who identified dilatory procedures in removal as being an abuse about which the UNHCR was particularly concerned. He expressed concerns in support of the PRRA bar, including: the lack of "differentiated outcome between being recognized or not recognized as a refugee," that "there needs to be an end to the process," that "the real issue" is "how long it takes to remove you" because "[i]f removal is expedited and speedy there is probably no need for further review because country situations do not change that quickly." and that "[if there is a fundamental change during that period] it is important for the individual to have access to some sort of protection due to a risk concern."

[56] The representative of the Canadian Council of Refugees stated that:

> We understand that the current process too does not work. Review requests cannot be processed again; that is not feasible. At the same time, there has to be a possibility… to allow for this new evidence to be heard.

[57] The representative on behalf of the Canadian Bar Association stated regarding the PRRA process: "… [i]t is neither fast nor fair. It does, as it is currently structured, delay removals for a long period of time, and almost nobody gets accepted. We propose a much more efficient system that would correct mistakes…" that would permit reopening of a case only if "there are very special changed circumstances." Other representatives expressed the same views that when exceptional circumstances occur, such as when there is new evidence, there should be a mechanism that is not required to be "a big and formal appeal mechanism" to review the new evidence before the person is removed.

[58] In addition, statistical evidence shows that from 2005 to September 2012, positive PRRA determinations after a negative RPD decision were extremely low, being only 1.6 percent. This means that 98.4 percent of PRRA applications were unsuccessful during that period. Between 2005 and September 2012, 65,219 PRRA applications were submitted and only 1,013 were successful. During the time period studied there was no time bar in place and thus, there was no limit on the length of time between the negative RPD decision and the PRRA decision. It may be inferred that the success rate for PRRAs in the months after the RPD decision, when the application is based upon rate of "change" in country conditions, was likely even lower.

[59] The respondent contends that the low rate of positive determinations is evidence both that the RPD assesses risk well and that country conditions do not change quickly or much at all in a way that impacts risk assessments and certainly not within the 12 month PRRA bar. Broad access to the PRRA process therefore merely adds to the delay in removal without substantial benefit.

[60] The respondent also submits that the low rate of successful PRRA applications objectively counters the arguments of the applicant's expert that country conditions change quickly or that the reporting of country conditions is not reliable. These arguments are in addition to the respondent pointing out that the opinion makes no specific reference to examples of untimely documents concerning Sri Lanka in general or among the voluminous materials filed by the applicant in this case. If this opinion were accepted, all risk decisions in the refugee determination process would be unreliable for lack of timely data and subject to ongoing future consideration without finality.

[61] The respondent further contends that the low rate of positive determinations demonstrates that the amendments are not arbitrary in that there is a clear connection between what the law seeks to achieve and the claimed infringement of rights.

[62] In addition, the respondent submits that the applicant's other arguments lead to the conclusion that removal could never occur. With the exception of voluntary compliance to leave Canada, the CBSA is required to take a number of steps before removal can occur: locate the individual, convoke them for a pre-removal interview, obtain necessary travel documents, and in

some cases defer removal for a short time in order to allow unsuccessful refugee claimants to organize their affairs. These are irreducible aspects of the removal process. Moreover, there could always be updated documents that would merit another review of risk allegations and a further PRRA decision, which would then be subject to applications for judicial review. That state of affairs certainly could not be characterized as necessary to satisfy the principles of fundamental justice. On the contrary, the timely removal of unsuccessful claimants is more in line with the principles of fundamental justice, provided that there is an opportunity to provide compelling new evidence of personalized risk for those exceptional cases where new risks arise.

(2) The Absence of Consideration of Persecution in the Removals Test

[63] The respondent acknowledges that when there is evidence of new risks, the wording of the removals test, which is based on the applicant establishing that they will face a risk to life, inhumane treatment, or extreme sanction upon return to their country, may be likened to the wording of section 97 of the *IRPA* and does not include the risks of persecution covered by section 96 of the *IRPA*.

[64] The respondent argues that the applicant is unable to demonstrate how the Federal Court of Appeal in *Shpati*, which was dealing with the scope of an removals officer’s discretion to defer in circumstances where risk was at issue and where a negative PRRA assessment had been made, differs from a post-RPD evaluation of new risk as in this matter. The respondent denies the assertion that the *Shpati* decision is *obiter* and contends that *Shpati* stands for the proposition that if an individual’s risk has been fully considered and rejected, lawful removal may occur

unless there is persuasive evidence of new risk of deprivation of a key human right (i.e. risk to life, extreme sanction, or inhumane treatment).

[65] Section 97 of the *IRPA* provides a broader scope of protection than the claimant would be entitled to under section 96, which only provides coverage when an individual establishes a subjective and objective basis for a well-founded fear of persecution on one or more of the listed grounds, also known as a "nexus". As a result, the scope of the risk assessed by the removals test encompasses nearly all of the risk arising out of persecution claims.

[66] The respondent acknowledges that the standard of proof under section 97 of the *IRPA* is a risk on a balance of probabilities which may impose a higher hurdle than section 96 of the *IRPA*, which employs the standard of a serious possibility of persecution. The respondent responds that the removals officer is not concerned with matters of standard of proof of the risk, as no final determination is being made. The officer's assessment is limited to the sufficiency of evidence to determine whether it is "new" and probative that the applicant will likely face deprivation of a key human right if returned, in which case removal will be deferred for the purposes of a PRRA application.

[67] The respondent also acknowledges that the definition of persecution based upon the Federal Court of Appeal decision in *Rajudeen v Canada (Minister of Citizenship and Immigration* (1984)*,* 55 NR 129 (FCA) (available on QL) [*Rajudeen*] might imply a lower level of harm than the wording of the removals test. The respondent argues that the very definition of persecution that he cited ("systematic infliction of punishment directed against those holding a

particular [religious belief]; persistent injury or annoyance from any source") implies a history of harm being inflicted on the applicant. By definition, the RPD will have already considered this sort of evidence in the claim rejected prior to removal and it will not be new for the purposes of the removals test.

[68] While acknowledging that it is not necessary to show past personal persecution in order to establish a nexus to the Convention refugee grounds (*Salibian*), the respondent asserts that the evidence must be tied to actual events of persecution of similarly situated persons. The respondent submits that it is difficult to imagine a convincing situation in which such a claim could arrive shortly after a negative refugee determination before the RPD but fails to meet the removals test.

[69] The respondent notes that the applicants have not made any argument as to how the application of the removals test prejudices them. The removals test is a broader test than section 96 of the *IRPA* and at the stage of making their deferral request, the removals officer is only assessing the sufficiency of new evidence.

[70] The respondent further argues that if the deferral request is refused the claimant still has recourse before the Federal Court to seek a stay of removal on the grounds removal would violate the individual's rights under section 7 of the *Charter*. The Supreme Court in *Németh* stated that there is no specific procedure that is required to satisfy the principles of fundamental justice. Moreover, Justice Evans in *Shpati* remarked the "Federal Court can often consider a

request for a stay more comprehensively than a removals officer can a deferral" (*Shpati* at para 51).

[71] The respondent contends that the applicant's complaint is contingent upon the time lag between leave for judicial review being dismissed in the RPD decision and removal being scheduled. Consequently, the applicant's argument that he is entitled to another full-scale risk assessment after a negative decision by an expert tribunal is a thinly-veiled attempt at extending the individual's unlawful stay in Canada by providing another opportunity to put forward evidence that was not put forward before the RPD for no particularly persuasive reason.

[72] The applicant's proposed test of "evidence not inherently incredible and not previously considered" is significantly broader than the more limited powers of removals officers and would create the very abuses the amendments to the Act are designed to eliminate. The Federal Court of Appeal has already rejected the suggestion that removals officers should defer removal where applicants have sought judicial review of a negative PRRA decision in good faith as too low a threshold (see *Shpati* at paras 46-48).

(3) Competence and Bias of Removals Officers

[73] The respondent contends that removals officers do not carry out a risk assessment per se, but rather assess the evidence to determine whether the alleged risk is obvious, serious, and arose after the RPD determination (see *Ragupathy* at para 35; *Kumuravel v Canada (Minister of Public Safety and Emergency Preparedness)* (11 Dec 2012) IMM-458-12; *Hussain v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1544).

[74] Further, the respondent contends that Mr. Peter's arguments boil down to allegations of institutional bias. The standard for institutional bias is a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases (*R v Lippé*, (1991) 2 SCR 114, 128 NR 1 at 144). This test was applied by the Federal Court and upheld on appeal in a trilogy of cases looking at the institutional independence of PRRA officers (see *Say v Canada (Solicitor General)*, (2005) FCJ No 931 (QL), [2006] 1 FCR 532 at paras 39-43, aff'd 2005 FCA 422, 345 NR 340, leave to appeal to SCC refused, (2006) SCCA No 49).

[75] The respondent argues that this application of the test for institutional bias holds true for CBSA removals officers deciding deferral requests. They have sufficient institutional independence to fulfil their jurisdiction under section 48(2) of the *IRPA*, especially since removals officers do not actually conduct a risk analysis, but rather examine the evidence of risk to determine if it is sufficiently serious.

[76] Furthermore, the respondent argues that the position of a removals officer need not carry with it the level of procedural fairness attached to the IRB's court-like processes. The context in which the removals officer is making his or her decision must be analyzed in order to determine the level of procedural fairness required. First, the role of the removals officers falls at the end of a removal process where the majority of the claimants involved have already been found not to be at risk. As a result, they need only address the rare situations when a new risk will arise in the period after the RPD hearing. The respondent also argues that there is an important distinction between removals officers who make decisions on deferral requests and removals officers who schedule and determine removals. There is no evidence that the officers making deferral

decisions are "singularly focused on effecting removal," as the applicant alleges. Finally, the determination of deferral requests is a very administrative process.

[77] In addition, the discretion of a removals officer to defer removal when someone does demonstrate new risk is sufficient to remedy the danger of removing an unsuccessful refugee claimant under risk. While a statutory stay of removal or appeal is not available to the claimant, he or she can apply to the Federal Court for further for a review of the removals officer's consideration of risk in the deferral request.

[78] Further, the lack of a statutory stay or appeal is appropriate at the deferral stage, as there needs to be some finality to the risk assessment process to ensure that allegations of risk do not become a tool to avoid removal. The courts have rejected the use of risk assessments as a method to avoid removal (see *Sinnappu v Canada (Minister of Citizenship and Immigration)* 1997] 2 FC 791, 126 FTR 29 at para 71, aff'd 179 FTR 320 (note), 253 NR 234 (FCA) [*Sinnappu*]; see also *Ragupathy*). Further, the respondent argues that *Sinnappu* found that the removals test under the pre-2002 *IRPA* regime was constitutional.

[79] Finally, no rights are determined by a removals officer determining deferral, as there is no right to remain in Canada that is being abrogated in those circumstances. The removal of an inadmissible person is not inconsistent with section 7 or 12 of the *Charter* (*Idahosa v Canada (Minister of Public Safety and Emergency Preparedness))* 2008 FCA 418, [2009] 4 FCR 293 at para 48; *Daniel v Canada (Minister of Citizenship and Immigration)*, 2007 FC 392, 156 ACWS

(3d) 1144 at para 21; *Canada (Minister of Employment and Immigration) v Chiarelli* (1992) 1 SCR 711, 90 DLR (4th) 289 at paras 24-25).

[80] As a result of the foregoing, the respondent argues that the determination of deferral requests does not necessitate a high level of procedural fairness.

V. ISSUES

[81] The following issues arise in the present case:

1. Does section 112(2)(b.1) of the *IRPA* violate section 7 of the *Charter*?
2. Does the removals process violate section 7 of the *Charter*?
3. Was the CBSA removals officer's decision not to defer removal of the applicant reasonable?

VI. STANDARD OF REVIEW

[82] In *Shpati*, the Federal Court of Appeal noted at paragraph 27 that the standard of review of the decision of an removals officer to defer removal is reasonableness, unless it involves a question of law:

> [27] In my view, the officer's decision under section 48 is reviewable on a standard of reasonableness because it involves either the exercise of discretion, or the application to the facts of the words of section 48, "as soon as is reasonably practicable." However, any question of law on which the officer based his decision (such as the scope of the statutory authority to defer) is reviewable on a standard of correctness: *Patel v. Canada (Citizenship and Immigration)*, 2011 FCA 187 at paras. 26-27.

> Enforcement officers have no delegated legal power to decide questions of law.

[83] Issues 1 and 2, above, involve the constitutionality of the PRRA bar and the removals process, which requires a review on a correctness standard (*Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 at para 58, [*Dunsmuir*]). Issue 3 relates to the removals officer's exercise of discretion, which requires a review on a reasonableness standard.

VII. STATUTORY PROVISIONS

[84] The following provisions of the *Charter, IRPA,* and *Immigration and Refugee Protection Regulations,* SOR/2002-227 [*IRPA Regulations*] are applicable to the case at hand:

> Canadian *Charter of Rights and Freedoms*, section 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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.

> *Immigration and Refugee Protection Act*, SC 2001, c 27

48. (1) A removal order is enforceable if it has come into force and is not stayed.	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le

made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.
112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
(2) Despite subsection (1), a person may not apply for protection if	(2) Elle n'est pas admise à demander la protection dans les cas suivants :
(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;	a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;
(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;	b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);
(b.1) subject to subsection (2.1), less than 12 months have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee	b.1) sous réserve du paragraphe (2.1), moins de douze mois se sont écoulés depuis le dernier rejet de sa demande d'asile — sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu à la section E ou F de l'article premier de la Convention — ou le dernier prononcé du désistement ou du retrait de la demande par la Section de la protection des réfugiés ou

Appeal Division;

la Section d'appel des réfugiés;

(c) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their last application for protection was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Minister.

c) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de 36 mois se sont écoulés depuis le rejet de sa dernière demande de protection ou le prononcé du retrait ou du désistement de cette demande par la Section de la protection des réfugiés ou le ministre.

(d) [Repealed, 2012, c. 17, s. 38]

d) [Abrogé, 2012, ch. 17, art. 38]

(2.1) The Minister may exempt from the application of paragraph (2)(b.1) or (c)

(2.1) Le ministre peut exempter de l'application des alinéas (2)(b.1) ou c) :

(a) the nationals — or, in the case of persons who do not have a country of nationality, the former habitual residents — of a country;

a) les ressortissants d'un pays ou, dans le cas de personnes qui n'ont pas de nationalité, celles qui y avaient leur résidence habituelle;

(b) the nationals or former habitual residents of a country who, before they left the country, lived in a given part of that country; and

b) ceux de tels ressortissants ou personnes qui, avant leur départ du pays, en habitaient une partie donnée;

(c) a class of nationals or former habitual residents of a country.

c) toute catégorie de ressortissants ou de personnes visés à l'alinéa a).

(2.2) However, an exemption made under subsection (2.1) does not apply to persons in

(2.2) Toutefois, l'exemption ne s'applique pas aux personnes dont la demande

respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by the Refugee Appeal Division.

d'asile a fait l'objet d'une décision par la Section de la protection des réfugiées ou, en cas d'appel, par la Section d'appel des réfugiés après l'entrée en vigueur de l'exemption.

(2.3) The regulations may govern any matter relating to the application of subsection (2.1) or (2.2) and may include provisions establishing the criteria to be considered when an exemption is made.

(2.3) Les règlements régissent l'application des paragraphes (2.1) et (2.2) et prévoient notamment les critères à prendre en compte en vue de l'exemption.

(3) Refugee protection may not result from an application for protection if the person

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or	c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
(d) is named in a certificate referred to in subsection 77(1).	d) il est nommé au certificat visé au paragraphe 77(1).

Immigration and Refugee Protection Regulations, SOR/2002-227

230. (1) The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of	**230.** (1) Le ministre peut imposer un sursis aux mesures de renvoi vers un pays ou un lieu donné si la situation dans ce pays ou ce lieu expose l'ensemble de la population civile à un risque généralisé qui découle :
(a) an armed conflict within the country or place;	a) soit de l'existence d'un conflit armé dans le pays ou le lieu;
(b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or	b) soit d'un désastre environnemental qui entraîne la perturbation importante et momentanée des conditions de vie;
(c) any situation that is temporary and generalized.	c) soit d'une circonstance temporaire et généralisée.
(2) The Minister may cancel the stay if the circumstances referred to in subsection (1) no longer pose a generalized risk to the entire civilian population.	(2) Le ministre peut révoquer le sursis si la situation 'expose plus l'ensemble de la population civile à un risque généralisé.

(3) The stay does not apply to a person who	(3) Le paragraphe (1) ne s'applique pas dans les cas suivants:
(a) is inadmissible under subsection 34(1) of the Act on security grounds;	a) l'intéressé est interdit de territoire pour raison de sécurité au titre du paragraphe 34(1) de la Loi;
(b) is inadmissible under subsection 35(1) of the Act on grounds of violating human or international rights;	b) il est interdit de territoire pour atteinte aux droits humains ou internationaux au titre du paragraphe 35(1) de la Loi;
(c) is inadmissible under subsection 36(1) of the Act on grounds of serious criminality or under subsection 36(2) of the Act on grounds of criminality;	c) il est interdit de territoire pour grande criminalité ou criminalité au titre des paragraphes 36(1) ou (2) de la Loi;
(d) is inadmissible under subsection 37(1) of the Act on grounds of organized criminality;	d) il est interdit de territoire pour criminalité organisée au titre du paragraphe 37(1) de la Loi;
(e) is a person referred to in section F of Article 1 of the Refugee Convention; or	e) il est visé à la section F de l'article premier de la Convention sur les réfugiés;
(f) informs the Minister in writing that they consent to their removal to a country or place to which a stay of removal applies.	f) il avise par écrit le ministre qu'il accepte d'être renvoyé vers un pays ou un lieu à l'égard duquel le ministre a imposé un sursis.
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 la demande 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 ne 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	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

is refused, and

demande est rejetée;

(e) if the application referred to in paragraph (d) is granted, the appeal is not filed within the time limit or the Supreme Court of Canada dismisses the appeal.

e) si la demande d'autorisation visée à l'alinéa d) est accueillie, l'expiration du délai d'appel sans qu'un appel ne soit interjeté ou le jugement de la Cour suprême du Canada rejetant l'appel.

(2) Subsection (1) does not apply if, when leave is applied for, the subject of the removal order is a designated foreign national or a national of a country that is designated under subsection 109.1(1) of the Act.

(2) Le paragraphe (1) ne s'applique pas si, au moment de la demande d'autorisation de contrôle judiciaire, l'intéressé est un étranger désigné ou un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1) de la Loi.

(3) There is no stay of removal if

(3) Il n'est pas sursis à la mesure de renvoi si l'intéressé fait l'objet :

(a) the person is subject to a removal order because they are inadmissible on grounds of serious criminality; or

a) soit d'une mesure de renvoi du fait qu'il est interdit de territoire pour grande criminalité;

(b) the subject of the removal order resides or sojourns in the United States or St. Pierre and Miquelon and is the subject of a report prepared under subsection 44(1) of the Act on their entry into Canada.

b) soit, s'il réside ou séjourne aux États-Unis ou à Saint-Pierre-et-Miquelon, du rapport prévu au paragraphe 44(1) de la Loi à son entrée au Canada.

4) Subsection (1) does not apply if the person applies for an extension of time to file an application referred to in that

(4) Le paragraphe (1) ne s'applique pas si la personne demande une prolongation du délai pour déposer l'une des demandes visées à ce

subsection.	paragraphe.
232. A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, and the stay is effective until the earliest of the following events occurs:	**232.** Il est sursis à la mesure de renvoi dès le moment où le ministère avise l'intéressé aux termes du paragraphe 160(3) qu'il peut faire une demande de protection au titre du paragraphe 112(1) de la Loi. Le sursis s'applique jusqu'au premier en date des événements suivants:
(a) the Department receives confirmation in writing from the person that they do not intend to make an application;	a) le ministère reçoit de l'intéressé confirmation écrite qu'il n'a pas l'intention de se prévaloir de son droit;
(b) the person does not make an application within the period provided under section 162;	b) le délai prévu à l'article 162 expire sans que l'intéressé fasse la demande qui y est prévue;
(c) the application for protection is rejected;	c) la demande de protection est rejetée;
(d) [Repealed, SOR/2012-154, s. 12]	d) [Abrogé, DORS/2012-154, art. 12]
(e) if a decision to allow the application for protection is made under paragraph 1114(1)(a) of the Act, the decision with respect to the person's application to remain in Canada as a permanent resident is made; and	e) s'agissant d'une personne à qui l'asile a été conféré aux termes du paragraphe 114(1) de la Loi, la décision quant à sa demande de séjour au Canada à titre de résident permanent;

(f) in the case of a person to whom subsection 112(3) of the Act applies, the stay is cancelled under subsection 114(2) of the Act.

f) s'agissant d'une personne visée au paragraphe 112(3) de la Loi, la révocation du sursis prévue au paragraphe 114(2) de la Loi.

233. A removal order made against a foreign national, and any family member of the foreign national, is stayed if the Minister is of the opinion that the stay is justified by humanitarian and compassionate considerations, under subsection 25(1) or 25.1(1) of the Act, or by public policy considerations, under subsection 25.2(1) of the Act. The stay is effective until a decision is made to grant, or not grant, permanent resident status.

233. Si le ministre estime, aux termes des paragraphes 25(1) ou 25.1(1) de la Loi, que des considérations d'ordre humanitaire le justifient ou, aux termes du paragraphe 25.2(1) de la Loi, que l'intérêt public le justifie, il est sursis à la mesure de renvoi visant l'étranger et les membres de sa famille jusqu'à ce qu'il soit statué sur sa demande de résidence permanente.

234. For greater certainty and for the purposes of paragraph 50(a) of the Act, a decision made in a judicial proceeding would not be directly contravened by the enforcement of a removal order if

234. Il est entendu que, pour l'application de l'alinéa 50a) de la Loi, une décision judiciaire n'a pas pour effet direct d'empêcher l'exécution de la mesure de renvoi s'il existe un accord entre le procureur général du Canada ou d'une province et le ministère prévoyant:

(a) there is an agreement between the Department and the Attorney General of Canada or the attorney general of a province that criminal charges will be withdrawn or stayed on the removal of the person from Canada; or

a) soit le retrait ou la suspension des accusations au pénal contre l'étranger au moment du renvoi;

(b) there is an agreement between the Department and the Attorney General of Canada or the attorney general of a province to withdraw or cancel any summons or subpoena on the removal of the person from Canada.	b) soit le retrait de toute assignation à comparaître ou sommation à l'égard de l'étranger au moment de son renvoi.

VIII. ANALYSIS

A. *Section 7 Analysis*

(1) Introduction

[85] This case presents a number of challenging section 7 issues. As noted, one is to determine whether the PRRA bar enacted by section 112(2)(b.1) of the *IRPA* violates the *Charter* and in the alternative, whether the removals process does. Each presents its own differentiated *Charter* evaluation procedure, but the second issue is considerably more complex than the first.

[86] While I carry out a *Charter* analysis of the PRRA bar legislation, I conclude that the availability of the removals process generally provides a complete answer to the constitutionality challenge to section 112(2)(b.1). I do so based on the strength of the applicant presenting an alternative form of removals process, with the impugned section 112 remaining in place.

[87] A *Charter* analysis of the removals process presents an entirely different set of considerations. First, there is the removals process itself. At a first stage, it involves a removals officer exercising a discretion delegated to him by the Minister. Jurisprudence of the Federal

Courts has established that this discretion exists under section 48 of the Act. The removals officer must assess whether there is sufficient new evidence of a risk of serious harm upon removal of an unsuccessful refugee claimant such that removal should be deferred to permit the applicant to have the risk assessed by a PRRA officer. Thereafter, if the deferral request is rejected, a second stage is available where the Federal Court may stay a deferral under section 52 of the *Federal Courts Act*, RSC 1985, c F-7, if it concludes that the tripartite test for a stay is met to allow the applicant to proceed with a leave application for a judicial review to set aside a removals officer's decision (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA)).

[88] The removals process raises a number of issues which form the heart of the applicant's *Charter* challenge. First, one must consider whether the *Charter* is engaged. This involves determining how and to what extent the deprivation of an alleged right of non-removal occurs. The respondent acknowledges that the removals test comprises the "need for protection" factors of section 97 but not those for persecution under section 96. However, the respondent argues that the removals test nevertheless assesses most of the persecution risks, except for those with less serious risks of harm ("the residual or unassessed risk") under section 96. In my analysis, I propose that the definition of persecution should include a description of the threshold of serious harm necessary to constitute persecution that is adopted from the Federal Court of Appeal decision of *Cheung v Canada (Minister of Employment & Immigration,* [1993] 2 FC 314, 102 DLR (4th) 214 (FCA) [*Cheung*].

