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Etienne v. MPSEP: Constitutional Challenge to the PRRA Bar (s. 112(2)(b.1) of the IRPA)

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The PRRA BAR was Manifestly Unconstitutional

- The PRRA Bar constitutional challenge should not really be coming as a surprise to any of us here
- The legislative intent was to deny a risk assessment to all failed refugee claimants for 1 year
- And the government knew that removal Officers have neither the jurisdiction nor expertise to conduct a procedurally fair risk assessment
- So this created an obvious constitutional gap

Charter Compliance in Legislative Drafting

- Surely, in the legislative drafting phase, government lawyers would have flagged the vulnerability of the PRRA Bar to constitutional challenge
  - individuals with additional risk since their RPD hearing will face removal
  - And those who had a refugee hearing, but no risk assessment could also be removed before becoming PRRA eligible

    - RPD may decide cases on other grounds: failure to establish identity; availability of IFA, etc. and not assess risk altogether

The PRRA BAR was Implemented

- Yet, the gov't implemented the PRRA Bar despite the obvious gap
- And yes, of course the legislation breaches section 7 of the *Charter:*
  - Removal w/o risk assessment violates the security of person
  - The legislation does not conform with supreme court jurisprudence
  - The process is unfair & not in accordance with PFJ
  - And it is also not saved under section 1 of the Charter

Background: The *Etienne* Family

- The Etienne family was unfortunately caught by the PRRA Bar regime
- They were facing removal and did not qualify for legal aid
- And they were almost removed from Canada despite clear evidence of risk to their 9 year old son
- The family is originally from Haiti But moved to Turks and Caicos in 1995
- And there they faced Persecution because of their Haitian origin

Background: The *Etienne* Family

- Simeon, family's youngest child suffered significant physical and emotional abuse
- He was repeatedly mistreated by his teachers
- Was frequently beaten, and denied access to the washroom, etc.
- All of this resulted in severe anxiety, nightmares and post-traumatic stress disorder ('PTSD')
- And these symptoms persisted after the family`s move to Canada.

Etienne v. MPSEP: No Prior Risk Assessment

- The Family arrived in Canada in Dec. 2010 and they claimed protection
- Unfortunately the RPD rejected their claim w/o assessing their risk (September 4, 2012)
- The decision was based on the presumed availability of a valid internal flight alternative ('IFA') in the United Kingdom
- The IFA was ultimately not valid – the Etiennes were eligible to apply for citizenship but were not in fact citizens of UK
- And CBSA was unable to arrange for their removal to the UK

Etienne v. MPSEP: Refusal to Defer despite Imminence of PRRA Eligibility

- The Etienne family's Removal to Turks and Caicos was scheduled on August 31, 2013, just four days before the family would become eligible for their PRRA
- They presented clear evidence of risk from their son's psychiatrist that his medical condition would worsen significantly if he was returned to the Turks and Caicos
- And they requested a deferral of their removal until they had received a PRRA, which was denied

Etienne v. MPSEP: Stay of Removal and Challenge to PRRA BAR

- On August 27, 2013, the Applicants filed a notice of leave for judicial review along with a stay motion challenging the CBSA Officer`s refusal to defer their removal
- They also challenged the constitutionality of s.112(2)(b.1) of *IRPA* (the 'PRRA Bar')

Etienne v. MPSEP: Stay of Removal Granted

- On August 30, 2013 the Honourable Mr. Justice Zinn heard the stay motion and granted a stay of their removal:

  - He said, "Although an officer is required to remove persons as soon as "possible," this must mean as soon as legally possible" and that "removal in breach of the *Charter* is illegal" (para 7) [Emphasis Added].

  - He also determined, "The issue raised in this case is whether the removal prior to September 4, 2013 – prior to PRRA eligibility breaches the Applicants' section 7 rights" (para 7).

Etienne v. MPSEP: Strong Evidence of Significant Harm to a Child

- "Based on the fact that no assessment of risk has yet been made, that there is evidence establishing a prima facie case of risk to Simeon, and the binding authority of *Suresh,* I find there is a likelihood of success in this case. Thus a serious issue has been made out" (para 8).
- "Not only has their risk not been assessed, (which by itself may constitute irreparable harm), there is strong evidence that significant harm will befall a young child if he is removed to Turks and Caicos" (para 8) [Emphasis Added].

Etienne v. MPSEP: Pending H&C and PRRA Applications

- On August 30, 2013, the same date as Justice Zinn's stay of removal decision, the Applicants received a negative decision on their H&C application
- This decision was also