[89] I also review the applicant's arguments that the removals test is deficient because the removals officer applies a less onerous legal standard and due to his lack of competence and authority to assess evidence. I disagree to some extent with the respondent's conclusion that the legal standard in the removals test is the same as that for section 97, i.e. establishing a likelihood of harm upon removal, as opposed to a serious or reasonable risk. I also comment on the nature of the intrinsically elevated evidentiary threshold confronting an applicant arguing new evidence of a change in risk in country conditions or personally.

[90] Having delineated and reviewed the alleged deficiencies in assessing risk by the removals process (too narrow a test, too onerous a legal standard, assessment by persons not competent to evaluate risk) that engage the *Charter*, the more challenging question is what form of analysis to apply to determine whether all or any of the deficiencies in the removals process infringe the applicant's section 7 *Charter* rights.

[91] In order to carry out this analysis, I consider other arguments advanced by the parties: factors in a balancing exercise (including the Federal Court's oversight function), the alleged section 7 *Charter* remedy available in the Federal Court, there being no judicial precedent of persecution being raised as a factor in the removals test, whether the applicant can be readmitted if no serious harm occurs, and the applicant's proposed screening test (including whether the removals test should include persecution as a factor).

[92] Facing a multi-faceted process with various related issues, I conclude that the appropriate analysis is to determine whether the alleged deficiencies in the removals test can be considered foundational requirements for the dispensation of justice.

[93] However, this analysis is supplemented by an approach that balances individual and societal interests with the view to demarcate whether the deficiencies represent deprivations of rights entitled to protection by section 7 of the *Charter*. In carrying out this analysis, I am mindful of the requirement not to conflate the balancing of individual and societal interests for the purpose of elucidating rights under section 7, with the balancing exercise that properly occurs under section 1.

[94] In considering the balancing factors that delineate the scope of a right against non-removal and the foundational requirements for such a principle in the circumstances of a refugee determination process, I conclude that the removals process does not violate section 7 of the *Charter*.

(2) Is the 12-Month PRRA Bar Unconstitutional?

[95] The applicant submits that Parliament created an illegal provision by creating the PRRA bar in section 112 of the *IRPA*. He claims that it is now possible, and in fact probable, that many unsuccessful refugee claimants who are facing risk upon return to their countries of origin will likely be deported before they are permitted to seek the protection that the PRRA mechanism was intended to offer.

[96] The respondent does not seriously contend that the legislation does not engage section 7 of the *Charter*. Issues of risk on removal and refoulement have been found by the Supreme Court in *Suresh* and *Németh* to engage section 7, even if these cases are distinguishable on their facts. As Sopinka J. indicated in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 at 584 [*Rodriguez*], the first stage of the section 7 analysis is concerned with the "values at stake with respect to the individual." This has been found to encompass serious risks to a refugee claimant upon removal. I find that this extends to an unsuccessful refugee claimant alleging a change in risk conditions following a decision of the RPD.

[97] However, at the same time the applicant acknowledges that the 12 month PRRA bar is only in breach of section 7 insofar as it fails to provide a fresh risk assessment on the basis of evidence not previously considered. The applicant corrects this alleged deficiency by proposing his own alternative test which would render section 112 of the *IRPA* constitutional. Accordingly, the applicant's argument is directed primarily at whether the removals test is *Charter*-compliant.

[98] I find the arguments of the applicant similar to those advanced in *Suresh*. In *Suresh*, it was argued there that section 53(1)(b) of the *Immigration Act,* RSC 1985, c I−29 (the "*Immigration Act*"), which authorized deportation of refugees, was unconstitutional to the extent that it permitted deportation to torture. The Court held that the provision was constitutionally valid because the Minister was required to exercise her discretion in accordance with the *Charter*. In this matter, I similarly conclude that that the PRRA bar is constitutional insofar as the removals process is carried out in accordance with the *Charter*. To the extent that the content and application of the removals test is created by the jurisprudence, it may also be

amended by the courts without the necessity of the legislative amendment and rendered *Charter*-compliant if need be.

[99] I nevertheless think it worthwhile to review the premises underlying section 112 of the *IRPA* in terms of their being arbitrary, overbroad, or grossly disproportionate, such that the provision could be described as a "failure of instrumental rationality" (Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 151 [Stewart]. The Supreme Court adopted this phrase from author Hamish Stewart in the recent decision of *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para 107 [*Bedford*]. It generally describes the tests applied by the courts to determine whether an otherwise good law is "inadequately connected to its objective or in some sense goes too far seeking to attain it" because the policy instrument enacted as the means to achieve the objectives was defective.

[100] I consider this a worthwhile endeavour because the constitutionality of the removals process cannot be separated from the purpose of the 12 month PRRA bar enacted by section 112 of the *IRPA*. This is particularly so because the applicant argues that the goal of the provision is resource efficiency.

[101] Arbitrariness describes the situation where there is no direct connection between the effect the object of the law and the limit it poses on life, liberty of security of the person (*Bedford* at para 111). Overbreadth is described as a "law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose" and recognizes that a law may be "rational in some

cases" but "[overreach] in its effect in others" (*Bedford* at paras 112 and 113). Gross disproportionality applies in extreme cases where the seriousness of the deprivation on life, liberty or security of the affected person is so grossly disproportionate and out of sync to its purposes and objectives that they cannot be rationally supported (*Bedford* at para 120).

[102] The respondent submits that the objective of the 12 month PRRA bar is to ensure that unsuccessful refugee claimants are removed with minimum delay and within the 12 month bar period so as to prevent claimants from abusing the refugee adjudication process and immigration programs by remaining in Canada, as well as to bring finality to the process.

[103] Prior to the amendments to the *IRPA* described above, unsuccessful refugee claimants who accessed the PRRA and other adjudicative mechanisms were remaining in Canada on average for periods of more than 6 years (1.9 months average for the RPD determination and a further 4.5 years after the RPD process) (see Respondent's Response Submissions, Schedule 1).

[104] The delay in removal of unsuccessful refugee claimants is largely a function of unnecessary PRRA applications. In particular, a PRRA application extends the claimant's entitlement to remain in Canada due to the time required to complete the application, which for the first PRRA (others often follow) includes a statutory stay on removal until the application is determined (*IRPA Regulations*, s 232). This usually involves the applicant remaining in Canada for over a year while the application is being completed,

[105] The fact that most PRRAs are unnecessary is demonstrated by the objective statistic that 98.4 percent of PRRA claims are rejected. Moreover, the respondent reasonably argues that the success level for PRRA applications launched within one year of the RPD decision is probably lower than 1.6 percent. New evidence of risk since the RPD decision is a prerequisite for a PRRA application. One would expect the success rate for those PRRA applications launched immediately after the RPD decision to be lower than those applied for after spending a greater length of time outside their countries of origin.

[106] While the high rejection of PRRA applications may be decreased by evidence of the rate of success on Federal Court judicial review applications of these decisions, the parties did not introduce evidence of this nature. It may also be difficult to track ultimate success because setting aside a decision usually results in referring the matter back for reconsideration by a different PRRA officer. The reconsideration decisions may, therefore, be included in the 98.4 percent of unsuccessful PRRA decisions. Regardless of the absence of this evidence, it does not appear that it would alter the conclusion that positive PRRA outcomes are exceptionally low.

[107] Unnecessary PRRAs have a concatenating effect due to the time that is required to determine these adjudicative processes. This creates a vicious circle of increasing delay because of the backlog effect and further time expended on servicing unsuccessful PRRA claims. By the additional time acquired residing in Canada, unsuccessful refugee claimants may argue that changes in risk circumstances have again occurred, such as are advanced immediately after the RPD decision, to support a further PRRA application.

[108] By extending their residency in Canada, unsuccessful refugee claimants may also advance "establishment" arguments in an H&C application. Humanitarian arguments are based on the applicant getting married, having children, the best interests of the affected children, inadequate medical facilities in the country of origin, being an exemplary member of Canadian society or generally integrating into Canada such that removal to the country of origin creates unusual and undeserved or disproportionate hardship. These arguments most often result by the individual entering Canada as an invalid refugee claimant and remaining in the country over an extended period of time because of the inability to expeditiously remove the person after the unsuccessful refugee determination by the RPD. Each of these applications before PRRA or H&C officers provides an occasion for a further application for leave and for judicial review to the Federal Court, necessitating further time spent residing in Canada while these applications are determined.

[109] Moreover, consideration of the removals officer's duty to remove as soon as reasonably practicable under section 48 of the *IRPA* (now as soon as possible) may be avoided by applicants applying to stay removal in a motion to the Federal Court based upon an underlying pending PRRA or H&C leave application (or in some cases, the officer's refusal decision). A stay motion based on a pending PRRA or H&C application is not brought against the respondent Minister (who is responsible for removals by section 48 of the Act) but against the Minister of Citizenship and Immigration and employs the "frivolous and vexatious" formulation of the "serious issue" test, rather than the heightened serious issue test stipulated by *Wang/Baron* for stays (discussed below).

[110] Most of these applications, which often prove to be unsuccessful, are avoided by a speedy removals process immediately following the RPD decision. The positive effects of an expedited removal process were described by the UNHCR representative during the Senate consideration of the amendments as follows:

> The real issue (of the availability of an examination of risk on removal) is not whether you have access to it or not; the issue is how long it takes to remove you. If removal is expedited and speedy, there is probably no need for a further review because country situations do not change that quickly.
>
> …[If there is a fundamental change during that period] it is important for the individual to have access to some sort of protection due to a risk concern.

[111] I am also of the view that expeditious removal of unsuccessful refugee claimants does not just serve the best interests of the refugee determination process. It is essential to the integrity of Canada's immigration programs as a whole, which in a sense are in competition with false claimants under the refugee system.

[112] The failure to expeditiously remove unsuccessful refugee claimants may serve to undermine the other available immigration processes based on applications from abroad. There exists an enormous demand for permanent Canadian residency that cannot be met by the relatively limited openings even though approximately a quarter million persons obtain this status yearly. The unrequited demand, combined with the inherent delay in the immigration processing regime due to the large number of applications, could lead frustrated foreign nationals who observe successful entry through extended residency gained by unwarranted applications brought under Canada's refugee regime to consider inventing a false refugee narrative as a means to obtaining Canadian residency and citizenship. It is also a regular occurrence for refugee

claimants to pass through the United States or have an unsuccessful refugee claim in that country before arriving on our doorstep claiming refugee status, as is the case of both applicants.

[113] Delay also is harmful to unsuccessful refugee claimants themselves. They have to plan their lives and often live in anguish waiting to know whether they will remain in Canada or not.

[114] Overall, I agree with respondent's submissions that the low success rate of PRRA applications is indicative of the reasonableness of the RPD decisions, bearing in mind that contested decisions are subject to Federal Court oversight.

[115] I also agree with the respondent's submission that the low success rate of PRRAs is an objective indicator of a certain degree of misuse of the PRRA process. The success rate, whether it be 2 or 5 percent, is low by any acceptable measure of an adjudicative process that is intended to serve a practical purpose. For the large majority of unsuccessful refugee claimants, a PRRA application should realistically be undertaken with little expectation of success. Despite this, the PRRA is almost a routine application for unsuccessful refugee claimants, as evidenced by the over 65,000 PRRA applications made between 2005 and 2012. In doing so, claimants are delaying and significantly impeding the finality of their removal, contrary to the intended result of their unsuccessful refugee claim.

[116] Looking ahead, the low probability of a successful PRRA application supports the argument for a screening mechanism that is framed to capture only those cases where there is clear and persuasive evidence that new risk circumstances have arisen.

(a) *Is 12 Months an Arbitrary Limitation for the PRRA Bar?*

[117] The applicant introduced an affidavit of Professor Okafor opining that the country conditions documentation may not be reliable within a 12 month period of the rejection of refugee protection because there is an inherent delay in capturing and reporting on country condition evidence. The affiant offered no opinion as to what timeframe was necessary to render country condition documentation reliable. In addition, his evidence was not specific to Sri Lanka, nor did it provide any examples of unreliable out-of-date evidence contained in the documentation submitted to the officer. The situations of change identified were generally obvious and the conditions were common knowledge and widely publicized in the media. This opinion is contradicted by the thousands of unsuccessful PRRA decisions over a number of years, from which I infer country conditions are well assessed by the RPD and generally do not change quickly after the RPD hearing. Otherwise, these conditions may be responded to by the *IRPA Regulations* or the Minister may not contest the evidence if satisfied a change in conditions has occurred.

[118] Moreover, if one cannot rely on the evidence presented in risk determination cases (RPD or PRRA), even though forward-looking, how can cases ever be effectively determined? The evidence will always be out of date at the time it is presented to the decision-maker by more than 12 months or whatever longer period of time it is eventually suggested might be appropriate. It will be perpetually unreliable, because conditions may have worsened or improved and this would not be accounted for in the documentation. I agree with the respondent's submissions that the affidavit tendered on this issue is not substantiated and is not helpful.

[119] Coming back to the issue of arbitrariness, the fact that I conclude that the removals process is *Charter*-compliant suggests, at first blush, that the time prescriptions of either 12 or 36 months contained in section 112 of the Act are irrelevant. If the removals process properly defers to a PRRA, it will do so whenever the new evidence of serious risk arises for persons facing removal. Serious new risk may occur both during the 12 months bar period and after. There is only one removals test and the removals process must defer to a PRRA when circumstances warrant it, regardless of how long it has been since the RPD determination.

[120] Indeed, based on a *Charter*-compliant removals process, the question arises as to whether Parliament needed to impose time limitations on PRRAs at all. Removals could safely be carried out at any time simply by eliminating the statutory stay that attaches to the first PRRA under section 232 of the *IRPA Regulations*. Whenever serious changes in risk circumstances did occur, the removals process would impose an administrative stay, either by the removals officer or the Federal Court, to defer removal so as to permit a PRRA to be conducted on the understanding that the stay would remain in effect until a decision is rendered.

[121] Parliament chose to bar PRRAs for 12 or 36 months after rejection of a refugee protection claim, thus preventing the PRRA statutory bar from taking effect so removals could be undertaken during those periods. It nevertheless allowed the statutory bar to remain after the 12 and 36 month periods expired for the first PRRA, but not for subsequent PRRA applications. The question is why Parliament attached importance to these time prescriptions on the PRRA and why did it permit the statutory bar to continue after the prescription periods. In my view, this scheme of time bars and statutory stays indicates that, despite confidence in the removals

process, Parliament wanted more assurances that risk situations were vetted as the time increased since the last full risk assessment due to the increasing probabilities of new risks arising.

[122] However, I do not accept this policy of additional risk assurances as a statement that the removals process is only *Charter* compliant within the 12 months following a rejected refugee protection claim. The statutory stay scheme acknowledges that country conditions are more apt to change the greater the time lapse following the risk evaluation. It appears that for the 36 month PRRA bar for designated countries, the same reasoning applies on the premise that functioning democracies will see less disruptive events of the kind that entail changes in risk circumstances that give rise to an increase in claimants being put at risk on removal.

[123] In my view, responding in a proactive fashion to a potential increase in claims from changing country conditions is good policy and common sense. It demonstrates an intention to provide an extra degree of precaution against possible removals of unsuccessful refugee claimants to situations of risk when the number of claimants begins to increase with valid claims. It is statistically obvious that the more circumstances that arise of persons facing changed risk, the more likely that an errant removal to danger may occur, despite a removals process that works.

[124] With this background in mind, I conclude that the amendment creating the 12-month bar on PRRA is not arbitrary, overbroad, or grossly disproportionate. In this time period, there would be less occasion for a change in country conditions to occur, as these would normally correlate with time elapsed since the RPD rejection of refugee protection claim. The 12-month bar also

prevents unnecessary adjudicative processes that delay removal of unsuccessful refugee claimants. These are appropriate considerations to support a 12-month bar.

[125] Twelve months also appears to be a reasonable period of time to organize the applicant's removal, with some degree of latitude for exigent circumstances, while also accommodating the request for deferral and stay motion, with some margin to spare.

[126] I find the prescriptive period of 12 months to be reasonable in the circumstances and appropriate given its objectives of ensuring the expeditious removal of unsuccessful refugee claimants within a reasonable timeframe, so as to prevent unwarranted use of the immigration and refugee determination regimes and to bring finality to the process.

[127] This conclusion is subject to an appropriate removals process to ensure that new significant changes in risk circumstances are reviewed and deferral of removal provided to a PRRA where circumstances warrant.

(3) Is the Removals Process Unconstitutional?

(a) *Overview*

[128] I do not believe that the courts have previously considered an argument whether a process comprising a series of related issues involving the scope of the test used, the nature of the assessment, and the competence of the decision-maker, combined in such a way that different elements of the process support each other, deprives an individual of his or her fundamental

rights under the *Charter*. While much of the discussion focuses on the removals test, it too must be considered in the context of the removals process, of which the test is the primary, but not sole, element.

[129] I am satisfied that the principles based on failures of instrumental rationality cannot apply to the constitutionality analysis of the removals process. A form of overbreadth issue is perhaps present where a law depends on a corollary determination of risk, such as occurs where the constitutionality of section 112(2)(b.1) is reflected in the removals process. Nevertheless, the focus must be on the process itself and not simply on the removals test.

[130] I agree with the respondent that the removals process in its entirety is at issue. This comprises both the test and the procedures, which I believe make this a novel section 7 *Charter* scenario. On the one hand, the Court is required to consider the substantive content and standard of proof issues relating to the removals test. It also must review the procedural fairness challenges concerning the authority, competence and institutional bias of the decision-maker, as well as the supervisory role of the Federal Court. All factors must be considered together to determine whether the removals process deprives the applicant of a section 7 right to protection upon removal in a manner inconsistent with the principles of fundamental justice.

[131] I also conclude that the respondent is correct in describing the issue as whether the removals process is "vital or fundamental to our societal notion of justice" as described by the Supreme Court in *Rodriguez* (*Rodriguez* at 590). However, because there are competing interests at play when dealing with both the need to protect an unsuccessful refugee on removal and the

need to assure that unsuccessful refugees are removed from Canada, I further conclude that the Court is called upon to balance these interests to delineate the extent of the applicant's right to protection upon removal. In doing so, I find that his fundamental rights are not deprived by the current removals process.

(b) *Section 7 Charter Principles Applicable to the Removals Process*

(i) Principles of Fundamental Justice

a. Vital or Fundamental Principle

[132] Reliance is placed by the respondent on the Supreme Court decision of *Canadian Foundation* at paragraph 8 that described the three criteria that must be fulfilled to establish a principle of fundamental justice. I cite the respondent's submissions from the respondent's further memorandum of argument, at paragraphs 28 and 29, without the citations, but indicating my emphasis:

> [28] The three criteria to establish the existence of a principle of fundamental justice was stated by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law*, as follows:
>
> > Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria: *R. v. Malmo-Levine*, First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that

> have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.

> [29] In that case [*Canadian Foundation*], the legal principle of 'best interests of the child' was found not to be a principle of fundamental justice because, as important a legal principle as it is, it was found not to be a foundational requirement for the dispensation of justice – it was not vital or fundamental to our societal notion of justice (at para. 9). In the case of removal without a PRRA, where an applicant has had the benefit of a full refugee hearing before an independent quasi-judicial tribunal, and is to be removed within months of its decision, there is no authority or justification for a finding that a second such process is a foundational requirement for the dispensation of justice, particularly when such applicant may make a deferral request based on new evidence of risk (and other factors) and may seek a stay of removal from the Court. Additionally, the current scheme provides for a statutory exemption from the PRRA bar (s. 112(2.1)).
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> [Emphasis added.]

[133] My initial comment on the respondent's submissions is that the legal principle central to the applicant's case is not cast so wide as to be described as "a second such process," meaning a second risk assessment. It is rather whether an unsuccessful refugee claimant is entitled to a second risk assessment before removal when new evidence is presented that is not screened for a risk of persecution, but only for risks of death, extreme sanction, or inhumane treatment. In fairness, prior to the Court's first direction the respondent did not respond fully to the issue of whether the removals process was *Charter*-compliant.

[134] I find that the applicant's allegations sufficiently define a legal principle when expressed in terms of the requirement for a removals test. Furthermore, if the applicant is correct that the test does not sufficiently provide for new risk situations arising from persecution or has other serious deficiencies, the principle is capable of being identified with precision and applied to situations in a manner that yields predictable results. The real issue is therefore what a foundational requirement for the dispensation of justice is.

[135] Professor Hogg in his recent article "The Brilliant Career of Section 7 of the *Charter*" referred to the foundational test with the "one important quibble". The quibble concerns the "societal consensus" element of the test, which he suggested "is not intended to be taken seriously, and the judges will decide for themselves (and no doubt often disagree) on whether societal consensus exists for a proposed principle of fundamental justice" (Peter W. Hogg, The Brilliant Career of Section 7 of the *Charter* (2012) 58 SCLR (2d) 58).

[136] In my view, Professor Stewart has provided more content to the test for the circumstances of the present case such that it cannot be passed off as a subjective measure of the courts. Professor Stewart cites the jurisprudence circumscribing the test's borders and concludes that "[the principles of fundamental justice] are not matters of general public policy to which societal consensus in the empirical sense might indeed be relevant, but lie 'in the inherent domain of the judiciary as guardians of the judicial system' " (Stewart at 108, citing *Re: BC Motor Vehicle Act*, [1985] 2 SCR 486, 60 DLR (4th) 397 at 503). He further states that principles of fundamental justice are norms that control the content of the law in the process of the administration of justice in a legal order committed to respecting human dignity and the rule of law. These values

themselves provide the societal consensus necessary to the recognition of a principle of fundamental justice. He went on to conclude "the decisive question is what role the principle plays in a legal order that is committed to the values expressed in the *Charter*" (Stewart at 109).

b. Balancing the Fundamental Rights of the Individual with Societal Interests

[137] The principles of fundamental justice are also said to involve balancing the interests of the person who claims his or her rights have been infringed with the societal interests that arise in the exercise of that right. Again citing Professor Stewart, his text provides an example of a situation where an answer to a cross-examination question may be overly prejudicial to the *Charter*-protected right to a fair trial. That situation would require one to balance the right to cross-examine a witness against the societal interest in a just resolution of the competing sides. Balancing in this sense serves to assist in delineation of the extent of the right based on *Charter*-protected value of a fair trial.

[138] The Supreme Court has been emphatic that the balancing of interests as an aspect of fundamental justice should not be confused with balancing interests under section 1 of the *Charter*. The Supreme Court, *R v. Mills*, [1999] 3 S.C.R. 668 [*Mills*], emphasized that the particular issue for determination under section 7 was the delineation of the boundaries of the rights in question. I cite paragraphs 65 and 66 from the decision below.

> [65] It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the *Charter*. The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. As McLachlin J. stated for the Court in *Cunningham v Canada*, 1993 CanLII 139 (SCC), [1993] 2 S.C.R.

> 143, at p. 152, regarding the latter: "The . . . question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society." Much the same could be said regarding the central question posed by s. 1.
>
> [66] However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the *Charter* rights.
>
> [Emphasis added]

[139] In the above excerpt from *Mills* the Court emphasized that balancing in respect of principles of fundamental justice is not a freestanding step in the section 7 analysis, nor is it an overarching principle of fundamental justice in its own right. Rather, the Court points out again, at paragraphs 95, 96 and 98, that the main function of the balancing of interests is to delineate the right.

> [95] Braidwood J.A. considered that "the operative principle of fundamental justice" in these cases is the harm principle (see para. 159). However, having concluded that the prohibition against simple possession complies with the harm principle, he went on to consider a second question — "whether the NCA strikes the 'right balance' between the rights of the individual and the interests of the State" (para. 160). As authority for this approach, reference was made to *Cunningham v. Canada*, 1993 CanLII 139 (SCC), [1993] 2 S.C.R. 143; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, at p. 539, per La Forest J.; and Rodriguez, supra, at

> pp. 592-93, per Sopinka J. Prowse J.A., in dissent, engaged in a similar balancing exercise.
>
> [96] We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure "strikes the right balance" between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, [Emphasis in original document] would entirely collapse the s. 1 inquiry into s. 7. The procedural implications of such a collapse are significant. Counsel for the appellant Caine, for example, urges that the appellants having identified a threat to the liberty or security of the person, the evidentiary onus should switch at once to the Crown within s. 7 "to provide evidence of the significant harm that it relies upon to justify the use of criminal sanctions" (Caine's factum, at para. 24).
>
> …
>
> [98] The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in Rodriguez, *supra*, "in arriving at these principles [of fundamental justice], a balancing of the interest of the state and the individual is required" (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1. ….
>
> [Emphasis added.]

[140] My first direction to counsel asked whether the respondent was, by reference to the evidence on delay of removal, abuse and low success rates in PRRAs, advancing a section 1 *Charter* defence argument. I did so in part, because the empirical evidence of the consequences on the refugee determination process, since *Singh* rejected its application to a lack of fairness violation of section 7, might have provided a reconsideration of the preclusion of a section 1

defence to breaches of section 7, as was intimated in the Hogg text on Constitutional Law, at section 47.4(b):

> The argument that such a procedure would make it impossible to deal expeditiously with the many thousands of refugee claimants who arrive in Canada each year was rejected as an inadmissible "utilitarian" or "administrative" concern, which could not be permitted to vitiate individual rights. In fact, after *Singh*, refugee claimants arrived in Canada at the rate of about 36,000 a year, and the federal government was not able to comply with the *Singh* rule in a timely fashion. As a result, a huge backlog of refugee claimants developed, and they endured delays of two or more years awaiting adjudication.

[141] The respondent's counsel confirmed in her reply that the respondent was not interested in an alternative argument based on section 1 of the *Charter*. The statistics contradicted any argument of arbitrariness of the legislation, as well as demonstrating that the RPD screened well for nearly all cases of risk. The respondent emphasized that the delay referred to in the materials was only in respect of the removal of individuals, not the overall refugee process itself. This evidence was also intended to demonstrate the abuse of the PRRA process.

[142] The respondent made reference to a "balancing" form of argument, stating that: "[o]n the other hand legislation that provides every unsuccessful refugee claimant with a formal [PRRA] merely adds to the delay in removal without substantial benefit." I understand that the reference to "without substantial benefit" refers to the rarity of successful PRRA decisions and the respondent's argument that section 97 already assesses risk for nearly all forms of harm that arise in persecution cases.

[143] *Charter* rights may be limited when their exercise undermines the purpose that they are said to serve. The example is provided of cross examination which is a *Charter* right essential for a fair trial. Nevertheless, in certain contexts, the right may be limited when its use prejudices the factual determination process. That is because sound factual conclusions are the essence or foundation of the trial process itself.

[144] I see the respondent's submissions as a form of counter-balancing argument that extensive deferrals of removals for PRRAs undermine the removals process, which is an integral element of the refugee determination process.

[145] The purpose of the balancing exercise is to determine the point which delineates the extent of the right, i.e. where cross-examination no longer serves the purpose of reliable factual determination. In the present case, that point is where the right to non-removal is limited by its lack of usefulness or negative impact on the refugee determination process by preventing removals.

[146] In this matter the factual matrix is considerably more complex than that involving a right to cross-examination. Determining the balancing point that limits the right of non-removal requires the assembly and consideration of the pertinent factors that weigh in moving the delineation point in one direction or the other, in respect of the right to be protected from a risk of harm on removal.

[147] However, the balancing process has, to a large extent, been acknowledged and the debate on the delineation of the *Charter* compliance of the removals process is underway. I say this because the requirement for a form of delineation of the right to a PRRA is acknowledged where the parties offer different versions of a removals test in an attempt to describe the right balancing point to eliminate unnecessary deferrals from those cases that should be referred to a PRRA. The task that follows is to assemble the relevant factors to complete the analysis.

[148] In this respect, the constitutionality debate also somewhat mirrors the flexible administrative law approach to balancing *Charter* values that is said to be more consistent with the nature of discretionary decision-making (*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at paras 5-6, 36-37). This is difficult to apply in the present case because the focus is on the <u>test</u> of the administrative decision-maker, as opposed to the exercise of his or her discretion, which on constitutional matters receives little deference from the Court.

(c) *The Jurisprudence Establishing the Removal Test*

[149] It is a useful exercise to examine the historical development of the jurisprudence regarding the removals officer's discretion and origins of the removals test. This exercise not only confirms the limited discretion conferred on the officer to defer removal but it also provides the background necessary to respond to a number of issues raised by the applicant, such as the competency of the officer, whether the removals test is only an *obiter* statement, and the officer's role in relation to the motions judge in a Federal Court stay of removal proceeding.

[150] To assist in understanding the evolution of the legislation in this field, attached as Appendix A to these reasons is the relevant history of Canada's risk determination legislation and accession to relevant treaties. Appendix B to these reasons provides the text of the statutory provisions where specifically indicated in Appendix A. These materials were provided by the respondent at the Court's request. I have made some small additions at the applicant's request with respect to the 12 month bar on H&C applications and have also included the official French translation of the statutory provisions provided in Appendix B.

(i) Removals Test – *Wang*

[151] The removals test is often described as the *Baron/Shpati* test or the *Wang/Baron/Shpati* test, in reference to the principal cases that developed it. Justice Pelletier first formulated the test in the *Wang* decision and it preceded the implementation of the *IRPA* in 2002. Refugee status was limited to persecution under the Convention grounds (as later adopted in section 96 of the *IRPA*). Unsuccessful Refugee claimants became members of the "post-determination refugee claimants in Canada class" (the "PDRCC") and were entitled to a form of risk analysis under the *Immigration Regulations* similar to a PRRA.

[152] Justice Pelletier in *Wang* was confronted with a stay application based on a removals officer's decision to refuse to defer removal pending the disposition of an H&C application. The applicant's risk application under the *Immigration Regulations* had been previously dismissed. The decision considered both the test to be applied by the removals officer and the accompanying discretion to assess risk. As discussed in more detail below, *Wang* also modified the "serious issue" factor considered in a stay application pending leave to appeal the removals

officer's decision by requiring the courts to go further and closely examine the merits of the underlying application.

[153] The Court in *Wang* made reference to the Federal Court jurisprudence that had recognized a limited discretion of the removals officer who was acting in the name of the Minister. The discretion was interpreted to arise from section 48 of the Act, which at that time, and for the purposes of this matter, required a removal order to "be executed as soon as reasonably practicable." More recent amendments have changed the wording to "as soon as possible" (*Protecting Canada's Immigration System Act,* SC 2012, c 17).

[154] Justice Pelletier summarized the previous jurisprudence on the nature of the decisions that fell within the removals officers discretion at paragraphs 30 to 33 of *Wang*:

> [30] These cases illustrate the range of the discretion which has been attributed to removal officers, but they do not suggest an organizing principle which might inform the Court's review of the exercise of this discretion.
>
> [31] A useful starting point in an attempt to discern such an organizing principle is to consider the logical boundaries of the notion of deferral. To defer means "to put over to another time." But one does not defer merely for the sake of delay. If the act of deferring is to be legally justifiable, it must be because, as a result of that deferral, some lawful reason for not executing the removal order may arise.
>
> [32] Aside from questions of travel arrangements and fitness to travel, the execution of the order can only be affected by some other process occurring within the framework of the Act since the Minister has no authority to refuse to execute the order. Accordingly, a request for deferral can only be made in the context of some collateral process which might impinge upon the enforceability of the removal order. To put it another way, if the order must be executed regardless of the outcome of the collateral process, what rationale is there for deferral? As a result, it seems to me that the appropriate inquiry is whether the process in question

> could result in a situation in which the execution of the removal order was no longer mandatory.
>
> [33] Consequently, the expression "to defer" refers to two different concepts. It is used in the sense of a temporal displacement: the execution of the removal order will be deferred until tomorrow. But it is also used in the sense of granting precedence to, or yielding to, some other process. The two senses are related, yet distinct.
>
> [Emphasis added.]

[155] At paragraph 41, the Court in *Wang* distinguished between the H&C and PRRA process contained in the *Immigration Regulations*, as follows:

> [41] The outcome of the process outlined in subsections 6(5) and 6(8) of the Act is similar to that of a successful H&C application. The person acquires the right to apply for landing, subject to meeting the admissibility requirements. There is a difference though. In the case of H&C applications, the person making the application may not face threats to their personal safety upon their return to their country of origin whereas, by definition, members of the PDRCC are subject to a risk to their life, or extreme sanctions or inhumane treatment. The Regulations describe a member of the PDRCC as follows [subsection 2(1) (as amended by SOR/93-44, s. 1)]:
>
>> 2. (1) . . .
>>
>> "member of the post-determination refugee claimants in Canada class" means an immigrant in Canada who the Refugee Division has determined on or after February 1, 1993 is not a Convention refugee, ...
>>
>> . . .
>>
>> (c) who if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country,

> (i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of that country to provide adequate health or medical care,
>
> (ii) of extreme sanctions against the immigrant, or
>
> (iii) of inhumane treatment of the immigrant;
>
> [Emphasis added.]

[156] The Court summarized the test to be applied under section 48 of the *Immigration Act*, RSC 1985, c I-2 at paragraph 48, as follows:

> [48] It has been recognized that there is a discretion to defer removal though the boundaries of that discretion have not been defined. The grant of discretion is found in the same section which imposes the obligation to execute removal orders, a juxtaposition which is not insignificant. At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the Act. One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the Act, is that deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative. The consequences of removal in those circumstances cannot be made good by readmitting the person to the country following the successful conclusion of their pending application. Family hardship cases such as this one are unfortunate but they can be remedied by readmission.
>
> [Emphasis added.]

[157] Justice Pelletier described the extent of the discretion of the removals officer to assess risk at paragraph 50 as follows:

> [50] The discretion to be exercised does not consist of assessing the risk. The discretion to be exercised is whether or not to defer to another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction. If the process has not been initiated at the time of the request for deferral, or has been initiated as a result of the removal process, the person exercising the discretion could conclude that the conduct of the applicant is inconsistent with an allegation of fear of death or inhumane treatment. This is not a question of assessing the risk but rather of assessing the bona fides of the application.
>
> [Emphasis added.]

[158] In summary, the applicant is correct that the *Wang* test is *obiter* for the purposes of the present case, because its facts involved the removals officer considering deferral for leave to proceed with the review of an H&C decision, as opposed to a deferral to allow for a PRRA application after (or before, as is the practice) the 12 month bar. Nevertheless, it remains clear that the test was formulated in terms of consideration of risks of harm that might arise upon removal. It employed the terminology of the then equivalent of a PRRA under the *Immigration Regulations*, which forms the basis for the test. The respondent acknowledges that the factors from the *Immigration Regulations* correspond to those in section 97 of *IRPA*: “extreme sanctions” corresponds to “cruel and unusual punishment,” while “inhumane treatment” can be said to be similar to “cruel and unusual treatment.”

[159] It is also true that section 96 persecution was not taken into consideration for the purpose of the test. Clearly, it was not thought necessary to reconsider a claim of persecution anew as part of the removals process when the refugee claim based on persecution had just been rejected. I acknowledge the applicant’s argument that by adding section 97 to the refugee determination

process and including section 96 in the new PRRA provisions implemented in the 2002 *IRPA*, there is a certain logic to the notion that persecution should be a consideration of the removals test. Conversely however, it is equally significant that despite the opportunity to do so in every removals decision where a second PRRA application was the underlying basis for deferral, the issue was never raised before this case.

[160] The *Wang* decision also modified the "serious issue" test used in the stay motion to defer removal in order to seek leave to review the removals officer's decision. Justice Pelletier stated that because the relief on the stay is the same as that sought in the judicial review of the removals officer's decision refusing to defer, the judge hearing the motion ought not simply to apply the "serious issue" test, but should go further and closely examine the merits of the underlying application.

(ii) *Baron*

[161] The *Wang* decision was later considered and applied by the Federal Court of Appeal in *Baron*. It was an appeal from a decision of the Federal Court, dismissing an application for judicial review of a removals officer's decision refusing to defer the removal from Canada until a decision had been rendered on their H&C application. The applicants obtained a stay and when the application subsequently reached the Federal Court, it was dismissed due to mootness. The Court of Appeal concluded that the application was not moot, but nevertheless dismissed the appeal and in doing so endorsed the *Wang* removals test at the appellate level. The applicant argued that like *Wang*, the decision should be considered *obiter* to this matter, because it concerned an H&C application and not a PRRA risk. Based on the factual circumstances, this

is probably correct, in that in this matter the deferral sought is to apply for a PRRA, as opposed to seeking leave to review the PRRA officer's negative decision in *Baron*. However, statements of legal principles in appellate courts can and often do carry precedential value without the necessity of a shared factual foundation.

[162] Justice Nadon, speaking for the majority of the Court in *Baron*, endorsed the requirement in *Wang* that the motions judge closely examine the merits of the underlying application, because the relief on the stay is the same as that sought in the judicial review of the removals officer's decision refusing to defer. However, he also commented that because the standard of review of a removals officer's decision was reasonableness, "for an applicant to succeed on a judicial review challenge of such a decision, he or she must be able to put forward quite a strong case" (*Baron* at para 67).

[163] Reasonableness refers to the test in *Dunsmuir*, which provides considerable scope to administrative decision-makers to whom deference is owed. Their decisions will be considered reasonable and will not be set aside if they fall within a range of possible acceptable outcomes based on the facts and law (*Dunsmuir* at paras 47 and 53). The removals officers' narrow range of discretion suggests that their stated higher *Wang/Baron* threshold ("quite a strong case") is, in reality, comparable to that of "serious issue", which is required to set aside decisions of PRRA or H&C officers. These officers' discretion is considerably wider with more factors to consider and therefore, so is their range of possible acceptable outcomes.

(iii) *Shpati*

[164] The Federal Court of Appeal had further occasion to consider *Wang* in *Shpati*. This case is an example of a multiplicity of immigration proceedings where the applicant sought judicial review of three decisions before the Federal Court regarding unsuccessful PRRA and H&C decisions, as well as the removals officer's decision refusing to defer removal. The Federal Court decision on the three decisions was being reviewed by the Federal Court of Appeal.

[165] Justice Evans endorsed the respondent's position that, in the absence of a statutory stay, the Federal Court is normally the proper forum for individuals seeking to stay their removal, by showing that they meet the tripartite test for granting an interlocutory injunction (*Shpati* at paras 3, 38-40). By accepting that argument, he rejected the applicant's submission that removal should be deferred automatically when an individual facing removal had instituted judicial review proceedings in respect of a negative PRRA.

[166] The applicant argues that the Court's ruling in *Shpati* is *obiter* in respect of the facts in this matter because it concerned a removals officer's decision pending a PRRA application that had been refused and for which leave was being sought. Here, the removals officer is required to assess to determine whether a PRRA application should be initiated. The officer does not start from the PRRA application having already been dismissed, as was the case in *Shpati*.

[167] Nevertheless, I disagree that the situations are substantively different. The applicant in this matter has just undergone an unsuccessful RPD process, consisting of a comprehensive risk evaluation and finds himself in a similar situation as the applicant in *Shpati* after having his

PRRA application rejected. Indeed, in light of the fact that in this matter the RPD decision was already confirmed by the Federal Court's rejection of the leave application, whereas the authorisation for leave for judicial review of the PRRA in *Shpati* was before the removals officer, *Shpati* represents a decision on greater prospects of an opportunity for deferral than in this matter. In my view, *Shpati* stands for the proposition that the removals officer is entitled to refuse to defer for the purpose of a PRRA application, whether pending the obtaining of leave to review a PRRA decision, or the right to commence a fresh PRRA application following the RPD decision.

[168] The Court endorsed Justice Nadon's description in *Baron* of the kinds of new risks that a removals officer may consider, paraphrasing Justice Pelletier's test from *Wang* that "deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment." While these remarks, at paragraph 43 of the decision, were made with reference to a pending H&C application, they had the same application to the removals officer's decision based on the underlying pending PRRA application.

[169] Justice Evans added that the language chosen by Parliament to describe the primary statutory duty to remove unsuccessful refugee claimants confined the removals officers' discretion to a relatively narrow list of considerations capable of making removal not "reasonably practicable" under section 48. He stated "their functions are limited, and deferrals are intended to be temporary. Removals officers are not intended to make, or to re-make, PRRAs or H&C decisions" (*Shpati* at para 45).

[170] It is to be noted that *Shpati* involved the consideration of a removals officer's refusal to defer in the face of a leave for judicial review of a rejected PRRA, where the statutory stay of removal had lapsed. This would have been an excellent occasion for the applicant to argue that the removals test was too narrow because it failed to give consideration to risks from persecution.

[171] Justice Evans also commented on other issues that bear consideration here. First, he rejected the argument that deferral should be based upon the good faith of the applicant in contradistinction to the views expressed in *Wang*. Having regard to section 48 of the *IRPA,* he stated at paragraph 48 of the decision as follows:

> [48] I do not agree with this argument. First, because <u>good faith in this context is a very low threshold</u>, a deferral would tend to be granted in most cases where an applicant had made an application for judicial review of a negative PRRA. The adoption of Mr. Shpati's argument would be almost tantamount to providing a statutory stay of removal in a situation which is not one of those expressly provided by the *IRPA*, and would therefore be inconsistent with the scheme enacted by Parliament and section 48 in particular.
>
> [Emphasis added.]

[172] Justice Evans' position that the "good faith" test presented too low a threshold and would have an adverse impact on deferring removals, being "almost tantamount to providing a statutory stay," is equally applicable to the applicant's proposed screening test, as I discuss below.

[173] Second, Justice Evans distinguished the reviewing judge's comments regarding the issue of mootness. The reviewing judge stated that Parliament could not have "intended that it was reasonably practicable for a removals officer, who was not trained in these matters, to deprive an

applicant of the very recourse Parliament had given him," which in this case was caused by the mootness of the decision (*Shpati* at paras 47-48).

[174] Justice Evans concluded that the answer to any limitation placed upon the exercise of the officer's discretion regarding the potential mootness of the matter and similar difficulties was found in the legislative scheme for a motion to stay a removal before the Federal Court, stating at paragraph 51 as follows:

> [51] The Federal Court can often consider a request for a stay more comprehensively than an enforcement officer can a deferral. This may result in a degree of bifurcation between the Federal Court and enforcement officers. However in my opinion, it is the decision-making scheme that Parliament has enacted.
>
> [Emphasis added.]

[175] These conclusions are relevant to the applicant's arguments concerning the authority and competence of removals officers to render decisions involving more challenging issues in the course of deferring removal. The role of the Federal Court extends not only to considering legal issues, such as mootness or the *Charter*, but most obviously to assessing the reasonableness of the officer's decision on risk.

(d) *The Alleged Narrowness of the Removals Test for its Failure to Consider Persecution Risks*

(i) The Parties' Arguments

[176] Prior to directions from the Court, the parties' initial arguments on the narrowness of the removals test were relatively straightforward. Based on Canada's international obligations and

section 7 of the *Charter*, the applicant contended that the Supreme Court established that an appropriate risk analysis was required prior to removal or refoulement. Accordingly, the failure to consider Convention persecution factors constituted a major omission in the scope of the test for risk, thereby violating the applicant's fundamental rights.

[177] I agree with the respondent's submissions that the cases cited by the applicant must be distinguished, because they do not relate to a removals process following an unsuccessful refugee determination process, where the applicant's risk on removal has recently been fully considered. The situation is considerably more nuanced than the applicant first argued.

[178] Conversely, the respondent submitted that the test used by removals officers had been found to be constitutional, referring to the decision of *Sinnappu*. Like the applicant's refoulement risk cases, I find *Sinnappu* distinguishable, if it applies at all. Not only did it predate the pronouncement of the test in *Wang*, but it also did not face the conundrum posed by the applicant's arguments under the *IRPA*: if the RPD decision is based on sections 96 and 97, as is the PRRA application following the removals officer's decision to defer, why would the intervening screening test not also comprise section 96 factors?

[179] The respondent's principal reply to this question was that the protections afforded under the section 97 removals test were broader in scope than section 96, not being limited to particular classes of persons.

[180] Additionally, the respondent submitted that the test based on section 97 assessed risk for nearly all situations of prejudicial outcomes that result from section 96 persecution, including those described in the applicant's application and the related *Peter* application.

[181] The respondent also argues that persecution generally related to past historical circumstances which were not readily subject to change in the short term. As for those rare persecution risk situations not protected by the section 97 removals test, the respondent contends that the applicant could always move for a stay in the Federal Court based on a violation of section 7 of the *Charter*.

[182] With respect to extrinsic evidence on the low rate of positive PRRA determinations, the respondent contended that the statistics demonstrate that the RPD assesses risk well and that country conditions do not change quickly.

[183] In reply, the applicant challenged the respondent's assertion that the removals test is broader than the persecution standard, arguing that it needs to include systemic harassment, discrimination rising to the level of persecution, and single acts. He also emphasized that persecution was forward-looking on removal and did not need to be personalized, in the sense that it could depend upon persecution against persons with same or similar profiles, particularly in terms of those already suffering persecution by the state.

[184] As the parties were contesting the nature and extent of case law where persecution risks were not protected by the removals test, by a second direction I requested the parties' assistance

to provide some form of empirical evidence of persecution cases that did not involve prejudicial outcomes that would fall within an assessment for a risk of death, extreme sanction, or inhumane treatment. The applicant responded by providing submissions and a book of cases said to be examples of persecution that would not be captured by the removals test. I consider and comment on these cases below. In the analysis that follows, the Court has attempted to capture the extent of the alleged risk of persecution not assessed by the removals test.

(ii) The Extent of "Residual" Risks Arising from Persecution Not Assessed by the Removals Test

a. Persecutory Discrimination versus Hardship Discrimination

[185] I understand persecution under section 96 of the *IRPA* to be a form of discrimination (differential treatment related to being members of defined classes or groups of persons). However, persecution requires a level of harm caused to the complainant below which, the discrimination is usually described as either hardship or harassment. This is evident from the materials provided by the applicant's counsel in response to my second direction. These included comments taken from Chapter 3 of the Memorandum of the Immigration and Refugee Board, "Interpretation of the Convention Refugee Definition in the case law":

> **3.1.1.1. Serious Harm**
>
> […]
>
> The requirement that the harm be serious has led to a distinction between persecution on the one hand, and discrimination or harassment on the other, with persecution being characterized by the greater seriousness of the mistreatment which it involves.
>
> *Saddouh v MCI*, [1994] FCJ No 129
> *Sagharichi v MEI*, [1993] FCJ No 796 (FCA)

Naikar v MEI Canada, [1993] FCJ No 592
Moudrak v MCI, [1998] FCJ No 419

Discrimination and harassment are sometimes conceived of as being distinct from persecution; alternatively, some references to persecution and discrimination imply that persecution is a subset of discrimination; but in either case, what distinguishes persecution – whether from discrimination or non-persecutory discrimination – is the degree of seriousness of the harm. The Court of Appeal has observed that "the dividing line between persecution and discrimination or harassment is difficult to establish."

Sagharichi v MEI, [1993] FCJ No 796 (FCA)

[…]

3.1.2. Cumulative Acts of Discrimination and/or Harassment

A given episode of mistreatment may constitute discrimination or harassment, yet not be serious enough to be regarded as persecution.

Moudrak v MCI, [1998] FCJ No 419

[…]

Even so, acts of harassment, none amounting to persecution individually, may cumulatively constitute persecution.

Madelat v MEI, [1991] FCJ No 49 (FCA)
Retnem v MEI, [1991] FCJ No 428 (FCA)
Lossifov v MEI, [1993] FCJ No 1318
Mirzabeglui v MEI, [1991] FCJ No 50

[186] In terms of the difference between persecutory harassment and harassment which does not rise to that level and would be more appropriately considered under s. 25 hardship considerations, Justice Muldoon noted the following in *Kadhm*:

> 12. It is worth recalling that in general the courts have recognized, in *Rajudeen v. Canada (Minister of Citizenship and Immigration)* (1984), 55 N.R. 129 (F.C.A.) 133; *Retnem v. Canada (Minister of Employment and Immigration)* A-470-89, May 6,

> 1991 *Retnem v. Canada (Minister of Employment and Immigration)* (1983), 52 N.R. 67 (F.C.A.) at 69 and *Hassan v. Canada (Minister of Employment and Immigration)*, (1992), 141 N.R. 381 (F.C.A.) that harassment in some circumstances may constitute persecution if sufficiently serious and it occurred over such a long period of time that it can be said that a claimant's physical or moral integrity is threatened. The incidents recited by the applicant in her testimony were no doubt unfortunate beginnings. They demonstrate repeated harassment in regards to the whereabouts of her husband. However, the members of the CRDD made it clear that for them they were not serious or systematic enough to be characterized as persecution. However there was a serious possibility of persecution in the future. In light of the applicant's own testimony, where she states that she was questioned eight to ten times over a period of six months as the wife of a Shi'ite opponent, the CRDD's conclusion is an unreasonable one.
>
> *Kadhm v MCI*, [1998] FCJ No 12

The need to consider whether repeated incidents of harassment in the past may lead to a serious possibility of persecution in the future has been recognized by the Court, as in the case above.

[Emphasis added.]

b. The Need for a Threshold Definition of Persecutory Discrimination: *Cheung v Canada (Minister of Employment & Immigration*

[187] Despite the cases cited above stipulating that the discrimination by harassment must reach a level of seriousness to amount to persecution, and despite the acknowledgement that a line exists somewhere that separates persecutory discrimination from hardship discrimination, no definition of that threshold exists.

[188] The thresholds of risk of harm necessary to meet the removals test and section 97 are definable, mainly because the protections for both are defined on the basis of the serious risk of harm: threats to life, cruel and unusual punishment or treatment, extreme sanction, and inhumane treatment. In contrast, the definition of persecution, which was taken straight from the dictionary, stresses the <u>persistent</u> or <u>systematic</u> nature of the mistreatment as a form of harassment without describing the threshold of gravity of harm necessary to constitute persecution. In the leading case of *Rajudeen* (cited over 1000 times according to Lexis-Nexis), the Federal Court of Appeal defined persecution as "[t]o harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship" (*Rajudeen* at para 14). The absence of a threshold or general statement of the level of risk of harm necessary for persecution makes it difficult to compare its defined protections with those of section 97, and difficult to determine in the context of the removals test. This will become more evident from the analysis of the cases provided by the applicant, which he claims pose risks of persecutory harm that do not fall within the scope of the removals test.

[189] The Court of Appeal observed in *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 182 NR 398, 42 ACWS (3d) 494 (FCA) that "the dividing line between persecution and discrimination or harassment is difficult to establish." However, I do not believe that any court has set out to attempt to define that threshold, even though it would serve as a useful guide for both persecution and hardship cases to have one available.

[190] In the course of reviewing cases for the purpose of comparing the levels of harm for persecution and that for the removals test, I noted that the Federal Court of Appeal decision in

Cheung appears to be relevant to this issue. It described persecution in terms of a level of risk of harm as that of "a grave or serious threat to a person's physical or mental integrity."

[191] *Cheung* was overlooked in the Memorandum of the Immigration and Refugee Board cited above from the applicant's submissions, although reference was made to the Federal Court decision of Justice Muldoon in *Kadhm v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 12; 140 FTR 286; 77 ACWS (3d) 157 [*Kadhm*]. Justice Muldoon described a somewhat similar threshold of harm as being attained when "a claimant's physical or moral integrity is threatened." Unfortunately, *Kadhm* makes no reference to the Federal Court of Appeal decision of *Cheung*, while the four cases cited from the Trial Division do not describe a concept of persecution consisting of risks to the physical or moral integrity of the individual.

[192] In *Cheung,* Justice Linden (speaking for the Court) was faced with the task of describing the threshold of harm necessary to constitute persecution involving a threat of a single act of forced sterilization. The reviewing Court concluded that it did not constitute persecution where generally acceptable economic and social objectives were being applied to control the harmful effects of exponential population growth in China, the world's most populous country. In resolving the question, the Court in *Cheung* focused on the severity of the intrusiveness of the conduct on the person's mental and physical integrity.

[193] Justice Linden adopted the threshold of harm of "a serious intrusion on the physical and mental integrity of the person" (*Cheung* at para 91) in reliance on the text of James Hathaway (The Law of Refugee Status, page 125) and the Supreme Court of Canada decision of *E (Mrs)*

v E, [1986] 2 SCR 388. In regard to the latter, he stated that "the Supreme Court of Canada has recently forbidden non-therapeutic sterilization as a 'serious intrusion on the basic rights of the individual'; as 'in every case a grave intrusion on the physical and mental integrity of the person'; and, as a 'grave intrusion on a person's rights [leading to] certain physical damage'."

[194] I find that a risk of "a severe or grave intrusion on the physical and mental integrity of the person" to aptly represent the absent and elusive threshold of risk of harm that constitutes a "well-founded fear" for the purposes of defining persecution.

[195] Moreover, it is reasonable that the definition of a Convention Refugee contain some expression of the threshold of harm required to be considered a Convention Refugee. Article 33 of the Convention limits refoulement of Convention Refugees who were victims of persecution to circumstances where their "life or freedom would be threatened," thereby describing the level of harm as an outcome of the persecution. Logically, the threshold of risks of harm to define a Convention Refugee should be the same as those that permit refoulement under Article 33. The need for protection from risk on refoulement of a person determined to be Refugee is the same for a person claiming to be one. There is no reason the definition of a Convention Refugee should not contain the same expression of the level of harm required to permit refoulement, in its modernized form, which I propose should be that described in *Cheung*.

[196] The formulation of the threshold of harm in *Cheung* emphasizes the serious nature of intrusion, i.e. its grave prejudicial effect, as being the result of any repeated or persistent act of punishment or other infliction of harm at a level that reasonably forces a person to flee and fear

returning to their homeland. The intrusion on the integrity of the person can relate to a risk or fear of a single incident of harm, or a repeated series of oppressive acts.

[197] When speaking to the integrity of the person, this formulation helps present an image in the mind's eye of what it means to be a Convention Refugee by describing a serious risk of harm which will impact on the physical and mental well-being of the individual to the point of breaking down or gravely diminishing the claimant's physical and mental wholeness if returned to their country of origin.

[198] I will return to the *Cheung* definition when I consider the meaning to be attributed to "inhumane treatment", in the removals test or "cruel and unusual treatment" in section 97. It would appear that the *Cheung* definition would work equally well in defining the threshold of harm for section 97, as it does for section 96. If it is concluded that both provisions share the same level of risk of harm, the result would largely foreclose on much of the applicant's argument that the removals test is too narrow for failing to consider persecution risks.

[199] Despite my attraction to the *Cheung* decision as a means to introduce some definitional clarity on the threshold of the risk of harm for persecution, I recognize that, facing a long established definition of persecution in *Rajudeen*, dating back more than 30 years, it is difficult for me to attempt to graft a past Court of Appeal decision onto the definition of persecution. While I revisit the issue below in the context of the definition of inhumane treatment, I proceed otherwise on the basis that *Rajudeen* defines persecution for the purposes of section 96 for the remainder of my analysis.

c. The "Residual" or "Unassessed" Persecution Risk Factors

[200] Regardless of whether there exists a legal definition of the threshold of harm required to constitute persecution, the fact that such a factual threshold exists to define persecution means that persecution is not simply a form of *conduct* by an agent (persistent or systematic harassment, etc.). It must also meet a *harm* threshold (necessarily serious), which has been determined empirically, though not formally defined other than in *Cheung*, through the years via thousands of cases determining whether the alleged discrimination is sufficient to constitute persecution. Accordingly, even if no definition is available to assist in a comparative analysis of the risk of harm protected by section 96 versus 97, by reviewing the nature of the risk of harm constituting persecution in the case law, some general conclusions may be drawn.

[201] My analysis leads me to conclude that the respondent is correct that most persecution cases are based on risks of harm that are assessed in the same manner as the removals test (risks of death, extreme sanctions, or inhumane treatment). The boundaries of the risks of persecution that require protection as a fundamental right engaged by section 7 could be said to be those risks of persecutory harm that are not assessed by the removals test. I would describe these as the "residual" or "unassessed" persecution risk factors.

[202] The respondent argues that these unassessed, residual persecution risk factors are rare. Moreover, they necessarily represent the less serious persecution cases not captured by the removals test, which captures all of the most serious risks of harm from persecution. On this basis, the respondent contends that it could not be said that a wider test of residual persecution risks on removal is a foundational norm that is essential for the dispensation of justice in Canada.

(iii) The Nature and Extent of the Risk on Removal Presented by the Applicants Peter and Savunthararasa

[203] I agree with the respondent's argument that the risk of harm from persecution in this case and that of Mr. Savunthararasa (whose assertions are the same or similar to those of the applicant) would be assessed by the removals test. This may be seen both from the evidence of the applicants' personal narratives and the country condition documentation presented by them.

a. Personal Narratives

[204] The narrative of the related applicant Mr. Peter first describes a prior history of being arrested and tortured in 2010. He originally claimed to have become involved, without intention or justification, in the affairs of a person called Ruban who was allegedly arrested by the authorities. The applicant feared being detained, abducted, and beaten if returned to Sri Lanka based on his connection with Ruban because of an allegation that the applicant's card was found on Ruban's person.

[205] The amended version presented by Mr. Peter to the removals officer differs significantly from that he related to the RPD. Mr. Peter abandons reliance upon his connection with Ruban, or at least as it being his primary motivation to flee Sri Lanka. He claims he was untruthful before the RPD on the advice of a translator, whose advice he apparently preferred to that of his lawyer. The events involving Ruban he now states occurred in 2006. In a declaration provided to the removals officer, he alleges that from 2006 to 2010, he was a driver for the international aid organization CARE. An assassination attempt was made on the Defense Secretary by an employee of CARE which led to accusations being made against the organization. Intelligence

officers were alleged to regularly stop and search the applicant's vehicle and to have visited his home at least once a month and sometimes as often as five times a month. The applicant deposed in his declaration to the removals officer that he was scared that at any time the intelligence officers visited they might arrest, torture, or kill him. After speaking with other CARE drivers who were experiencing the same problems and hiding from intelligence officers, because of his fear for his personal safety, he eventually left Sri Lanka and came to Canada claiming refugee status.

[206] The applicant Savunthararasa claims that he was injured during a shelling incident in Puthumathalan, Sri Lanka in February 2009. In May 2009, he was detained by a group of Sinhalese and Tamil men who came in a military vehicle. They questioned him about his connections with the LTTE, examined his wounds, and warned him not to stay in Vavuniya. They also warned him against filing a complaint with the police, saying they would hear about this if he did. From this evidence I understand therefore that he was threatened with personal harm by state officials if he did not move to some other place in Sri Lanka, or if he related the police threats to other authorities.

b. Country Conditions

[207] The applicants' arguments were bolstered by extensive documentary evidence enumerating the limitations and deficiencies in the legal, political, and military framework of Sri Lanka. Reference was made to the lack of rights of self-determination, the failure to accept international norms, cooperation with human rights mechanisms and institutions, and deficiencies in the legal, institutional, and political framework.

[208] As relates to persecution, reference was made to different forms of the failures of the assessment to ensure equality and non-discrimination and to various rights enshrined in named international conventions. A breakdown of ethnic and minority groups in Sri Lanka was also provided.

[209] The most important aspect under the heading of equality and non-discrimination rights, however, was a reference to the personal profile of refugee claimants, which was said to give rise to a risk of persecution or torture in Sri Lanka on the basis of their Tamil ethnicity. The points mentioned included the following:

- time spent as a resident in a “Western” country;
- being an unsuccessful refugee claimant in a “Western” country;
- a record of criticizing or protesting against the Sri Lankan government;
- having any connection, real or imagined, regardless of length, objective significance, or even rationality, with the LTTE;
- being a friend or family member of a targeted person; and
- being in a targeted age group - this appears to focus on young and middle aged adults (or in most other cases before the Court usually identified as male).

[210] By any measure, these criteria would encompass a significant percentage of the Tamil population in Canada applying for refugee status. Not only do the criteria arise from the very fact of living in a Western country and being a refugee claimant, but the alleged threat does not require any reasonably supported foundation. The threat is also said to be arising out of relationships or connections with family, friends, aid organizations, or unidentified individuals who have been said to be targeted or mistreated, like Ruban in Mr. Peter’s narrative.

[211] In this case, the evidence supporting these claims was presented under various headings and sub-headings as follows: Right to Physical and Moral Integrity (Murders and deaths in custody in Sri Lanka, Prohibition of torture and Practice of torture in Sri Lanka, Torture of returnees, Conditions of detentions); Right to Liberty and Security (abduction, enforced disappearance, arbitrary arrest and arbitrary detention and arrest, and detention and habeas corpus); Right to an Effective Remedy and the Impunity of State Action. In all cases, the focus was on threats of grave personal harm to Tamils, referenced by hundreds of footnotes and voluminous pages from reports, newspaper articles, etc.

[212] The submissions before the removals officer contained comparatively limited references to threats to Tamils' economic security and restrictions on their cultural rights. Reference was made to elements of Article 27 of the *Universal Declaration of Human Rights* (the "UDHR") and Article 15 of the *International Covenant on Economic, Social, and Cultural Rights* (the "ICESCR"). The submissions also referred to restrictions on the cultural life of the Tamil community, such as its right to enjoy the arts and to share in scientific advancement and its benefits, among others. There was also reference to Tamils being threatened by the process of Sinhalization through forms of cultural assimilation. These prejudicial outcomes of persecution are in the category of those that I would consider as being outside the ambit of a risk of death, extreme sanction or inhumane treatment under the removals test, although this is without knowing what enforcement measures accompanied these policies, which may often entail threats of personal harm.

[213] I conclude that, despite the limited references to infringement of economic and cultural rights in the applicants' evidence, the applicants' allegations of well-founded fear upon return to Sri Lanka would be directly related to detention and physical harm that reaches a threshold which is to be assessed by the removals test.

(iv) Examples of Residual Persecution Risk Cases

[214] In response to my request for cases of persecutory risk of harm not assessed by the removals test, the applicant provided a description of cases with a book of authorities which included 30 cases where the Federal Court found persecution that the applicant submitted would not meet the risk requirements of the removals test.

[215] Based on my examination of the facts in those cases, I conclude that 20 of the 30 cases cited by the applicant involve circumstances of risks of harm that would fall within the scope of the removals test assessment. These included threats of death, being imprisoned illegally without just cause for a significant duration, or being beaten under interrogation.

[216] In some of the 20 cases, the serious incidents of personal harm occurred in the past, but were followed by continued harassment to the point of inducing a well-founded fear of recurrence. This would include for example *Retnem v Canada (Minister of Employment and Immigration)*, 132 NR 53, 27 ACWS (3d) 481 [*Retnem*], which was described in the IRB Memorandum as a case where acts of harassment did not amount to persecution individually. However, the facts in that case included a serious act of persecution involving a two-week detention and torture in 1984 that the Court found was still current as a basis for fear when linked

with all of the less serious prior and subsequent harassment the applicant had endured. I conclude that in *Retnem* the serious incidents initiated earlier remained the basis for the well-founded fear. I also included in the category of serious mistreatment cases of threats of forced sterilization or abortion, which in my view constitute forms of inhumane treatment under the removals test. I have nevertheless emphasized passages below where the conduct described might fall within the scope of the removals test.

[217] The ten remaining cases I have set out below in chronological order with a brief description of the nature of the risk of harm presented. I have highlighted some circumstances bordering on serious risks of harm.

1. *Amayo v Minister of Employment and Immigration*, 8 ACWS (2d) 68 (available on WL) (FCA)

    - Very few facts given

    - FCA held that applicant suffered persecution from various sources at his place of work and, after his discharge therefrom, during his period of unemployment prior to coming to Canada, all as a result of his former political activities and beliefs

2. *Mirzabeglui v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 50 (QL), [1991] ACF no 50 (QL) & *Madelat v Canada (Minister of Employment and Immigration)*, 179 NR 94

    - Applicant's son and daughter were both excluded from Muslim school

    - Applicant's daughter was subsequently expelled from a Jewish school because of the applicant's husband's record of anti-government sympathies, arrest, and three-week detention.

3. *He v Canada (Minister of Employment and Immigration)*, 78 FTR 313, 48 ACWS (3d) 804

   - Applicant was arrested and detained for over one month until she signed a confession under compulsion because of her participation in pro-democracy demonstrations

   - Applicant's teaching job was terminated thereafter and her request for a work card that would permit her to do other work was denied

   - Applicant was restricted to living in a rural farming community to make a living from farming.

4. *Xie v Canada (Minister of Employment and Immigration),* 75 FTR 125, 46 ACWS (3d) 708

   - Applicant was arrested and detained at the city police office for two days, and then again detained for approximately two months because of applicant's involvement in student uprising

   - Applicant was released but had to report to the police regularly; was eventually repatriated to his hometown

   - Applicant's name was placed on a "black file" which prevented him from obtaining employment or going back to school to upgrade his qualifications.

5. *Fathi-Rad v Canada (Secretary of State)*, 77 FTR 41, 47 ACWS (3d) 822

   - Applicant was fired without reason from her employment because of her political beliefs and activities

- Applicant began receiving threatening telephone calls from persons who claimed to be members of the Revolutionary Guard

- The applicant was arrested, detained and questioned approximately once every two months for her failure to conform to Islamic dress code.

6. *Namitabar v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 42, [1993] ACF no 1183

   - Applicant was threatened with expulsion from school and was sent home for a day because of her statements against the Islamic dress code

   - Applicant was brought before the komiteh twice for disobeying the Islamic dress code, and questioned and orally reprimanded for wearing the chador improperly

   - Applicant was accused of anti-Islamic conduct and sentenced to ten strokes of the whip or a fine of 10,000 tamans.

7. *Lerer v Canada (Minister of Citizenship and Immigration)*, 90 FTR 105, 52 ACWS (3d) 1331

   - Applicants were physically evicted from their family home because of their Jewish ethnicity by a political group which had been authorized to expropriate their home

   - Applicants were subjected to anti-Semitic slogans

   - Applicants were denied food coupons, bank accounts frozen, and pension payments withheld

- Police came to their home and demanded payment and threatened punishment

- Applicants were summoned to Ministry of National Security and were asked for information about non-nationals

- Unknown persons broke a window of their home and threw a gasoline-soaked rag through the broken window.

8. *Ali v Canada (Minister of Citizenship and Immigration)*, 119 FTR 258, 66 ACWS (3d) 942

   - Applicant child could not attend school because she was a girl in Afghanistan under the Taliban, and would have faced violence if she sought out education.

9. *Chen v Canada (Minister of Citizenship and Immigration)*, 69 ACWS (3d)

   - Applicant hosted prayer groups, and state Public Security Bureau raided the applicant's premises arresting an elderly practitioner

   - Applicant faced possibility of short detention, fine or re-education term.

10. *Kadhm*

    - Applicant was regularly questioned by government as to whereabouts of her husband, threatened with imprisonment, and told that if she didn't provide information she'd be punished because of applicant's desertion from military

- Applicant feared being taken and held_in order to force her husband to come out of hiding, a well-known technique.

[218] My comments from this fairly limited selection of cases would be twofold. First, the cases presented by the applicants generally confirmed the respondent's contention that successful persecution cases presenting risks of harm not captured by the removal test appear to be rare. This confirms my review of the nature of unsuccessful refugee cases brought before the Court, which are usually similar to the two matters under review herein, involving allegations of serious risk of harm being engaged by the removals test.

[219] Secondly, less serious risk-persecution cases appear to be even rarer in recent times. No persecution cases of less serious harm were provided from the last 15 years. While I am not suggesting that a number of other successful but less serious persecution cases may not have been brought forward during that period or prior to that time, the applicant's cited cases appear to be outliers and not characteristic of most persecution cases, which normally involve risks captured by section 97 of the *IRPA*.

[220] Some of the cases described above involving restrictions on employment, education, and similar circumstances not entailing personal harm could arguably be considered probative examples of discriminatory hardship for an H&C application. This is consistent with what I view as a trend to more clearly distinguish between serious risk and hardship cases. For example, in the recent Federal Court of Appeal decision of *Kanthasamy v Canada (Citizenship and*

Immigration), 2014 FCA 113, 372 DLR (4th) 539, the Court generally described section 96 and 97 *IRPA* factors under the risk heading such as at paragraphs 68 and 69 of the decision:

> [68] Applicants for humanitarian and compassionate relief under subsection 25(1) have not met the thresholds for relief under sections 96 and 97 of the Act. They have not met the risk factors under those sections, namely the risk of persecution, torture, or cruel and unusual treatment or punishment upon removal in accordance with international conventions.
>
> [69] Subsection 25(1.3) provides, in effect, that a humanitarian and compassionate relief application must not duplicate the processes under sections 96 and 97 of the Act, i.e., assess the risk factors for the purposes of sections 96 and 97 of the Act.
>
> [Emphasis added]

(v) Conclusions on the Extent of the Unprotected Risk

[221] In the final analysis, the fundamental question posed in this section is whether persons are being removed who would have succeeded on a PRRA had they remained. I conclude in answer to this question, based on an analysis of a number of factors, that the persecution cases that are not captured by the removals test that could succeed on a PRRA application are minimal at best.

[222] First, as noted above, the success rate for all PRRA applications under both sections 96 and 97 of the *IRPA* is extremely low. This is evidence that the RPD does a good job at evaluating risk. It is also evidence of the *de minimis* nature of the risk involving a PRRA, from which it is reasonable to conclude that with such a low rate of success, only serious risk of harm situations resulting from persecution, i.e. those encompassed by section 97 of the *IRPA*, would succeed if deferred to a PRRA.

[223] Second, from the limited sample of the cases on persecution presented by the applicant at the request of the Court, those said to involve risks not contained under section 97 of the *IRPA* appear to be equally rare, particularly in more recent times. This conclusion is supported by the facts in this case, which describe risks which are in the nature of extreme sanctions or inhumane treatment, both of which are assessed under section 97 of the *IRPA*. One would have thought that in a test case, the facts demonstrating the failure to test for section 96 *IRPA* factors would have been in plain evidence before the Court.

[224] Third, the definition of persecution as a systematic or persistent form of mistreatment implies that in most cases, there will be a history of affliction of harm, either against the claimant or at least for similarly situated individuals. This would be particularly true for longstanding harassment, which eventually amounts to persecution. This evidence will already have been considered by the RPD on a forward-looking assessment. I also agree with the respondent that if evidence of continuing or systematic persecution was *not* available at the RPD proceeding, it is unlikely that new probative evidence – capable of leading to a conclusion of continuing or systematic persecution – will become available in 12 months. This is even less likely when the person is already out of the country. Alternatively, if new risks do arise, they will necessarily have to be different in character or in the severity of risk in order to change the outcome, such that they will likely fall under the protection of section 97 *IRPA* risk factors.

[225] Fourthly, because changes in country conditions require a degree of severity to be considered in a PRRA application, they could well require the Minister to exempt nationals of countries or areas of countries where conditions have deteriorated. This could be done by

regulation through the operation of section 112(2)(b.1) (*IRPA,* s 112(2.1)) and has been applied in the past to exempt the nationals of a number of countries, including Mali and Syria. I point out, however, that the refugees from such exempted countries would likely be protected in any event under the risk of harm by section 97 of the *IRPA* and the removals test. Nevertheless, recourse to the *IRPA Regulations* to exempt foreign nationals from designated countries further reduces the number of claims that could possibly entail a risk of harm related to persecution not falling within the scope of protection under the removals test.

[226] My conclusion, that the alleged right relating to persecution risks that are not assessed by the removals test borders on the minimal, raises questions whether the alleged risk of harm on removal can be sufficiently delineated to engage the protection of the *Charter*.

(e) *The Untested Scope of Cruel and Unusual or Inhumane Treatment*

[227] The relative scope of protection under sections 96 and 97 of the *IRPA* has not, to my knowledge, arisen before this case. Specifically, no consideration has been given to whether persecution qualifies as a form of inhumane or cruel and unusual treatment under section 97 and the removals test.

[228] The term "treatment" found in section 97(1)(b) of the *IRPA* and the removals test is very broad in scope. It captures all possible forms of conduct, behaviour, actions, dealings, and usage. Mistreatment, such as by persecution, would be a form of treatment. This would also include harassment or any persistent conduct, action, or behaviour that is either intended to inflict or results in the infliction of cruel and unusual punishment or inhumane treatment.

[229] Admittedly, inhumane treatment does not extend to harassment by "annoyances," which is contained in the definition of persecution in the leading case of *Rajudeen.* As noted above, the Court in *Rajudeen* defined persecution as "[t]o harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship" (*Rajudeen* at para 14).

[230] It is hard to understand how "annoyances" could have anything to do with creating a well-founded fear. Nor am I aware of any persecution case that refers to annoyances. It is also hard to imagine how annoyances could constitute a section 7 *Charter*-protected interest. Apart from annoyances, the definition of persecution in *Rajudeen* equates very well with section 97 *IRPA* terminology, using terms such as "repeated acts of cruelty," "to afflict persistently," and "to afflict or punish." Conversely, the term "inhumane," which is used to describe the severity of the treatment considered in the removals test, is equally broad. The Online Oxford Dictionary defines inhumane as "[w]ithout compassion for misery or suffering; cruel."

[231] Moreover, there is no underlying premise that section 97(1)(b) was not intended to provide protection against the risks of harm of the same gravity as those arising under persecution under section 96. The protections afforded by section 96 were obviously too narrow, because they only protected members of the named groups or classes of individuals. Other persons not falling within one of the classes of section 96, but suffering persecution, such as those being targeted by criminal organizations or as victims of blood feuds, required similar protection as those under section 96.

[232] On its face, persecution would seem to be a particular form of inhumane or cruel and unusual treatment. If inhumane treatment comprises persecution, *Cheung* could appear to provide a unified definition to describe the threshold of the risk of harm required to be met under both section 96 and 97. If the threshold test for harm that applies for persecution is defined as "a grave intrusion of the physical or personal integrity of the person," it would also appear to describe the harm threshold for inhumane treatment.

[233] Apart from issues of the different legal standards under sections 96 and 97 and some of the limitations to section 97, the result would provide some degree of symmetry to refugee protection under the IRPA. Besides thereby eliminating some of the complexity of refugee protection, it would also limit what is probably the unfair differentiated treatment of claimants that presently pervades the refugee protection process. We would also have some means to distinguish between persecutory and hardship discrimination for H&C applications.

[234] If sections 96 and 97 share a common definition of the threshold level of the risk of harm, much of the applicant's complaint that the removals test is too narrow would be accommodated.

[235] Otherwise, determining the scope of protected harm by the term inhumane treatment exposes the problem with the applicant's case. He is making a novel argument on a test that has been employed for over a decade and is not advancing facts that permit the Court to consider whether any allegedly unassessed risk of persecution would nevertheless fall into the category of inhumane treatment.

(f) *Where Removal Might Result in the Order of the Removals Officer Inoperative*

[236] Justice Pelletier in *Wang* added the caveat that removal should be deferred "only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective." (*Wang* at para 48). He pointed out that in situations of risk to life, extreme sanction, or inhumane treatment, a removal order might be rendered inoperative despite being overturned on a judicial review, which distinguishes the PRRA risk situation with that of removal involving circumstances of an H&C hardship. He states as follows at paragraph 48:

> The consequences of removal in those circumstances cannot be made good by readmitting the person to the country following the successful conclusion of their pending application. Family hardship cases such as this one are unfortunate but they can be remedied by readmission.

[237] In *Shpati*, Justice Evans pointed out in somewhat similar circumstances that the individual's removal does not necessarily abrogate the person's right under section 18.1 of the *Federal Courts Act* to make an application for judicial review of an unsuccessful PRRA decision. The Court suggested that the respondent could permit the applicant, if successful, to return to Canada pending the redetermination of the PRRA.

[238] In situations where the persecution is at the lower end of the seriousness of harm scale (i.e., no risk of death, extreme sanction or inhumane treatment), the situation would not be so grave upon removal (e.g. being subject to continued harassment) that if the applicant was successful on the application for judicial review of the removals officer's decision, he could not

be readmitted to Canada to pursue a PRRA application. The consequences of removal would therefore not be final in regard to the availability of having access to a PRRA.

(g) *No Previous History of Persecution as an Issue in Removal*

[239] Prior to the introduction of legislation creating the *IRPA* in 2002, persecution was not a factor considered in the form of PRRA provided for by the *Immigration Regulations*. The historical equivalent of today's RPD determination also included a limited consideration to section 96 persecution claims. If unsuccessful at the RPD, the claimant was entitled to a form of PRRA under the *Immigration Regulations* based on the standard of a risk of death, extreme sanction, or inhumane treatment upon removal.

[240] The *IRPA* created both section 97 and the PRRA, while also providing that both the RPD and PRRA applications would be based on the factors from sections 96 and 97. Nevertheless, the removals test developed in *Wang*, which is based only on section 97 factors, was employed for over a decade without being challenged on the basis that the test was too narrow for not screening for section 96 persecution. This could have, for example, been argued in the *Shpati* case. Thus, both prior to the 2002 legislation creating the *IRPA* and during the following decade, screening for removals has been based upon section 97 factors alone.

[241] I agree with the applicant that the absence of an earlier challenge does not render the removals test *Charter*-compliant. Historical factors are not determinative of whether a particular rule should be considered a principle of fundamental justice (see *Rodriguez* at 591-92). Nonetheless, the failure to recognize and raise as an issue the narrowness of protection by the

alleged failure to test for persecution upon removal, over a decade of substantial use, is evidence that suggests that challenges to the removals test are related to collateral factors and not the test itself. The failure to assert the alleged legal right over such a significant period suggests that there is no consensus that it is vital or fundamental to our notions of justice.

(h) *Standard of Assessment, Gatekeeping on a Lower Threshold, Assessing for Deferral to a PRRA or H & C Officer*

[242] In paragraphs 54-57 and 59 of his Further Memorandum of Fact and Law, the applicant advances a number of arguments intended to demonstrate deficiencies in the removals test. It is submitted that remedying these defects requires the adoption of an alternative test to be administered by the removals officer. The applicant contends that the officer's authority should be limited to determining whether evidence (which has not been previously considered and that is not inherently incapable of being believed) is sufficient to raise a possibility that a PRRA officer might conclude that the claimant should not be removed either on a "well-founded fear of persecution" or "person in need of protection" basis.

[243] The deficiencies said to exist in the present test include:

1. The test is not based upon the legal standard demonstrating a well-founded fear (i.e. a serious or reasonable chance based on evidence accepted on a balance of probabilities);

2. It is incongruous for a "gatekeeper" to apply a more stringent test than that which is applied by the actual decision-maker;

3. There is no consistent legal standard articulated for the officer's assessment of the evidence;

4. The removals officer is not authorized to assess evidence; and

5. The test should be based upon a tentative assessment of the evidence similar to that of determining (a) whether a serious issue is raised in a stay application, (b) whether there is any credible evidence (*Orelien*), or (c) whether the applications have some merit after which officials with expertise in matters of PRRA and H&C applications can decide the case (*Jayasundararajah* at para 15).

[244] I review these items but also consider the oversight role of the Federal Court in a stay motion to defer removal as an important validation factor to ensure that the removals officer's decision is reasonable.

(i) The test does not evaluate for the standard of demonstrating a well-founded fear; and

(ii) The test applies a more stringent test for deferral than that which is applied by the actual decision-maker.

[245] The applicant's first two submissions are substantive in nature and can be said to support his argument that the removals test is not *Charter*-compliant. I find that his complaint of not evaluating for a well-founded fear is responded to by my reasons concerning the narrowness of scope of harm issue treated above. More relevant to the discussions under this section is the applicant's argument that the removals test will result in valid requests for deferral being rejected

because the legal standard of the test is more stringent than that required to establish persecution on a PRRA. The removals test plays a screening role in relation to PRRAs. This screening stage should not apply a more stringent legal standard than that used by the ultimate decision-maker on a PRRA, since the referral to a PRRA is the basis for a deferral of removal.

[246] The respondent acknowledges that risk under the section 97 test, for which the standard of proof is the balance of probabilities, "might impose a higher hurdle than that of section 96," which is based on a legal standard of a reasonable or serious possibility of persecution, as opposed to a "mere possibility" (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680, 57 DLR (4th) 153 at 155 [*Adjei*]). However, the respondent argues that the legal standard plays no role because the removals officer is not making a final determination – the officer is only assessing the sufficiency of evidence to determine whether there is new and probative evidence that can support a conclusion that the applicant would be exposed to a risk of death, extreme sanction, or inhumane treatment.

[247] I agree with the respondent that the removals officer's task is not to assess risks based on the legal standards used in a PRRA. Rather, the officer's jurisdiction is limited to assessing the sufficiency of the new evidence that is alleged to establish risk. This assessment relies heavily on a comparative analysis using the evidence considered by the RPD (or a PRRA officer) and the conclusions of the RPD (or PRRA) decision as a benchmark. Therefore, sufficiency of evidence may also include a requirement that there be sufficient differentiation from the previous decision on matters of evidence and factual conclusions (e.g. conclusions of profiles of persons at risk). The distinction in the sufficiency assessment in terms of its newness, as opposed to its probative

value, is sometimes difficult to make. The difference is that evidence inherently lacking probative value (e.g. inadmissible or unreliable evidence) requires no reference to the previous decision for its rejection.

[248] The removals officer's functions are carried out at a factual level - the purpose of the assessment is to determine whether a risk of harm is factually established based on the newness and probative value of the applicant's evidence. The applicant bears the onus of providing new evidence that, on a balance of probabilities, "likely" supports his or her alleged exposure to a risk described in the test. It is in this evidentiary sense that "clear and convincing" evidence is required to sufficiently establish the likelihood of the factual conclusion of a risk upon removal.

[249] This task is not to be confused with the determination of refugee protection status on a PRRA, where the factual conclusions about risk are assessed by the officer to determine whether they meet the legal standards of either section 96 or 97. In decisions involving questions of mixed fact and law, such as those which arise when considering risk in a PRRA, factual conclusions are not always expressed as distinct findings from the legal conclusion but are nonetheless being made as an intrinsic part of the reasoning process. The sufficiency of the evidence considered by the removals officer relates only to factual findings, not to the application of the legal standards of sections 96 and 97.

[250] I am fortified in my conclusion that no legal standard applies in the removals test by the fact that the applicant's proposed test also assesses for the "sufficiency of evidence," although bearing no relation to the issue of risk. Moreover, if the removals test applied a legal standard,

one would have thought that the courts would have considered its nature prior to this time. I assume this to be the case because no decisions on this issue have been brought to my attention. In fairness however, I should add that no case law was provided stating that the removal officer's authority should be limited to considering the sufficiency of evidence. Nevertheless, in practice the decisions of removals officers, as in this matter, amount to reviewing the sufficiency of the evidence, even if not explicitly stated in these terms.

[251] This appears to be the first consideration of a possible legal standard as an element of the removals test so I consider it appropriate to respond to the applicant's argument which presupposes that the standard is that used under section 97 (balance of probabilities). In my view, if the removals test should be considered to apply a legal standard, I would think that it only requires the applicant to establish a reasonable or serious risk (of death, extreme sanction or inhumane treatment), i.e. a standard comparable to that of persecution under section 96 of the IRPA, and not section 97.

[252] The respondent appears to support the applicant's submission by conceding that, if a legal standard were to apply, the balance of probabilities standard used with section 97(1)(b) should necessarily be that attached to the removals test because the test uses the factors of that provision. To the extent such an inference is being made, I disagree as I see no necessary link between the factors of section 97(1)(b) being applied in the removals test and the requirement that they be assessed against the balance of probabilities standard of proof. Logically, a test that screens for refugee protection determinations should be at the same or lower threshold as the

legal standard(s) that will be applied at the final determination with regard to persecution and protection.

[253] In *Li v Canada*, 2005 FCA 1, 249 DLR (4th) 306 [*Li*], Justice Rothstein, as he then was, concluded that the legal standard for both 97(1)(a) and (b) is "more likely than not." He arrived at this conclusion by way of an interpretive analysis that first considered Parliament's intention in adopting the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* for the purposes of section 97(1)(a). The conclusion from this analysis was applied to section 97(1)(b) with the following comment at paragraph 38:

> [38] Mr. Li says that the reasonable-chance test should apply to paragraph 97(1)(b). However, there are no words that qualify the term "risk" in paragraph 97(1)(b) or that suggest the test in section 96 should apply to paragraph 97(1)(b). In the absence of some compelling reason suggesting a particularly low or a particularly high-level test, I do not see why the degree of risk for purposes of paragraph 97(1)(b) should not be that it is more likely than not that the individual would be subjected, personally, to a risk to his life or to a risk of cruel and unusual treatment or punishment if the person was returned to his country of nationality.
>
> [Emphasis added.]

[254] The removals test has its genesis in the *Immigration Regulations* which provided no similar legislative contextual basis for an analysis like that applied in *Li*. There is no reason to believe that when first pronounced in *Wang*, Justice Pelletier would not have intended that a risk would mean a reasonable or serious risk when formulating the removals test attached to section 48 of the IRPA. A risk in singular form is normally defined as a "possibility of harm or damage" [Oxford Dictionary, *sub verbo* "risk"]. If reasonableness is implied in the definition of the risk in

the removals test, it would place the legal standard on a similar plane as that of a well-founded fear, being that of a serious or reasonable possibility.

[255] I am also of the view that the function of the removals test provides “some compelling reason suggesting a particularly low or a particularly high-level test” (*Li*, para 38). It is precisely because the function of the risk assessment under the removals test is for referral to a PRRA (comprising both sections 96 and 97) that the legal standard of the removals test must consider the lower threshold of section 96 where a claimant must establish their claim’s factual basis on a balance of probabilities but is not required to prove that persecution would more likely than not occur (*Adjei* at 155). On this premise, I agree with the applicant’s argument that the legal standard of a test for deferral to a PRRA should not be at a higher threshold than that required to demonstrate persecution. Thus, if there is a legal standard applicable to the removals test, it would be that of demonstrating a serious or reasonable risk. However, it remains my view that the removals officer does not actually apply a legal standard - his or her function is to assess whether there is sufficient new probative evidence of the applicant’s exposure to a risk of death, extreme sanction, or inhumane treatment.

[256] As a final comment on the parties’ debates about legal standards, I point out that this issue is not necessarily determinative of whether the removals test is *Charter*-compliant. Compliance with the principles of fundamental justice is not decided by the conclusions of the “legal standards” issue being discussed here, nor by the issue of the narrowness of the scope of the harm discussed above. I conclude that, in this matter, *Charter*-compliance pursuant to section

7 involves the balancing of all factors that apply to delineate the foundational qualities of the right to a PRRA prior to removal of an unsuccessful refugee claimant.

[257] More substantively, stressing the legal test misses the significant evidentiary challenge that faces applicants requesting a deferral of removal for a PRRA. The applicant's risk has already been thoroughly evaluated by the RPD on a forward looking basis, and if that assessment was appealed to the IRB's Refugee Appeal Division or judicially reviewed, it was not set aside. During this process the RPD will have evaluated the evolution of country conditions over an extended number of years to enable it to project a forward-looking assessment. A significant change in circumstances will be required to establish that new risks are presented. It will require "clear and convincing" proof of the state's inability to protect the applicant (Canada (Attorney General) v Ward, [1993] 2 SCR 689). As described previously, the change must raise a serious risk of harm not having the character, or the projected severity of the range of harms previously assessed over several years by the RPD.

[258] In other words, the difficulty that the applicant has in convincing the removals officer to defer lies not so much with the legal standard, but rather in the challenging evidentiary requirements to demonstrate a meaningful change in country conditions from those reviewed by the RPD. In effect, to succeed on the submission requires the sort of new evidence that is plain and obvious, making it a relatively simple assessment task for an officer to make.

[259] As for changes in personal circumstances of the applicant in the country of origin, they are less likely to occur, simply because the applicant has been in Canada and not his or her

country of origin. Allegedly new evidence tends to lack probative value, since it is highly coincidental and often comes from the applicant's sympathetic family or friends. Such evidence also faces the challenges of being hearsay and is rarely authenticated or corroborated, diminishing its reliability. Nonetheless, in appropriate situations, the removals officer, upon finding there to be credible evidence of changes in personal circumstances resulting in a risk of serious harm, will defer removal as is his or her duty to do so.

(iii) There is no consistent standard articulated for the officer's assessment of the evidence

[260] The applicant relies on the existence of different formulations of the standard to make this argument. I am not convinced that such confusion exists in the law. One reference was to a standard of *bona fides* of the request cited in the *Wang* decision. As noted above, *Shpati* rejected such a standard as being too broad and being tantamount to permitting all matters to be deferred.

[261] Another reference was to Justice Zinn's use of the term "clear and convincing" evidence in *Toth*. Justice Zinn's remarks were made in relation to the standard for a serious issue on the stay motion. I am also not satisfied that the words of "clear and convincing," in terms of a standard of evidence to establish a fact, are intended to convey anything beyond the requirement that the evidence be objective and persuasive. This amounts to the same standard as establishing a reasonable likelihood from the evidence that the risk arises as stated in *Selvarathinam v Canada (Minister of Public Safety and Emergency Preparedness)*, (IMM-11837-12, December 10, 2012) [*Selvarathinam*].

(iv) The removals officer is not authorized to assess evidence

[262] The applicant switches horses somewhat in raising issues of the authority, competency, and bias of removals officers. These issues could be said to concern procedural fundamental justice issues as opposed to the substantive *Charter* challenges analyzed above relating to the scope and legal standard of the test.

[263] With respect to the authority to assess evidence, I agree with Justice Gleason's conclusion in *Selvarathinam* that *Shpati* overruled *Wang* and the other decisions of the Federal Court cited by the applicant, which held that the removals officers cannot undertake the limited type of risk assessment required to determine whether to defer removal. She states as follows:

> This reasoning (in *Shpati*) specifically contemplates that removals officers do have the jurisdiction-and responsibility-to conduct a limited risk assessment to determine if the individual subject to removal would face a risk of death, extreme sanction or inhumane treatment if removed.

[264] In any event, I see this more as an issue regarding the officer's competency, which is discussed below.

(v) Competency of the Removals Officer

[265] Based on decisions such as *Chieu* and *Pushpanathan* at para 157, the applicant argues that fundamental justice is not being accorded to him because the determination of the existence of risk requires that there be a hearing – an oral one where credibility is at issue – before a competent, independent, and impartial decision-maker.

[266] No evidence was introduced on the degree of expertise and training that is afforded to removals officers and PRRA officers, which prevents any effective consideration of this issue. My impression is that removals officers are highly trained for their tasks. The Federal Court of Appeal has concluded that deference is owed them in consideration of their decisions (*Shpati* at para 27). I also conclude that by *Shpati* acknowledging the authority of the removals officers to conduct a limited assessment of risk, the Court confirms that they are considered competent to undertake the task.

[267] The competency of the officer is related to the tasks he or she is required to carry out. As described above, I find the officer's functions to be relatively straightforward in terms of assessing whether sufficient new evidence has been introduced and whether a serious risk of harm arises from a change in country conditions or changes in the applicant's personal circumstances. If either question is answered in the negative, then no deferral occurs. I find that these determinations are largely related to the sufficiency of evidence to be within the competence that could be expected from an experienced removals officer. I do not find these questions to be any more complex than assessing other grounds for deferral, such as for medical or personal exigencies, which may pose challenging issues from time to time.

[268] As stated by the Supreme Court in *Singh*, procedural fairness may demand different requirements in different contexts (*Singh* at 213). An oral hearing is not required in all circumstances, because in some cases written submissions are an adequate substitute. It is only where there is a serious issue of credibility that an oral hearing is warranted (*Singh* at 214). I find

no basis on any principle of fundamental justice to say that an oral hearing is required before a person may be removed.

[269] I similarly reject any contention that the removals officer cannot carry out his or her duty with respect to enforcing section 48 to remove unsuccessful refugee claimants as soon as reasonably practicable, while also exercising a discretion whether to defer removal. I understand that the officer carrying out the enforcement is not the same the officer exercising the discretion under section 48 to determine whether removal should be deferred. I adopt the submissions of the respondent with respect to the issue of institutional bias in reference to the *Lippe* decision.

[270] As noted, these issues have been canvassed for well over a decade, without challenge to their constitutionality. They have only been advanced after the PRRA bar was enacted. Based on the nature of the assessment the removals officer is required to undertake, the implicit recognition of the officer's authority in *Shpati* and the failure to bring these issues forward previously, I am satisfied that all of these issues in relation to procedural fairness regarding the officer are well established and the process is both recognized and fair.

[271] In summary, I conclude that none of the allegations relating to the legal standard or competency of the officer raise a principle of fundamental justice under section 7 of the *Charter*.

(vi) The Oversight Function of the Federal Court

[272] The oversight function of the Federal Court provides a heightened degree of reliability to the decisions of the removals officer, which I conclude mitigates to a large extent any concerns of competency or legal standards argued by the applicant.

[273] Although the serious issue factor of the stay process for the removals officer has been elevated by *Wang* and *Baron* to a higher threshold, as my comments indicated in my discussion of these cases concerning the higher thresholds generally in administrative law, based on a range of reasonable acceptable outcomes, I am not satisfied that the distinction is significant in comparison with the serious issue factor for PRRA and H&C officers, who exercise a much broader discretion in terms of a range of outcomes.

[274] In addition, a risk of harm to a person is also an issue of heightened concern for the court's attention by the irreparable nature of the prejudice that arises should the person be removed to a situation of danger. Where it is found that evidence of a risk of serious harm to the applicant has been presented and rejected by a removals officer, the court will not hesitate to overrule that officer.

(i) *The Availability of a Section 7 Remedy in the Federal Court*

[275] The respondent relies upon the availability of the Federal Court stay application to provide a remedy for any shortfall in coverage of risks to an applicant due to the narrowness of

the test. I do not agree with this proposition. I cite from the respondent's supplementary submissions in reply to the Court's direction at paragraphs 7 and 8:

> 7. … While not beyond the realm of possibility, it is difficult to imagine a convincing situation in which such a claim [a claim of persecution with a lower level of harm than the wording of the removals test] could arise shortly after a negative refugee determination, that could not have been advanced before the RPD but fails to meet the *Baron/Shpati* test. Should such an unusual situation arise, and the deferral request be refused because it does not meet the test, that individual still has recourse before the Federal Court to seek to stay removal on the grounds that removal would violate the individual's s. 7 rights. It should be borne in mind that the Supreme Court has stated that there is no specific procedure that is required to satisfy the principles of fundamental justice aspect of s. 7 (*Nemeth*). As also noted by the FCA in *Shpati,* the "Federal Court can often consider a request for a stay more comprehensively than an enforcement officer can a deferral. This may result in a degree of bifurcation between the Federal Court and enforcement officers. However, in my opinion, it is the decision-making scheme that Parliament has enacted" per Evans J.A. at para. 51.
>
> 8. As stated by this Court in *Toth v. Canada* ([2012] F.C.J. no. 1166 at Tab 55 of vol. 2 of the respondent's book of authorities):
>
>> [24] If there is clear and convincing evidence presented in a deferral request that an applicant's circumstances have materially changed or the conditions in the country of removal have altered for the worse such that a failed claimant faces a real risk of harm and inadequate protection, then that applicant may persuade a judge of this Court that he is likely to succeed on judicial review of the rejected deferral request. Alternatively, he may convince a judge that he has a prima facie case that his removal will deprive him of his right to liberty, security and perhaps life as protected by section 7 of the *Charter*. But neither possible avenue entails that the limitation on the right to a PRRA as found in section 112(2)(b.1) of *IRPA* is constitutionally invalid. The fact that an applicant who is prevented from accessing the PRRA process due to the 12 month bar has these other alternatives available to

> him strongly suggests, in my view, that section 112(2)(b.1) of *IRPA* is not invalid.
>
> [Emphasis added]

[276] Explanations are required for both paragraphs of the respondent's submissions. Dealing first with Justice Zinn's remarks in *Toth*, I do not believe that the applicant in *Toth* had argued that the removals test was unconstitutional. The argument put forward in that case challenged the constitutionality of section 112(2)(b.1) of the Act. Accordingly, by making reference to the availability of alternate procedures of convincing a Judge, either that the removals officer's decision was unreasonable or that a valid section 7 *Charter* issue had been advanced, Justice Zinn was speaking only to the constitutionality of the PRRA bar, not the removals process. I have expressed the same view in this matter in support of my conclusion that section 112(2)(b.1) of the *IRPA* is constitutional. As for convincing a judge that a valid section 7 *Charter* issue had been advanced, that is what has occurred in these applications and why they are before me.

[277] This situation is similar to that in *Shpati*, where the Court recognized a bifurcated process for issues such as the mootness of an application, which was beyond the competence of the removals officer. Justice Evans indicated that the mootness issue could be treated separately (or at least that it was better to be considered) by the Federal Court in a stay application, when deciding to defer removal for the purpose of the judicial review application. As indicated, this is how these applications are before me regarding the constitutionality of the removals test. However, this case is intended to resolve this issue, as the parties have agreed to certify a question for appeal. Otherwise, there is no freestanding *Charter*-based application as the respondent appears to argue that can be brought whenever an applicant is of the view that the test

did not adequately protect a risk falling under section 96 of the *IRPA*, but not captured by the removal test.

(j) *The Applicant's Proposed Removal Screening Test*

[278] The applicant's alternative argument recognizes that the PRRA bar would be constitutional were the removals officer to apply a proper risk screening test. The applicant argues that this test would require the officer to defer removal for a PRRA application when there is evidence before him or her (1) that is not inherently incapable of belief, (2) that has not been previously considered, and (3) which, if accepted as credible (by the PRRA officer), might lead a competent decision-maker (a PRRA officer) to determine that the claimant has a well-founded fear of persecution or is at risk from some other form of cruel and inhumane treatment on return to the claimant's country.

[279] I understand the applicant to be making a form of minimal impairment argument, by adopting a less onerous screening test that would save the constitutionality of the PRRA bar. Even with this intention imputed to the applicant, when the debate comes down to which form of test best screens for deferral of the removal, the principles in question do not appear to be of the nature that one would describe as "vital or fundamental to our societal notions of justice."

[280] The thrust of the applicant's argument is to discard the present test based on the removals officer's determination of whether there exists persuasive evidence of changes in circumstances that would put the unsuccessful refugee claimant at serious risk of being in need of protection.

[281] Instead, he proposes a low threshold test intended to determine whether evidence not previously considered that is not inherently incredible is sufficient to raise a possibility that a PRRA officer might conclude that the claimant should not be removed either on the "well-founded fear of persecution" or "person in need of protection" basis.

[282] The fundamental difference between the two approaches is that the present removals test starts from the premise that it is unlikely following the unsuccessful refugee application that new circumstances will arise leading to a successful PRRA application, were one to be carried out. This test views the circumstances giving rise to the need for a PRRA as being generally exceptional. I find this premise congruent with the extrinsic evidence on the entitlement to a post-RPD risk assessment and the low possibility of a successful PRRA application following an unsuccessful refugee claim before the RPD that underlies the amendments. The test recognizes that unless the relative exceptionality of removal is acknowledged and incorporated into the test itself, there will never be any finality (or at least a significantly diminished level of finality) to the removals process and the capacity to remove an unsuccessful refugee claimant will be severely diminished.

[283] Conversely, I see no rational connection between the proposed test and the greater context that suggests that the likelihood of a successful PRRA application occurring immediately following an unsuccessful RPD determination is very low. It ensures only that a broader number of removals are deferred for the purposes of presenting a PRRA application, on the pretext that most unsuccessful refugee claimants have the right to a full PRRA risk assessment even though the chances of success are minimal at most.

[284] Second, the proposed test would replace the present removals test based on section 97, even though the principal complaint is that the test is too narrow because it does not include section 96 persecution factors. The applicant's argument that this test must be abandoned for screening for section 97 risks is clearly collateral to his argument that the test is too narrow for its failure to include section 96 factors. In effect, the applicant proposes to abandon the present removals test, which has been used for more than two decades, for all removals where a risk element is alleged and not just for removals following a RPD decision.

[285] Third, the proposed removals test could have a profound impact on the fundamental nature of the decision being considered by the Federal Court. Presently, the removals officer is assessing whether the evidence is sufficient to demonstrate risk of harm (death, extreme sanction, or inhumane treatment). Based on the applicant's proposed test, the officer would not be directly involved in the decision on risk of harm.

[286] This would impact on the scope of the Federal Court to review the reasonableness of the removal decision based on the connection of the evidence to the risk that justifies removal. Under the applicant's proposed test, the focus of the leave for judicial review application would be on the sufficiency of the evidence to be referred back to a PRRA officer based on the nature of the evidence, not its direct connection to risk. If the Federal Court adheres to the limits of the decision it is reviewing, the protections afforded to unsuccessful refugee claimants would appear to actually diminish the Federal Court's authority to intervene in the protections afforded to unsuccessful refugee claimants. This is because the attention of the reviewing court would not be focused on the risk of harm, but instead placed on the evidence-weighing process. There is wide

discretion to determine the sufficiency and weighing of evidence because the judicial review is based on the reasonableness standard (*Dunsmuir*).

[287] Fourth, in terms of the required competence of the removals officer, analyzing evidence for its inherent credibility and sufficiency might lead a PRRA officer to determine whether the claimant has a well-founded fear of persecution or is at risk from some other form of cruel and inhumane treatment on return to their country of origin is as challenging as considering new persuasive evidence for the purpose of determining whether there is a serious risk of harm.

[288] Fifth, the applicant's removal test would leverage the already generous evidence rules regarding reliability in refugee law which exist in various forms beginning with the 1979 Federal Court of Appeal decision in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, 31 NR 34 [*Maldonado*] at paragraph 5. The majority in *Maldonado* overruled the Board member and created a presumption of truthfulness to the applicant's sworn testimony. The Court relied on this presumption to permit the applicant to corroborate an out-of-court statement by his spouse (made after the applicant had arrived in Canada) by swearing it to be true.

[289] Being required to accept new evidence concerning personal harm of the applicants, unless inherently not credible, would require the removals officer to accept the evidence at face value and to send the matter on to a PRRA officer. Similarly, applying the applicant's proposed test to changes in country conditions, it would be a rare occasion that new documentation would be inherently not credible constituting evidence that a PRRA officer might rely on.

[290] Sixth, there is no basis to limit the consideration of new evidence to whether it was "not previously considered." This would eliminate any assessment of whether the evidence was similar to that previously considered by the RPD (i.e. not new) or whether it was previously available to the applicant before the RPD hearing. That would fly in the face of section 113(a) of the *IRPA* which limits the bringing of a PRRA application to situations with new evidence that arose after the RPD or rejection or that could not reasonably have been expected in the circumstances to have been presented. The test proposed by the applicant would seriously handicap the ability of the removals officer to determine whether the evidence being presented was actually new.

[291] Seventh, the *Immigration Act* was amended in 1989 to include provisions whereby a senior immigration officer was called upon to determine whether there was any credible evidence upon which the Convention Refugee Determination Division at a second level could decide whether the claimant was a Convention Refugee. That scheme was abandoned in 1993, almost immediately by legislative amendment standards, as being impractical. There is no good reason why the government should return to an unnecessary two-tier test based on the evaluation of the credibility of the evidence as proposed by the applicant, particularly after the rejection of the claimant's refugee status. The result would be a return to untoward delay caused by a multiplicity of proceedings, the very mischief for which the 12 month bar on PRRA applications (along with other amendments to the *IRPA*) was intended to remedy in order to bring finality and to maintain the integrity of the refugee processing system.

[292] The proposed test is impractical and, if implemented, would lead to a situation approximating the reconstitution of the automatic PRRA in the number of deferred removals that would occur. At the same time, it would undermine the efficacy of the removals process as a whole, by making it subject to a continual series of deferred removals based on unchallengeable "new" evidence to support new PRRA applications. In other words, it would undermine the last vestige of finality that the past system actually possessed.

[293] In conclusion, I reject the applicant's implicit submission based on his proposed screening test that the present removals test is not a minimal impairment of his right to have his persecution risks screened for deferral of his removal to allow for a PRRA application.

(k) *Why Not a Removals Test That Includes Persecution?*

[294] Although not argued, the applicant's submissions beg the question: why not simply add persecution as a factor to the removals test? The answer to this question appears to be at least threefold. First, by reducing the level of assessment to that of less serious harm, the "bright line" analysis becomes murky as the evidence tends to approximate that at the ambiguous border of discriminatory hardship. Persecution not presenting risks of death, extreme sanction or inhumane treatment thereby encompasses forms of alleged mistreatment that are controversial, or at least questionable, both as to the degree of harm required and their character (e.g. educational or economic discrimination or harassment not amounting to persecution).

[295] Second, persecution relates as much to the form of mistreatment as it does to the seriousness of the harm resulting from the misconduct. Based on *Rajudeen*, which simply

adopted the dictionary definition of persecution, the courts' emphasis has largely been on persistent or systematic mistreatment, without any definitional requirement for a level of seriousness of harm. The degree of harm is therefore to be implied from the examples of persecution provided in the dictionary definition, ranging from persistent cruelty to persistent annoyances. Assessing a prolonged pattern of harassing conduct, none of which by itself amounts to persecution or falls within the factors of the removals test, but when considered as a whole describe harassment amounting to persecution, introduces a level of undue and unnecessary complexity into the test. This is particularly the case when it comes to attempting to assess "new" evidence of continuing harassment, which incidentally should be highly unlikely to exist, given the claimant's absence from the country of origin.

[296] Third, as indicated above, harm not on a scale of a risk of death, extreme sanction or inhumane treatment does not expose the applicant to irreparable harm, in the sense that if the decision of the removals officer is overturned, the applicant is prevented from being readmitted to Canada. This fact alone questions whether persecution not rising to the level of inhumane treatment engages section 7. Nevertheless, on a practical level, it seems to me that if the seriousness of the harm is not such that the mistreatment of the removed claimant in the country of origin will prevent readmission if the removals decision is overturned, then there is little reason that removal should be deferred, all other factors considered.

(l) *Balancing the Interests of the Unsuccessful Refugee's Removal Rights against Societal Interests Protecting the Refugee Protection Process*

[297] As described in my overview of *Charter* principles, *Charter* rights may be limited when their exercise undermines the purpose that they are said to serve.

[298] Once one recognizes that there are limits on the exercise of the *Charter* right, the next question is how to find the balancing point. In the example quoted above in these reasons, a balance must be struck between the point where the right to cross examination does not undermine the purpose it is said to serve. This balancing point delineates the extent of the right.

[299] Determining that the balancing point requires the assembly and consideration of the pertinent factors that weigh in moving the delineation point in one direction or the other.

[300] The applicant claims a *Charter* right against his removal without a PRRA where he alleges a new risk of serious harm has arisen since his refugee claim was last rejected. However, he has also acknowledged the first step described above, namely that the right is not unlimited in the sense of being based solely upon his allegations. He accepts that a screening process should be put in place to determine whether there is sufficient new evidence of a risk of harm to merit deferring his removal in order to participate in a PRRA.

[301] In acknowledging that a screening process is required, the applicant implicitly admits that there must be counterbalancing factors that limit his access to a full risk assessment which he claims is ultimately his *Charter* right. Therefore, the balancing point that determines the extent

of the right of non-removal after an RPD focuses largely on the test that screens for deferral to participate in a PRRA.

[302] I find that the two principal counterbalancing factors in the weighing equation to be as follows: from the applicant's point of view, the extent and seriousness of any risk of harm that is unprotected by the removals test; from the respondent's perspective, the extent to which the requirement to consider all risks alleged undermines the objectives of the removals process as an integral aspect of the refugee determination process.

[303] Regarding the applicant's issue regarding the seriousness of the unassessed risk of harm, I have already mentioned that if it turns out at some higher level of court that the present definition of persecution includes a threshold of the seriousness of the risk of harm, then I suggest that the removals test based on its lowest and widest threshold of inhumane treatment will capture all of the harm encompassed in persecution. That is because I am of the view that once a threshold of harm is defined for persecution, it will likely be the same as the removals test or at least approximate that of the removals test.

[304] Conversely, to the extent that there is any risk of harm not assessed by the removals test, I find that its extent is extremely limited. Furthermore, it consists of risks of harm at the lower levels of seriousness, bordering on hardship, and not of an irreparable nature that would prevent re-admittance. I find that any failures in the assessment of the risk by the removals are further mitigated by the stay procedure before a judge of the Federal Court.

[305] Turning to the respondent's perspective on the applicant's issue of the unprotected harm, I find that a requirement to include the very limited, unassessed persecution risks, based upon characteristics of persistence and systematic harassment of a less serious nature, introduces an unnecessary degree of protection and complexity into the removals process. This includes attempting to assess not so much the degree of seriousness of harm, but rather its persistent or systematic forms of harassment or annoyances. These may extend to social issues (e.g. economic or educational discrimination) that together with other incidents may add up in a judge's mind to persecution.

[306] The respondent's perspective on its balancing factors begins with its legitimate concerns about that an overly broad test would undermine the objectives of the removals process as an integral aspect of the refugee determination process. As a practical matter, any process with a success rate by applicants of 2 to 5 percent of some 65,000 applications would appear to be in discord with its objectives, thereby suggesting that there are serious anomalies in its use. This conclusion extends to the salient issue in this matter concerning the factors that should apply to defer removal for a PRRA. This evidence strongly suggests that the delineation point should be placed so as to recognize the general exceptionality of a removed claimant, had the person remained, achieving success on a PRRA. This requires the adoption of criteria that sets a standard of level of risk of harm at a sufficiently rigorous level that is congruent with the requirements for a successful PRRA being achieved. I conclude that the removals test appears to establish a threshold of risk of harm that assures that deferral of removal will capture those cases that should be reviewed at a PRRA.

[307] Speaking more generally, the context of refugee claimants demonstrates that advantages accrue to them simply by continuing to reside in Canada for as long as possible. In this sense, the analogy is similar to the limits on the right of cross-examination that impinges on the trial process itself. The exercise of the right of non-removal, if not constrained, impinges on the refugee determination process itself.

[308] The removals process is integral to the refugee determination process, without which it serves no purpose. By this I mean that the essential objective of the refugee determination process is to decide who remains in Canada and who must leave. If the removals side of the process is undermined by an over-extended right, then the effectiveness of its decisions and the system itself is undermined such that the right surely cannot be fundamental.

[309] Moreover, the conditions that permit the undermining of the removal of unsuccessful refugee claimants arise from the attributes of the adjudicative process that underlie the determination of who remains and who is removed. It is the very time lag caused by the processing of applications in a fair and comprehensive adjudication system and particularly the time required to execute the adjudicated decision by the humane removal of the unsuccessful refugee claimant that usually provides the conditions for the claimant to allege a change in circumstances of risk.

[310] I think it difficult to claim a fundamental right if the prejudice it causes to the objectives of the adjudicative process results from the inexorable and inherent conditions that attach to and are a legitimate characteristic of a humane adjudicative process that includes the execution of its

decisions. Ultimately, allowing the characteristics and time requirements of the adjudicative process to be played off against itself frustrates the process, particularly in this instance, by undermining the objectives of adjudicative decision-making to render timely and final decisions that are enforceable.

[311] I am not, of course, speaking in absolutes. The point is to find the balancing point with respect to two relatively intractable and significant societal interests: those of the applicant not to be removed to a situation of risk and those of society in upholding the core principles of the refugee determination process. This includes society's expectation that the rationale for the expeditious removal of unsuccessful refugee claimants should be maintained, with few exceptions, in a manner that reflects the experience of years of working with the PRRA procedure. On this basis, and for the other reasons described above, I conclude that the removals test is *Charter* compliant.

[312] As a final point, I do not believe that my interpretation that rejecting a rule that frustrates the refugee determination system is a section 7 *Charter* factor is inconsistent with the decision of my colleague Justice Mactavish in *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 930 [*Canadian Doctors*]. In that matter, she concluded that the issue of protecting the integrity of the refugee process was a section 1 *Charter* issue. The situation there was somewhat analogous to this matter in that applicants accepted that there is abuse in the refugee system and expressly conceded that preserving the integrity of Canada's immigration system is a pressing and substantial objective. The reforms to the refugee program were intended to curtail the use of the provisions providing refugee claimants with health

coverage while their status remained undetermined. Without attempting to examine the larger issues whether a rule that frustrates the process of which it is a part is a section 1 *Charter* issue, or that I am misapplying the balancing process to assist in delineating the limits of a *Charter* right, I believe the facts herein are distinguishable from those in *Canadian Doctors*.

[313] The undermining of the finality of the removals process caused by the unwarranted referral to a PRRA directly, as opposed to collaterally, undermines the adjudicative process of refugee protection determinations by diminishing the effectiveness and finality of its decisions. The right or legal principle that the applicant claims is engaged by section 7 of the *Charter* on removal serves no effective *Charter* purpose unless reasonably constrained to avoid abuse or other prejudice to the refugee determination process. This matter is concerned with the delineation of the right, not the balancing of societal interests after the right is delineated. Otherwise, it preys on the character and time limitations of the adjudicative process of refugee determination by subverting its essential need for minimized delay and finality and confounding the very purpose that it is intended to serve. The facts in *Canadian Doctors* do not concern the viability of the refugee determination process, but only the withdrawal of collateral benefits to claimants who are awaiting the results of that process.

(m) *Conclusion on the Constitutionality of the Removals Process*

[314] I have weighed the limited risks upon removal based on the removals test against the legitimate societal interest in the adjudication and execution of refugee claims that requires that refugee claimants after a thorough and fair rejection of their claim be removed humanely, fairly and expeditiously, under judicial oversight, with a minimum impairment of the non-removal

right, to comply with our laws and to prevent abuse caused by the exercise of the right in unacceptably extending residency in Canada.

[315] In considering the factors described above and balancing the interests involved, I conclude that the principle against removal of an unsuccessful refugee claimant in the face of alleged unprotected risks, based on the removals process under the *IRPA* presently in place with a removals test assessing for an exposure to a risk of death, extreme sanction or inhumane treatment, is not a principle that is vital or fundamental to our societal notions of justice, such that it deprives the applicant of his rights under the *Charter*.

B. *The Reasonableness of the Removals Officer's Decision*

[316] The applicant's submissions attacking the reasonableness of the removals officer's decision were of a limited and general nature, apart from the *Charter* challenge to the PRRA bar and the removals process. There were no specific challenges in any areas of the removals officer's decision apart from the argument that country conditions had significantly changed for the worse.

[317] The removals officer carefully considered the applicant's submissions regarding the country documentation. The officer provided reasons for his decision concluding that the applicant's claims of being at risk were speculative and not corroborated. This included the limited identification of the profiles and circumstances of the persons referred to in the documentation with those of the applicant and the questionable and partial sources for many of the documents. In addition there was nothing in the documentation identifying the applicant

as having been connected with the LTTE or describing any conduct on his part while in Canada that would draw the Sri Lankan authorities' attention to him. There is a justified, transparent and intelligible basis for the officer's rejection of the applicant's arguments that the country conditions have changed for the risk profile to conclude that the decision falls within the range of acceptable possible (reasonable) outcomes on this issue.

[318] There were no serious submissions with respect to any other aspect of the officer's decision. The officer's rejection of the new evidence with respect to the applicant's work for CARE and his family as being known to the authorities and under investigation is reasonable. Not only is coming forward with an entirely new basis for risk after intentionally misleading the RPD about his circumstances for leaving Sri Lanka not to be condoned, but the officer's conclusions that there was insufficient evidence explaining why it happened is also reasonable. I am also in agreement with the officer's conclusion that the new evidence would not be eligible for consideration as part of a PRRA application because it does not meet the requirements of section 113(a) of the Act, because it was reasonably available before the RPD hearing and would, in the circumstances, be reasonably expected to have been presented to the RPD.

[319] The applicant's submissions concerning the officer's consideration of the applicant's H&C application suffer from the same problems on the lack of a credible explanation for the change in circumstances relating to the applicant's alleged employment with CARE. In addition, the removals test for deferring removal is based on risk factors of exposing the applicant to death, extreme sanction, or inhumane treatment. The decisions in *Wang*, *Baron* and *Shpati* stand

for the proposition that a pending H&C application is not a ground for deferring removal when the application may be completed after the applicant's removal from Canada.

[320] The officer also provided reasonable grounds as a basis to reject the affidavit from the law clerk of the applicant's counsel because of its anecdotal nature and the failure to authenticate the assertions contained in the affidavit.

[321] In any event, I question the appropriateness of a practice that I have seen occur with some degree of regularity in refugee cases of a law firm introducing affidavit evidence on significant substantive issues, such as the circumstances of Tamil returnees in Sri Lanka in this case. Besides blurring, and probably crossing, the lines between the firm's role as advocate and witness before the decision-maker, evidence of this nature has little to no probative value. It raises issues of bias and provides no means of corroboration because, as in this case, the source is privileged client information. It is also inherently unreliable for its hearsay and out-of-court deficiencies. Moreover, one must recognize that an affidavit is merely evidence in chief. Without an appropriate opportunity for cross examination to test its accuracy and reliability, in all but the most exigent cases, it should be rejected out of hand; even more so where no reliable corroboration is provided.

[322] In summary, I find the removals officer's decision falls within a range of reasonable acceptable outcomes and is justified in reasons that are transparent and intelligible.

IX. CONCLUSION

[323] This application for judicial review shall be dismissed.

X. CERTIFIED QUESTIONS

[324] During argument the parties acknowledged that a question should be certified with respect to the constitutionality of the PRRA bar provisions of the *IRPA*. There is no issue that the constitutionality of either section 112(2)(b.1) of the *IRPA* or the removals process would be of general importance and dispositive of the appeal.

A. *Proposed by the Applicant:*

[325] The parties provided suggestions for questions to be certified which were generally similar. The Applicant's proposed questions are as follows:

1. Is the 12-month bar to consideration of a Pre-Removal Risk Assessment under s. 112(2)(b.1) of the *Immigration and Refugee Protection Act* in breach of s. 7 of the *Charter of Rights and Freedoms* in a manner that is not saved by s. 1?

2. If it is not, what is the test to be applied by an enforcement (removals) officer in deciding whether to defer removal for a qualified and competent officer to consider risk and compliance with s. 7 of the *Charter*?

B. *Proposed by the Respondent:*

[326] The Respondent's proposed questions are as follows:

1. In light of the entirety of the statutory scheme of IRPA, does s. 112(2)(b.1) violate section 7 of the *Charter of Rights and Freedoms*, to the extent that it bars an individual from making an application for protection in circumstances in which less than 12 months have passed since their claim to refugee protection was last rejected (or withdrawn or abandoned)?

2. If not, is there a constitutional basis for revising the test currently applied by enforcement officers when considering a request to defer removal based on risk allegations, which is the test confirmed by appellate jurisprudence (i.e. the test in *Wang/Baron /Shpati*)? If so, what is that basis?

[327] In my view, the proposed questions appear to be adding considerations that the Federal Court of Appeal will necessarily have to bear in mind in ruling on the constitutionality issues they raise. In addition, I conclude that the questions should be limited to section 7 *Charter* considerations, as argued by the respondent in specific reply to my query.

C. *Those Certified*

[328] With the view to stating the constitutional issues at their highest level of generalization for consideration, I shall certify the following two questions for appeal:

1. Does the prohibition contained in section 112(2)(b.1) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 12 months have passed since the claim for refugee protection was last rejected infringe section 7 of the *Charter*?

2. If not, does the present removals process, employed within 12 months of a refugee claim being last rejected, when determining whether to defer removal at the request of an unsuccessful refugee claimant for the purpose of permitting a Pre-Removal Risk Assessment application to be advanced, infringe section 7 of the *Charter*?

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The following serious questions of general importance are certified:

   a. Does the prohibition contained in section 112(2)(b.1) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 12 months have passed since the claim for refugee protection was last rejected infringe section 7 of the *Charter*?

   b. If not, does the present removals process, employed within 12 months of a refugee claim being last rejected, when determining whether to defer removal at the request of an unsuccessful refugee claimant for the purpose of permitting a Pre-Removal Risk Assessment application to be advanced, infringe section 7 of the *Charter*?

"Peter Annis"

Judge

APPENDIX A

LEGISLATIVE HISTORY

The following provides an outline of the history of Canada's risk determination legislation and accession to relevant treaties. The various specific provisions are provided in the attached Appendix B where indicated:

A. The 1952 *Immigration Act* contained no provisions regarding refugee claimants or persons claiming risk in their home countries. Consequently, the removal process did not deal specifically with risk.

B. The 1967 *Immigration Appeal Board Act* created a new scheme for the Immigration Appeal Board and specified that the IAB could stay the execution of a deportation order or quash it where there were reasonable grounds to believe that the appellant will be punished for activities of a political character or will suffer unusual hardship or where there were compassionate or humanitarian considerations (see Appendix B).

C. Canada acceded to the 1951 *UN Convention Relating to the Status of Refugees* (the "*Refugee Convention*") in 1969. Article 1 of the *Refugee Convention* outlines which persons will be considered refugees. Article 33 of the *Refugee Convention* creates the principle of non-refoulement, which prohibits any contracting state from expelling or returned a refugee to a country where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (added by the Court).

D. Canada acceded to the *International Covenant on Civil and Political Rights* on May 16, 1976.

E. A new Immigration Act was passed in 1976 and in force in 1978 repealing the Immigration Appeal Board Act. A stated objective was to fulfill Canada's legal obligations with respect to refugees. The definition of "refugee" contained in the *Convention* was incorporated into the Act. The Act set out the procedures for determining refugee status. These were the procedures under review by the Supreme Court in *Singh*. The associated principle of *non-refoulement* was also incorporated into the Act. An unsuccessful refugee claimant had a right of appeal to the Immigration Appeal Board and upon dismissal of that appeal, an unsuccessful refugee claimant was subject to removal (see Appendix B).

F. The *Canadian Charter of Rights and Freedoms* was signed into law in 1982.

G. Canada signed the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* on August 23, 1985 and ratified it on June 24, 1987.

H. The Supreme Court of Canada released its decision in *Singh v. MEI* in 1985.

I. Several significant amendments to the *Immigration Act* came into effect in 1989. The amendments created the Immigration and Refugee Board which consisted of two divisions: the Convention Refugee Determination Division (CRDD) and the Immigration Appeal Division (AD). A two step procedure was put into place whereby a refugee claimant's claim was first assessed as to whether it had a credible basis, and if so, it was referred to the CRDD (s. 46.01). The CRDD had

the power to determine whether a claimant was a Convention refugee (the current s. 96 provision) after a full hearing on the merits. The CRDD's decision was subject to an application for leave to the Federal Court (see Appendix B)

J. Amendments to the *Act* which came into force in 1993 which eliminated the 'credible basis' stage of the eligibility inquiry (above). The amendments also provided for a statutory stay of removal until the final disposition of the Federal Court of an application for leave and judicial review of a negative CRDD decision (see Appendix B).

K. Also in 1993 amendments were enacted to the *Immigration Regulations* which created a new prescribed class: "post-determination refugee claimants in Canada" class (PDRCC). This class consisted of individuals who were unsuccessful refugee claimants who if removed would be subject to and "objectively identifiable risk." The risk was defined as being a risk to life (but not a risk caused by the inability of that country to provide adequate health care), of extreme sanctions or inhumane treatment. An unsuccessful refugee claimant was deemed to have made a PDRCC application where the notification of the negative CRDD decision was made after February 1993. Later those provisions were amended to require the unsuccessful refugee claimant to make submissions in support of the PDRCC application (see Appendix B).

L. The *Immigration and Refugee Protection Act* (IRPA) came into force on June 28, 2002 and repealed the previous legislation. Subject to amendments since then including those in Bill C-31, this is still the applicable legislative framework. The

IRPA replaced the CRDD with the Refugee Protection Division (RPD) which is still the tribunal which hears and decides refugee claims. However, in addition, the IRPA added s. 97 to the "consolidated" grounds on which the RPD could make a finding that the claimant was a "protected person." In brief, the PDRCC class was repealed, but the grounds of risk were embodied in s. 97 of *IRPA* and jurisdiction to consider those grounds was granted to the RPD. Accordingly, the RPD considered both the s. 96 and s. 97 risk as part of its hearing into a refugee claim. The IRPA also enacted the Pre-Removal Risk Assessment provisions which provided that unsuccessful refugee claimants could apply to a PRRA officer to consider any new risk under s. 96 and s. 97 that arose since the RPD determination (s. 113) (see Appendix B).

M. Section 112(2)(b.1) of Bill C-31 came into force on June 28, 2012 and provided, *inter alia*, that persons who were under a removal order were not permitted a new risk assessment by a PRRA officer until 12 months from the date of their previous risk assessment had passed.

N. Section 48 of the *IRPA* was amended to require that removal orders be enforced "as soon as possible," rather than "as soon as reasonably practicable." The amendment came into force on December 15, 2012 (added by the Court, see Appendix B).

O. The legislative history of the provision in question, s. 112(2)(b.1) of IRPA, is somewhat complex by virtue of the fact that it was first introduced in 2010, in Bill C-11. The provision in question was to come into force in June of 2012 and

did come into force in June of 2012, but did so under Bill C-21 (PCISA). Most but not all of the parliamentary debates concerning s. 112(2)(b.1) occurred during the earlier 2010 sessions of Parliament. For that reason, the history is not only somewhat length but is complicated by the different legislative contexts in which it was first raised and then finally introduced. The main change between Bill C-11 and Bill C-31 is that the latter bill reintroduced the bar on H&C applications (for one year) and restricted recourse to [the Refugee Appeal Division] (added by the Court from the respondent's Further Memorandum of Argument on Judicial Review dated November 14, 2013; see Appendix B).

APPENDIX B

LEGISLATIVE PROVISIONS

Appendix B is linked to Appendix A. It provides the text of the statutory provisions where specifically indicated in Appendix A, as provided by the Minister in the English language only. The Court reproduces below the English and French legislative text.

B: *Immigration Appeal Board Act*, SC 1966-67, c 90	**B. *Loi sur la Commission d'appel de l'immigration*, LC 1966-67, c 90**
s 15 (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that	**art 15** (1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que
(a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case, or	a) dans le cas d'une personne qui était un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu de toutes les circonstances du cas, ou
(b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to	b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
(i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or	(i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou

(ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

(ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made.

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.

E. *Immigration Act, 1976*, SC 1976-77, c 52

E. *Loi sur l'immigration de 1976*, LC 1976-77, c 52

Interpretation

Définitions

s 2(1) In this Act [...]

art 2. (1) Dans la présente loi [...]

"Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

« réfugié au sens de la Convention » désigne toute personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques

(a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or

a) se trouve hors du pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays, ou

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

b) qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ou, en raison de ladite crainte, ne veut y retourner;

Objectives

s 3 It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

[...]

(g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;

[…]

Determination of Refugee Status

s 45 (1) Where, at any time during an inquiry, the person who is the subject of the inquiry claims that he is a Convention refugee, the inquiry shall be continued and, if it is determined that, but for the person's claim that he is a Convention refugee, a removal order or a departure notice would be made or issued with respect to that person, the inquiry shall be adjourned and that person shall be examined under oath by a senior immigration officer respecting his claim.

(2) When a person who claims that he is a Convention refugee is examined under oath pursuant to subsection (1), his claim, together with a transcript of the examination with respect thereto, shall be

Les objectifs

art 3 Il est, par les présentes, déclaré que la politique d'immigration du Canada, ainsi que les règles et règlements établis en vertu de la présente loi, sont conçus et mis en œuvre en vue de promouvoir ses intérêts sur le plan interne et international, en reconnaissant la nécessité

[...]

g) de remplir, envers les réfugiés, les obligations légales du Canada sur le plan international et de maintenir sa traditionnelle attitude humanitaire à l'égard des personnes déplacées ou persécutées;

[…]

Reconnaissance du statut de réfugié

art 45 (1) Une enquête, au cours de laquelle la personne en cause revendique le statut de réfugié au sens de la Convention, doit être poursuivie. S'il est établi qu'à défaut de cette revendication, l'enquête aurait abouti à une ordonnance de renvoi ou à un avis d'interdiction de séjour, elle doit être ajournée et un agent d'immigration supérieur doit procéder à l'interrogatoire sous serment de la personne au sujet de sa revendication.

(2) Après l'interrogatoire visé au paragraphe (1), la revendication, accompagnée d'une copie de l'interrogatoire, est transmise au Ministre pour décision.

referred to the Minister for determination.

(3) A copy of the transcript of an examination under oath referred to in subsection (1) shall be forwarded to the person who claims that he is a Convention refugee.

(3) Une copie de l'interrogatoire visé au paragraphe (1) est remise à la personne qui revendique le statut de réfugié.

(4) Where a person's claim is referred to the Minister pursuant to subsection (2), the Minister shall refer the claim and the transcript of the examination under oath with respect thereto to the Refugee Status Advisory Committee established pursuant to section 48 for consideration and, after having obtained the advice of that Committee, shall determine whether or not the person is a Convention refugee.

(4) Le Ministre, saisi d'une revendication conformément au paragraphe (2), doit la soumettre, accompagnée d'une copie de l'interrogatoire, à l'examen du comité consultatif sur le statut de réfugié institué par l'article 48. Après réception de l'avis du comité, le Ministre décide si la personne est un réfugié au sens de la Convention.

(5) When the Minister makes a determination with respect to a person's claim that he is a Convention refugee, the Minister shall thereupon in writing inform the senior immigration officer who conducted the examination under oath respecting the claim and the person who claimed to be a Convention refugee of his determination.

(5) Le Ministre doit notifier sa décision par écrit, à l'agent d'immigration supérieur qui a procédé à l'interrogatoire sous serment et à la personne qui a revendiqué le statut de réfugié.

[…]

[…]

Convention refugee of his determination

Reprise de l'enquête

s 46 (1) Where a senior immigration officer is informed pursuant to subsection 45(5) that a person is not a Convention refugee, he shall, as soon as reasonably practicable, cause the inquiry concerning that person to be resumed by the adjudicator who was presiding at the inquiry or by any other adjudicator, but no inquiry shall be

art 46 (1) L'agent d'immigration supérieur, informé conformément au paragraphe 45(5) que la personne en cause n'est pas un réfugié au sens de la Convention, doit faire reprendre l'enquête, dès que les circonstances le permettent, par l'arbitre qui en était chargé ou par un autre arbitre, à moins que la personne en cause ne

resumed in any case where the person makes an application to the Board pursuant to subsection 70(1) for a redetermination of his claim that he is a Convention refugee until such time as the Board informs the Minister of its decision with respect thereto.

demande à la Commission, en vertu du paragraphe 70(1), de réexaminer sa revendication ; dans ce cas, l'enquête est ajournée jusqu'à ce que la Commission notifie sa décision au Ministre.

(2) Where a person

(2) L'arbitre chargé de poursuivre l'enquête en vertu du paragraphe (1), doit, comme si la revendication du statut de réfugié n'avait pas été formulée, prononcer le renvoi ou l'interdiction de séjour de la personne

(a) has been determined by the Minister not to be a Convention refugee and the time has expired within which an application for redetermination under subsection 70(1) may be made, or

a) à qui le Ministre n'a pas reconnu le statut de réfugié au sens de la Convention, si le délai pour demander le réexamen de sa revendication prévu au paragraphe 70(1) est expiré ; ou

(b) has been determined by the Board not to be a Convention refugee,

b) à qui la Commission n'a pas reconnu le statut de réfugié au sens de la Convention.

the adjudicator who presides at the inquiry caused to be resumed pursuant to subsection (1) shall make the removal order or issue the departure notice that would have been made or issued but for that person's claim that he was a Convention refugee.

Execution of Orders

Exécution des ordonnances

s 55 Notwithstanding subsections 54(2) and (3), a Convention refugee shall not be removed from Canada to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion unless he is

art 55 Par dérogation aux paragraphes 54(2) et (3), un réfugié au sens de la Convention ne peut être renvoyé 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

à moins

(a) a member of an inadmissible class described in paragraph 19(1)(c), (e), (f) or (g),

a) qu'il ne fasse partie des personnes non admissibles visées aux alinéas 19(1)c), e), f) ou g),

(b) a person described in paragraph 27(1)(c) or 27(2)(c), or

b) qu'il ne soit une des personnes visées aux alinéas 27(1)c) ou 27(2)c), ou

(c) a person who has been convicted in Canada of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed,

c) qu'il n'ait été déclaré coupable au Canada d'une infraction prévue par une loi du Parlement et punissable d'une peine d'au moins dix ans d'emprisonnement,

and the Minister is of the opinion that the person should not be allowed to remain in Canada.

et que la Ministre ne soit d'avis qu'il ne devrait pas être autorisé à demeurer au Canada.

Redeterminations and Appeals

Demandes de réexamen et appels

s 70 (1) A person who claims to be a Convention refugee and has been informed in writing by the Minister pursuant to subsection 45(5) that he is not a Convention refugee may, within such period of time as is prescribed, make an application to the Board for a redetermination of his claim that he is a Convention refugee.

art 70 (1) La personne qui a revendiqué le statut de réfugié au sens de la Convention et à qui le Ministre a fait savoir par écrit, conformément au paragraphe 45(5), qu'elle n'avait pas ce statut, peut, dans le délai prescrit, présenter à la Commission une demande de réexamen de sa revendication.

(2) Where an application is made to the Board pursuant to subsection (1), the application shall be accompanied by a copy of the transcript of the examination under oath referred to in subsection 45(1) and shall contain or be accompanied by a declaration of the applicant under oath setting out

(2) Toute demande présentée à la Commission en vertu du paragraphe (1) doit être accompagnée d'une copie de l'interrogatoire sous serment visé au paragraphe 45(1) et contenir ou être accompagnée d'une déclaration sous serment du demandeur contenant

(a) the nature of the basis of the application;

a) le fondement de la demande;

(b) a statement in reasonable detail of the facts on which the application is based;

b) un exposé suffisamment détaillé des faits sur lesquels repose la demande;

(c) a summary in reasonable detail of the information and evidence intended to be offered at the hearing; and

c) un résumé suffisamment détaillé des renseignements et des preuves que le demandeur se propose de fournir à l'audience; et

(d) such other representations as the applicant deems relevant to the application.

d) toutes observations que le demandeur estime pertinentes.

s 71 (1) Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.

art 71 (1) La Commission, saisie d'une demande visée au paragraphe 70(2), doit l'examiner sans délai. À la suite de cet examen, la demande suivra son cours au cas où la Commission estime que le demandeur pourra vraisemblablement en établir le bien-fondé à l'audition; dans le cas contraire, aucune suite n'y est donnée et la Commission doit décider que le demandeur n'est pas un réfugié au sens de la Convention.

[…]

[…]

s 72 (1) Where a removal order is made against a permanent resident, other than a person with respect to whom a report referred to in subsection 40(1) has been made, or against a person lawfully in possession of a valid returning resident permit issued to him pursuant to the regulations, that person may appeal to the Board on either or both of the following grounds, namely,

art 72 (1) Toute personne frappée par une ordonnance de renvoi qui est soit un résident permanent, autre qu'une personne ayant fait l'objet du rapport visé au paragraphe 40(1), soit un titulaire de permis de retour valable et émis conformément aux règlements, peut interjeter appel à la Commission en invoquant l'un ou les deux motifs suivants :

(a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and

a) un moyen d'appel comportant une question de droit ou de fait ou une question mixte de droit et de fait;

(b) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

b) le fait que, compte tenu des circonstances de l'espèce, elle ne devrait pas être renvoyée du Canada.

(2) Where a removal order is made against a person who

(2) Toute personne, frappée par une ordonnance de renvoi, qui

(a) has been determined by the Minister or the Board to be a Convention refugee but is not a permanent resident, or

a) n'est pas un résident permanent mais dont le statut de réfugié au sens de la Convention a été reconnu par le Ministre ou par la Commission, ou

(b) seeks admission and at the time that a report with respect to him was made by an immigration officer pursuant to subsection 20(1) was in possession of a valid visa,

b) demande l'admission et était titulaire d'un visa en cours de la validité lorsqu'elle a fait l'objet du rapport visé au paragraphe 20(1),

that person may, subject to subsection (3), appeal to the Board on either or both of the following grounds, namely,

peut, sous réserve du paragraphe (3), interjeter appel à la Commission en invoquant l'un ou les deux motifs suivants:

(c) on any ground of appeal that involves a question of law or fact, or mixed law and fact, and

c) un moyen d'appel comportant une question de droit ou de fait ou une question mixte de droit et de fait;

(d) on the ground that, having regard to the existence of compassionate or humanitarian considerations, the person should not be removed from Canada.

d) le fait que, compte tenu de considérations humanitaires ou de compassion, elle ne devrait pas être renvoyée du Canada.

[…]

[…]

Appeals to the Federal Court of Appeal

s 84 An appeal lies to the Federal Court of Appeal on any question of law, including a question of jurisdiction, from a decision of the Board on an appeal under this Act if leave to appeal is granted by that Court based on an application for leave to appeal filed with that Court within fifteen days after the decision appealed from is pronounced or within such extended time as a judge of that Court may, for special reasons, allow.

Appel à la Cour d'appel fédérale

art 84 La décision de la Commission relativement à un appel interjeté en vertu de la présente loi est susceptible d'appel à la Cour d'appel fédérale sur toute question de droit, y compris de compétence, dans la mesure où ladite Cour accorde l'autorisation d'appel, sur demande déposée dans un délai de quinze jours du prononcé de la décision sujette à appel; ce délai peut, pour des raisons spéciales, être prorogé par un juge de ladite Cour.

I: *Immigration Act, 1976*, RSC 1985 (4th Supp), c 28

I : *Loi sur l'immigration de 1976*, LRC 1985 (4e suppl), c 28

Convention Refugee Claims

s 43 (1) Before any substantive evidence is given at an inquiry, the adjudicator shall give the person who is the subject of the inquiry an opportunity to indicate whether or not the person claims to be a Convention refugee.

(2) Where, on being given an opportunity pursuant to subsection (1), the person who is the subject of the inquiry does not claim to be a Convention refugee, the inquiry shall be continued and no such claim by that person shall thereafter be received or considered at that inquiry or any application, appeal or other proceeding arising therefrom.

Revendication du statut de réfugié au sens de la Convention

art 43 (1) Avant que ne soient présentés des éléments de preuve au fond, l'arbitre donne à la personne qui fait l'objet de l'enquête la possibilité de faire savoir si elle revendique le statut de réfugié au sens de la Convention.

(2) En l'absence de la revendication visée au paragraphe (1), l'enquête se poursuit et la question du statut de réfugié ne peut plus être prise en considération au cours de l'enquête ni au cours des demandes, appels ou autres procédures qui en découlent.

(3) Subject to subsection (5), where, on being given an opportunity pursuant to subsection (1), the person who is the subject of the inquiry claims to be a Convention refugee, the inquiry shall, if a member of the Refugee Division is not present at the inquiry, be adjourned to ensure the presence of a member thereat and shall be continued thereafter only in the presence of both the adjudicator and the member.

(3) En cas de revendication du statut de réfugié au sens de la Convention, l'enquête ne peut se poursuivre qu'en présence et de l'arbitre et d'un membre de la section du statut. Elle est ajournée, s'il y a lieu, pour permettre cette présence.

[…]

[…]

s 44 (1) Any person who is lawfully in Canada as a visitor or is in possession of a permit and who claims to be a Convention refugee may seek a determination of the claim by notifying an immigration officer.

art 44 (1) Les visiteurs séjournant légalement au Canada et les titulaires de permis peuvent revendiquer le statut de réfugié au sens de la Convention en avisant en ce sens un agent d'immigration.

(2) An immigration officer who is notified pursuant to subsection (1) shall forthwith refer the claim to a senior immigration officer, unless, where the claimant is a visitor, the immigration officer is satisfied that the claimant is a person described in subsection 27(2) and the Deputy Minister issues a direction pursuant to subsection 27(3) that an inquiry be held with respect to the claimant.

(2) Dès qu'il est avisé de la revendication, l'agent d'immigration défère le cas à un agent principal, sauf si l'intéressé est un visiteur et, relevant de l'un des cas visés au paragraphe 27(2), fait, aux termes du paragraphe 27(3), l'objet d'une directive du sous-ministre prévoyant la tenue d'une enquête.

(3) A senior immigration officer to whom a claim is referred pursuant to subsection (2) shall, as soon as practicable, cause a hearing to be held before an adjudicator and a member of the Refugee Division with respect to the claimant.

(3) Dans les meilleurs délais, l'agent principal fait tenir une audience sur le cas devant un arbitre et un membre de la section du statut.

s 46 (1) Where an inquiry is continued or a hearing is held before an adjudicator and a member of the Refugee Division,

(a) the adjudicator shall, in the case of an inquiry, determine whether the claimant should be permitted to come into Canada or to remain therein, as the case may be;

(b) the adjudicator and the member shall determine whether the claimant is eligible to have the claim determined by the Refugee Division; and

(c) if either the adjudicator or the member or both determine that the claimant is so eligible, they shall determine whether the claimant has a credible basis for the claim.

[…]

s 46.01

[...]

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

art 46 (1) Les règles suivantes s'appliquent aux enquêtes ou audiences tenues devant un arbitre et un membre de la section du statut :

a) dans le cas d'une enquête, l'arbitre détermine si le demandeur de statut doit être autorisé à entrer au Canada ou à y demeurer, selon le cas;

b) l'arbitre et le membre déterminent si la revendication est recevable par la section du statut;

c) si au moins l'un des deux conclut à la recevabilité, ils déterminent ensuite si la revendication a un minimum de fondement.

[…]

art 46.01

[...]

(6) L'arbitre ou le membre de la section du statut concluent que la revendication a un minimum de fondement si, après examen des éléments de preuve présentés à l'enquête ou à l'audience, ils estiment qu'il existe des éléments crédibles ou dignes de foi sur lesquels la section du statut peut se fonder pour reconnaître à l'intéressé le statut de réfugié au sens de la Convention. Parmi les éléments présentés, ils tiennent compte notamment des points suivants :

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

a) les antécédents en matière de respect des droits de la personne du pays que le demandeur a quitté ou hors duquel il est demeuré de crainte d'être persécuté;

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

b) les décisions déjà rendues aux termes de la présente loi ou de ses règlements sur les revendications où était invoquée la crainte de persécution dans ce pays.

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

s 46.02 (1) Where both the adjudicator and the member of the Refugee Division determine that the claimant is not eligible to have the claim determined by the Refugee Division or does not have a credible basis for the claim, they shall give their decision and the reasons therefor as soon as possible after making the determination and in the presence of the claimant wherever practicable and, where the matter is before an inquiry, the adjudicator shall, subject to subsection 4(2.1), take the appropriate action under section 32 with respect to the claimant.

art 46.02 (1) S'ils en viennent tous les deux à la conclusion que la revendication n'est pas recevable par la section du statut ou qu'elle n'a pas un minimum de fondement, l'arbitre et le membre de la section du statut prononcent leur décision, motifs à l'appui, le plus tôt possible et en présence du demandeur si les circonstances le permettent. S'il s'agit d'une enquête, l'arbitre prend ensuite, sous réserve du paragraphe 4(2.1), les mesures qui s'imposent aux termes de l'article 32.

(2) Where either the adjudicator or the member of the Refugee Division or both determine that the claimant is eligible to have the claim determined by the Refugee Division and either or both of them determine that the claimant has a credible basis for the claim, they shall give their decision and the reasons therefor as soon as possible after making the determinations

(2) Si au moins l'un d'eux conclut à la recevabilité de la revendication, et au moins l'un d'eux conclut que celle-ci a un minimum de fondement, l'arbitre et le membre de la section du statut prononcent leur décision, motifs à l'appui, le plus tôt possible, en présence du demandeur si les circonstances le permettent, et défèrent sans délai le cas à la section du statut, selon

and in the presence of the claimant wherever practicable and shall forthwith refer the claim to the Refugee Division, in the manner and form prescribed by the rules of the Board, and, where the matter is before an inquiry, the adjudicator shall take the appropriate action under subsection 32(1), (3) or (4) or section 32.1 with respect to the claimant.

les modalités prévues par les règles de la Commission. S'il s'agit d'une enquête, l'arbitre prend ensuite les mesures qui s'imposent aux termes des paragraphes 32(1), (3) ou (4) ou de l'article 32.1.

s 49 (1) Except in the case of a person residing or sojourning in the United States or St. Pierre and Miquelon against whom a removal order is made as a result of a report made pursuant to paragraph 20(1)(a), the execution of a removal order is stayed

art 49 (1) Sauf dans le cas où l'intéressé fait l'objet du rapport prévu à l'alinéa 20(1)(a) et réside ou séjourne aux États-Unis ou à Saint-Pierre-et-Miquelon, il est sursis à l'exécution d'une mesure de renvoi :

(a) in any case where the person against whom the order was made has a right of appeal to the Appeal Division, at the request of that person until twenty-four hours have elapsed from the time when the person was informed pursuant to section 36 of the right of appeal;

a) à la demande de la personne visée qui a un droit d'appel devant la section d'appel, durant vingt-quatre heures à compter du moment où elle a été avisée de ce droit conformément à l'article 36 ;

(b) in any case where the person against whom the order was made has a right to file an application for leave to commence an application or other proceeding under section 18 or 28 of the *Federal Court Act* in respect of the order, at the request of that person until seventy-two hours have elapsed from the time when the order was pronounced;

b) à la demande de la personne visée qui a le droit de produire une demande d'autorisation d'introduire une instance aux termes des articles 18 ou 28 de la *Loi sur la Cour fédérale*, durant soixante-douze heures à compter du moment où la mesure a été prise ;

(c) in any case where an appeal from the order has been filed with the Appeal Division, until the appeal has been heard and disposed of or has been declared by the Appeal Division to be abandoned;

c) en cas d'appel à la section d'appel, jusqu'à ce que cette dernière ait rendu sa décision ou déclaré qu'il y a eu désistement d'appel;

(d) in any case where the person, being other than a person described in paragraph 19(1)(g), files an application for leave to appeal or signifies in writing to an immigration officer an intention to file an application for leave to appeal a decision of the Appeal Division or a decision of the Refugee Division under subsection 69.3(4) to the Federal Court of Appeal, until the application for leave to appeal has been heard and disposed of or the time normally limited for filing an application for leave to appeal has elapsed and, where leave to appeal is granted, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be; and

d) si l'intéressé ne tombe pas sous le coup de l'alinéa 19(1)g) et dépose devant la Cour d'appel fédérale une demande d'autorisation d'appel d'une décision de la section d'appel ou d'une décision de la section du statut rendue aux termes du paragraphe 69.3(4), ou notifie par écrit à un agent d'immigration son intention de la faire, jusqu'à la décision du tribunal sur l'autorisation ou l'appel, ou l'expiration du délai normal de demande d'autorisation ou d'appel, selon le cas;

(e) in any case where the person, being other than a person described in paragraph 19(1)(g), files an application for leave to appeal or signifies in writing to an immigration officer an intention to file an application for leave to appeal a decision of the Federal Court of Appeal on an appeal referred to in paragraph (d) to the Supreme Court of Canada, until the application for leave to appeal has been heard and disposed of or the time normally limited for filing an application for leave to appeal has elapsed and, where leave to appeal is granted, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be.

e) si l'intéressé ne tombe pas sous le coup de l'alinéa 19(1)g) et dépose une demande d'autorisation d'en appeler à la Cour suprême du Canada de la décision de la Cour d'appel fédérale sur l'appel visé à l'alinéa d), ou notifie par écrit à un agent d'immigration son intention de la faire, jusqu'à la décision de la Cour suprême sur la demande d'autorisation ou l'appel ou l'expiration du délai normal de demande d'autorisation ou d'appel, selon le cas.

Claims and Appeals

Revendications et Appels

Establishment of Board

Mise sur pied de la Commission

s 57 (1) There is hereby established a board, to be called the Immigration and Refugee Board, consisting of two divisions,

art 57 (1) Est constituée la Commission de l'immigration et du statut de réfugié, formée de deux sections : la section d'appel

to be called the Convention Refugee Determination Division and the Immigration Appeal Division.

de l'immigration et la section du statut de réfugié.

[…]

[…]

Convention Refugee Determination Division

Section du statut de réfugié

s 67 (1) The Refugee Division has, in respect of proceedings under sections 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

art 67 (1) La section du statut a compétence exclusive, en matière de procédures visées aux articles 69.1 et 69.2, pour entendre et juger sur des questions de droit et de fait, y compris des questions de compétence.

[…]

[…]

s 69.1 (1) Subject to subsection (2), where a person's claim to be a Convention refugee is referred to the Refugee Division pursuant to subsection 46.02(2) or 46.03(5), the Division shall as soon as practicable commence a hearing into the claim.

art 69.1 (1) La section du statut entend dans les meilleurs délais la revendication du statut de réfugié au sens de la Convention dont elle est saisie aux termes du paragraphe 46.02(2) ou 46.03(5).

[…]

[…]

(4) A hearing into a claim shall be held in the presence of the claimant.

(4) L'audience sur la revendication se tient en présence de l'intéressé.

(5) At the hearing into a claim, the Refugee Division

(a) shall afford the claimant a reasonable opportunity to present evidence, cross-examine witnesses and make representations; and

(5) À l'audience, la section du statut est tenue de donner à l'intéressé et au ministre la possibilité de produire des éléments de preuve, de contre-interroger des témoins et de présenter des observations, ces deux derniers droits n'étant toutefois accordés au ministre que s'il l'informe qu'à son avis, la revendication met en cause la section E ou F de l'article premier de la Convention ou

(b) shall afford the Minister a reasonable opportunity to present evidence and, if the Minister notifies the Refugee Division that the Minister is of the opinion that matters involving section E or F of Article 1 of the Convention or subsection 2(2) of this Act are raised by the claim, to cross-examine witnesses and make representations.

le paragraphe 2(2) de la présente loi.

[…]

[…]

(9) The Refugee Division shall determine whether or not the claimant is a Convention refugee and shall render its decision as soon as possible after completion of the hearing and send a written notice of the decision to the claimant and the Minister.

(9) La section du statut rend sa décision sur la revendication du statut de réfugié au sens de la Convention le plus tôt possible après l'audience et la notifie à l'intéressé et au ministre par écrit.

[…]

[…]

Applications and Appeals to the Federal Court

Demandes et appels à la Cour fédérale

s 82.1 (1) An application or other proceeding may be commenced under section 18 or 28 of the *Federal Court Act* with respect to any decision or order made, or any other matter arising, under this Act or the rules or regulations only with leave of a judge of the Federal Court – Trial Division or the Federal Court of Appeal, as the case may be.

art 82.1 (1) L'introduction d'une instance aux termes des articles 18 ou 28 de la *Loi sur la Cour fédérale* ne peut, pour ce qui est des décisions ou ordonnances rendues ou mesures prises dans le cadre de la présente loi ou de ses textes d'application – règlements ou règles – ou de toute question soulevée dans ce cadre, se faire qu'avec l'autorisation d'un juge de la Section de première instance de la Cour fédérale ou de la Cour d'appel fédérale, selon le cas.

[...]

[…]

J: *Immigration Act*, *1976*, SC 1992, c 49

s 44 (1) Any person who is in Canada, other than a person against whom a removal order has been made but not executed, unless an appeal from that order has been allowed, and who claims to be a Convention refugee may seek a determination of the claim by notifying an immigration officer.

(2) An immigration officer who is notified pursuant to subsection (1) shall forthwith refer the claim to a senior immigration officer.

(3) Where a person who is the subject of an inquiry claims in accordance with subsection (1) to be a Convention refugee, the adjudicator shall determine whether the person may be permitted to come into or remain in Canada, as the case may be, and shall take the appropriate action under subsection 32(1), (3) or (4) or section 32.1, as the case may be, in respect of the person.

(4) Where a claim to be a Convention refugee by a person who is the subject of an inquiry is referred to a senior immigration officer and the senior immigration officer determines, before the conclusion of the inquiry, that the person is not eligible to have the claim determined by the Refugee Division, the adjudicator shall take the appropriate action under section 32 in respect of the person.

[…]

J : *Loi sur l’immigration de 1976*, LC 1992, c 49

art 44 (1) Toute personne se trouvant au Canada peut revendiquer le statut de réfugié au sens de la Convention en avisant en ce sens un agent d'immigration, à condition de ne pas être frappée d'une mesure de renvoi qui n'a pas été exécutée, à moins que la mesure n'ait été annulée en appel.

(2) Le cas échéant, l'agent d'immigration défère sans délai le cas à un agent principal.

(3) Lorsque la personne qui fait l'objet d'une enquête revendique le statut de réfugié au sens de la Convention conformément au paragraphe (1), l'arbitre détermine si elle doit être autorisée à entrer au Canada ou à y demeurer et prend à son égard la mesure indiquée prévue aux paragraphes 32(1), (3) ou (4) ou à l'article 32.1.

(4) Si la revendication est jugée irrecevable par l'agent principal avant la fin de l'enquête, l'arbitre prend contre l'intéressé la mesure indiquée prévue à l'article 32.

[…]

s 45 (1) Where a person's claim to be a Convention refugee is referred to a senior immigration officer, the senior immigration officer shall

(a) subject to subsection (2), determine whether the person is eligible to have the claim determined by the Refugee Division; and

(b) if the person is the subject of a report under subsection 20(1) or 27(1) or (2) or has been arrested pursuant to subsection 103(2), take the appropriate action referred to in any of subsections 23(4) and (4.2) and 27(4) and (6) or section 28.

art 45 (1) L'agent principal à qui le cas a été déféré décide, sous réserve du paragraphe (2), de la recevabilité de la revendication; il doit en outre, si l'intéressé fait l'objet d'un rapport en vertu des paragraphes 20(1) ou 27(1) ou (2) ou s'il a été arrêté en vertu du paragraphe 103(2), prendre à son encontre la mesure indiquée prévue aux paragraphes 23(4) ou (4.2) ou 27(4) ou (6) ou à l'article 28.

[…]

[…]

s 46.02 Where a senior immigration officer determines that person is eligible to have a claim determined by the Refugee Division, the senior immigration officer shall forthwith refer the claim to the Refugee Division in the manner and form prescribed by rules made under subsection 65(1).

art 46.02 S'il conclut à la recevabilité de la revendication, l'agent principal défère sans délai le cas à la section du statut selon les modalités prévues par les règles mentionnées au paragraphe 65(1).

s 49 (1) Subject to subsection (1.1), the execution of a removal order made against a person is stayed

(a) in any case where the person against whom the order was made has a right of appeal to the Appeal Division, at the request of that person until the time provided for the filing of the appeal has elapsed;

(b) in any case where an appeal from the order has been filed with the Appeal

art 49 (1) Sauf dans les cas mentionnés au paragraphe (1.1), il est sursis à l'exécution d'une mesure de renvoi:

a) à la demande de l'intéressé - s'il a un droit d'appel devant la section d'appel - jusqu'à l'expiration du délai de présentation de l'appel;

b) en cas d'appel, jusqu'à ce que la section d'appel ait rendu sa décision ou déclaré

Division, until the appeal has been heard and disposed of or has been declared by the Appeal Division to be abandoned;

qu'il y a eu désistement d'appel;

(c) subject to paragraphs (d) and (f), in any case where a person has been determined by the Refugee Division not to be a Convention refugee or a person's appeal from the order has been dismissed by the Appeal Division,

c) sous réserve des alinéas d) et f), dans le cas d'une personne qui s'est vu refuser le statut de réfugié au sens de la Convention par la section du statut ou dont l'appel a été rejeté par la section d'appel:

(i) where the person against whom the order was made files an application for leave to commence a judicial review proceeding under the *Federal Court Act* or signifies in writing to an immigration officer an intention to file such an application, until the application for leave has been heard and disposed of or the time normally limited for filing an application for leave has elapsed and, where leave is granted, until the judicial review proceeding has been heard and disposed of,

(i) si l'intéressé présente une demande d'autorisation relative à la présentation d'une demande de contrôle judiciaire aux termes de la *Loi sur la Cour fédérale* ou notifie par écrit à un agent d'immigration son intention de le faire, jusqu'au prononcé du jugement sur la demande d'autorisation ou la demande de contrôle judiciaire, ou l'expiration du délai normal de demande d'autorisation, selon le cas,

(ii) in any case where the person has filed with the Federal Court of Appeal an appeal of a decision of the Federal Court – Trial Division where a judge of that Court has at the time of rendering judgment certified in accordance with subsection 83(1) that a serious question of general importance was involved and has stated that question, or signifies in writing to an immigration officer an intention to file a notice of appeal to commence such an appeal, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be, and

(ii) si l'intéressé interjette un appel à la Cour d'appel fédérale du jugement de la Section de première instance de la Cour fédérale, dans le cas où celle-ci a certifié conformément au paragraphe 83(1) que l'affaire soulève une question grave de portée générale et a énoncé celle-ci, ou notifie par écrit à un agent d'immigration son intention de le faire, jusqu'au prononcé du jugement sur l'appel ou l'expiration du délai normal d'appel, selon le cas,

(iii) in any case where the person files an application for leave to appeal or signifies in writing to an immigration officer an intention to file an application for leave to appeal a decision of the Federal Court of

(iii) si l'intéressé dépose une demande d'autorisation d'en appeler à la Cour suprême du Canada du jugement de la Cour d'appel fédérale sur l'appel visé au sous-alinéa (ii), ou notifie par écrit à un agent

Appeal on an appeal referred to in subparagraph (ii) to the Supreme Court of Canada, until the application for leave to appeal has been heard and disposed of or the time normally limited for filing an application for leave to appeal has elapsed and, where leave to appeal is granted, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be;

d'immigration son intention de le faire, jusqu'au jugement de la Cour suprême sur la demande d'autorisation ou l'appel ou l'expiration du délai normal de demande d'autorisation ou d'appel, selon le cas;

K: *Immigration Regulations*, 1978, SOR/93-44

K. *Règlement sur l'immigration*, 1978, DORS/93-44

s 1

art 1

(1) “member of the post-determination refugee claimants in Canada class” means an immigrant in Canada

(1) « demandeur non reconnu du statut de réfugié au Canada » Immigrant au Canada :

(a) who the Refugee Division has determined on or after February 1, 1993 is not a Convention refugee, other than an immigrant

a) à l'égard duquel la section du statut a décidé, le 1er février 1993 ou après cette date, de ne pas reconnaître le statut de réfugié au sens de la Convention, à l'exclusion d'un immigrant, selon le cas :

(i) who has withdrawn the immigrant's claim to be a Convention refugee,

(i) qui a retiré sa revendication du statut de réfugié au sens de la Convention,

(ii) whom the Refugee Division has declared to have abandoned a claim to be a Convention Refugee, pursuant to subsection 69.1(6) of the Act,

(ii) à l'égard duquel la section du statut a, en vertu du paragraphe 69.1(6) de la Loi, conclu au désistement de la revendication du statut de réfugié au sens de la Convention,

(iii) whom the Refugee Division has determined does not have a credible basis for the claim, pursuant to subsection 69.1(9.1) of the Act, or

(iii) à l'égard duquel la section du statut a déterminé, en vertu du paragraphe 69.1(9.1) de la Loi, que sa revendication n'a pas un minimum de fondement.

(iv) who has left Canada at any time after it was determined that the immigrant is not a Convention refugee,

(iv) qui a quitté le Canada à tout moment après qu'il a été déterminé qu'il n'est pas un réfugié au sens de la Convention;

(b) who has not previously been refused landing by an immigration officer pursuant to section 11.4, and

b) auquel un agent d'immigration n'a pas déjà refusé le droit d'établissement en vertu de l'article 11.4 ;

(c) who if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country,

c) dont le renvoi vers un pays dans lequel il peut être renvoyé l'expose personnellement, en tout lieu de ce pays, à l'un des risques suivants, objectivement identifiable, auquel ne sont pas généralement exposés d'autres individus provenant de ce pays ou s'y trouvant :

(i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of that country to provide adequate health care or medical care,

(i) sa vie est menacée pour les raisons autres que l'incapacité de ce pays de fournir des soins médicaux ou de santé adéquats,

(ii) of extreme sanctions against the immigrant, or

(ii) des sanctions excessives peuvent être exercées contre lui,

(iii) of inhumane treatment of the immigrant; (*demandeur non reconnu du statut de réfugié au Canada*)

(iii) un traitement inhumain peut lui être infligé (*member of the post-determination refugee claimants in Canada class*)

s 11.4 (1) A member of the post-determination refugee claimants in Canada class and the member's dependants, if any, are subject to the following landing requirements:

art 11.4 (1) Les exigences relatives à l'établissement d'un demandeur non reconnu du statut de réfugié au Canada et des personnes à sa charge, le cas échéant, sont les suivantes :

(a) the member must not be, and no person specified pursuant to paragraph 10.2(2)(b) of the Act is, a person described in paragraph 19(1)(c), (c.1), (c.2), (d), (e), (f), (g), (j), (k) or (l) or (2)(a) or subparagraph 19(2)(a.1)(i) of the Act;

a) ni lui ni aucune des personnes à sa charge précisées selon le paragraphe 10.2(2) de la Loi n'appartiennent à une catégorie visée aux alinéas 19(1)c), c.1), c.2), d), e), f), g), j), k) ou l) ou (2)a) ou au sous-alinéa 19(2)a.1)(i) de la Loi;

(b) the member must not have been, and no person specified pursuant to paragraph 10.2(2)(b) of the Act has been, convicted of an offence referred to in paragraph 27(2)(d) of the Act for which a term of imprisonment of more than six months has been imposed or a maximum term of imprisonment of five years or more may be imposed;

b) ni lui ni aucune des personnes à sa charge précisées selon le paragraphe 10.2(2) de la Loi n'ont été déclarés coupables d'une infraction visée à l'alinéa 27(2)d) de la Loi pour laquelle une peine d'emprisonnement de plus de six mois a été infligée ou qui peut être punissable d'un emprisonnement maximal égal ou supérieur à cinq ans;

(c) the member must have been in Canada on the day on which the member became a member of the post-determination refugee claimants in Canada class and must have remained in Canada since that day; and

c) le demandeur était au Canada le jour où il est devenu demandeur non reconnu du statut de réfugié au Canada et il est demeuré au Canada depuis ce jour;

(d) the member must be in possession of a valid and subsisting passport or travel document or satisfactory identity documents.

(d) le demandeur possède un passeport ou un document de voyage en cours de validité ou des papiers d'identité acceptables.

(2) For the purposes of subsection 6(5) of the Act, a person who the Refugee Division has determined on or after February 1, 1993 is not a Convention refugee shall be deemed to have submitted an application for landing as a member of the post-determination refugee claimants in Canada class to an immigration officer on the day that the determination is made.

(2) Pour l'application du paragraphe 6(5) de la Loi, la personne à l'égard de laquelle la section du statut a décidé, le 1er février 1993 ou après cette date, de ne pas reconnaître le statut de réfugié au sens de la Convention est réputée avoir soumis une demande d'établissement à titre de demandeur non reconnu du statut de réfugié au Canada à un agent d'immigration le jour où la section du statut a rendu cette décision.

(3) Subject to subsection (4), the landing requirements referred to in subsection (1) shall not be applied before the expiration of the 15-day period immediately following notification by the Refugee Division to a person that the person is not a Convention refugee, so that the person may make written submissions to an immigration officer respecting the matters referred to in paragraph (c) of the definition "member of

(3) Sous réserve du paragraphe (4), les exigences relatives à l'établissement visées au paragraphe (1) ne s'appliquent qu'à compter de l'expiration du délai de 15 jours qui suit la notification à la personne, par la section du statut, du refus du statut de réfugié au sens de la Convention, afin que la personne ait la possibilité de présenter par écrit à un agent d'immigration ses observations concernant les question visées

the post-determination refugee claimants in Canada class" in subsection 2(1).

à l'alinéa c) de la définition de « demandeur non reconnu du statut de réfugié au Canada » au paragraphe 2(1).

[…]

As later amended [SOR/97-182]:

Tel que modifié ultérieurement [DORS/97-182]

s 11.4 (2) For the purpose of subsection 6(5) of the Act, a person whom the Refugee Division

art 11.4 (2) Pour l'application du paragraphe 6(5) de la Loi, la personne à laquelle la section du statut a décidé de ne pas reconnaître le statut de réfugié au sens de la Convention :

(a) during the period beginning on February 1, 1993 and ending on April 30, 1997, has determined is not a Convention Refugee is deemed to have submitted an application for landing as a member of the post-determination refugee claimant in Canada class to an immigration officer on the day that the determination is made; and

a) au cours de la période du 1er février 1993 au 30 avril 1997, est réputée avoir présenté à un agent d'immigration une demande d'établissement à titre de demandeur non reconnu du statut de réfugié au Canada le jour où la section du statut a rendu cette décision;

(b) on or after May 1, 1997, has determined is not a Convention Refugee and who intends to apply for landing as a member of the post-determination refugee claimants in Canada class shall submit an application for a determination of whether the person is a member of that class to an immigration officer not later than 15 days after the day the person is notified of the determination by the Refugee Division.

b) le 1er mai 1997 ou après cette date, si elle a l'intention de présenter une demande d'établissement à titre de demandeur non reconnu du statut de réfugié au Canada, doit présenter à un agent d'immigration une demande visant l'attribution de la qualité de demandeur non reconnu du statut de réfugié au Canada dans les 15 jours suivant la date où la section du statut l'a avisée de sa décision.

(3) A person, other than a person referred to in any of subparagraphs (a)(i) to (vii) of the definition "member of the post-determination refugee claimants in Canada class" in subsection 2(1), may make written submissions to an immigration officer respecting any of the matters

(3) La personne, à l'exclusion des personnes visées aux sous-alinéas a)(i) à (vii) de la définition « demandeur non reconnu du statut de réfugié au Canada » au paragraphe 2(1), peut présenter par écrit à un agent d'immigration ses observations concernant les questions visées à l'alinéa

referred to in paragraph (c) of that definition. The submission must be received by an immigration officer before

c) de cette définition ; ces observations doivent parvenir à un agent d'immigration avant la date suivante :

(a) in the case of a person referred to in paragraph (2)(a) whose application for landing is still pending, the later of June 1, 1997 and the day the immigration officer makes a determination respecting that application; and

a) dans le cas d'une personne visée à l'alinéa (2)a) dont le demande d'établissement est pendante, le 1er juin 1997 ou la date de la décision de l'agent d'immigration relative à cette demande, selon la plus tardive de ces deux dates;

(b) in the case of a person who submits an application for a determination referred to in paragraph (2)(b), the later of the end of a period of 30 days after the day the person submits the application and the day the immigration officer makes the determination.

b) dans le cas d'une personne visée à l'alinéa (2)b), la date d'expiration du délai de 30 jours suivant la date de présentation de la demande visant l'attribution de la qualité de demandeur non reconnu du statut de réfugié au Canada ou la date de la décision de l'agent d'immigration relative à cette demande, selon la plus tardive de ces deux dates.

[…]

[…]

L: *Immigration and Refugee Protection Act*, SC 2001, c 27, as assented to on 1 November 2001 ("IRPA")

***Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27, telle que sanctionnée le 1er novembre 2001 (« LIPR »)**

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION

NOTIONS D'ASILE, DE RÉFUGIÉ ET DE PERSONNE À PROTÉGER

Convention refugee

Définition de « réfugié »

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

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

politiques:

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

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

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

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

Person in need of protection

Personne à protéger

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

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

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

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

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

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

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

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

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

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

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

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

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

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

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

Exclusion — Refugee Convention

Exclusion par application de la Convention sur les réfugiés

s 98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

art 98 La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

PRE-REMOVAL RISK ASSESSMENT

EXAMEN DES RISQUES AVANT RENVOI

Protection

Protection

Application for protection

Demande de protection

s 112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

art 112 (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Exception

(2) Despite subsection (1), a person may not apply for protection if

(a) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;

(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or

(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

Exception

(2) Elle n'est pas admise à demander la protection dans les cas suivants :

a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la *Loi sur l'extradition*;

b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);

c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;

d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de désistement ou de retrait de sa demande d'asile.

Restriction

(3) Refugee protection may not result from an application for protection if the person

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection 77(1).

Restriction

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

d) il est nommé au certificat visé au paragraphe 77(1).

Consideration of application

s 113 Consideration of an application for protection shall be as follows:

Examen de la demande

art 113 Il est disposé de la demande comme il suit :

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

Effect of decision

Effet de la décision

s 114 (1) A decision to allow the application for protection has

art 114 (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au

paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

(a) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

Cancellation of stay

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay.

Révocation du sursis

(2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113d) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

N: *IRPA*, s 48

(Added by the Court)

Enforceable removal order

s 48. (1) A removal order is enforceable if it has come into force and is not stayed.

N. *LIPR*, art 48

(Ajouté par la Cour)

Mesure de renvoi

art 48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.

(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

As amended by the *Protecting Canada's Immigration System Act*, SC 2012, c 17, s 20 (the "*PCIS*")

Modifiée par la *Loi visant à protéger le système d'immigration du Canada*, LC 2012, c17 (la « *LPSIC* »)

s 20. Subsection 48(2) of the Act is replaced by the following:

art 20. Le paragraphe 48(2) de la même loi est remplacé par ce qui suit :

(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.

(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.

O: *IRPA*, as amended by *Balanced Refugee Reform Act*, SC 2010, c 8 s 4

(Added by the Court)

O: *LIPR*, modifiée par *Loi sur les mesures de réforme équitables concernant les réfugiés*, LC 2010, c 8, art 4

(Ajouté par la Cour)

Humanitarian and compassionate considerations — request of foreign national

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

s 4. (1) Subsection 25(1) of the Act is replaced by the following:

art 4. (1) Le paragraphe 25(1) de la même loi est remplacé par ce qui suit :

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et

resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.

(1.1) Le ministre n'est saisi de la demande que si les frais afférents ont été payés au préalable.

(1.2) The Minister may not examine the request if the foreign national has already made such a request and the request is pending.

(1.2) Le ministre ne peut étudier la demande de l'étranger si celui-ci a déjà présenté une telle demande et celle-ci est toujours pendante.

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

(1.3) Le ministre, dans l'étude de la demande d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

(2) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

As amended by the *PCIS*, s 13:

Telle que modifiée par la *LPSIC*, art 13

s 13. (1) Subsection 25(1) of the Act is replaced by the following:

art 13. (1) Le paragraphe 25(1) de la même loi est remplacé par ce qui suit :

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

(1.01) A designated foreign national may not make a request under subsection (1)

(1.01) L'étranger désigné ne peut demander l'étude de son cas en vertu du paragraphe (1) que si cinq années se sont écoulées depuis l'un ou l'autre des jours suivants :

(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;

a) s'il a fait une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en dernier ressort sur la demande d'asile;

(b) if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;

(c) in any other case, until five years after the day on which they become a designated foreign national.

c) dans les autres cas, le jour où il devient un étranger désigné.

(1.02) The processing of a request under subsection (1) of a foreign national who, after the request is made, becomes a designated foreign national is suspended

(a) if the foreign national has made a claim for refugee protection but has not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;

(b) if the foreign national has made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

(c) in any other case, until five years after the day on which they become a designated foreign national.

(1.03) The Minister may refuse to consider a request under subsection (1) if

(a) the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and

(b) less than 12 months have passed since the end of the applicable period referred to in subsection (1.01) or (1.02).

(1.02) La procédure d'examen de la demande visée au paragraphe (1) présentée par l'étranger qui devient, à la suite de cette demande, un étranger désigné est suspendue jusqu'à ce que cinq années se soient écoulées depuis l'un ou l'autre des jours suivants :

a) si l'étranger désigné a fait une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en dernier ressort sur la demande d'asile;

b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;

c) dans les autres cas, le jour où il devient un étranger désigné.

(1.03) Le ministre peut refuser d'examiner la demande visée au paragraphe (1) présentée par l'étranger désigné si :

a) d'une part, celui-ci a omis de se conformer, sans excuse valable, à toute condition qui lui a été imposée en vertu du paragraphe 58(4) ou de l'article 58.1 ou à toute obligation qui lui a été imposée en vertu de l'article 98.1;

b) d'autre part, moins d'une année s'est écoulée depuis la fin de la période applicable visée aux paragraphes (1.01) ou (1.02).

[…]

(3) Subsection 25(1.2) of the Act is replaced by the following:

Exceptions

(1.2) The Minister may not examine the request if

(a) the foreign national has already made such a request and the request is pending;

(b) the foreign national has made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division; or

(c) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.

[…]

[…]

(3) Le paragraphe 25(1.2) de la même loi est remplacé par ce qui suit :

Exceptions

(1.2) Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants :

a) l'étranger a déjà présenté une telle demande et celle-ci est toujours pendante;

b) il a présenté une demande d'asile qui est pendante devant la Section de la protection des réfugiés ou de la Section d'appel des réfugiés;

c) sous réserve du paragraphe (1.21), moins de douze mois se sont écoulés depuis le dernier rejet de la demande d'asile, le dernier prononcé de son retrait après que des éléments de preuve testimoniale de fond aient été entendus ou le dernier prononcé de son désistement par la Section de la protection des réfugiés ou la Section d'appel des réfugiés.

[…]

FEDERAL COURT

SOLICITORS OF RECORD

THE DOCKET:	IMM-12508-12
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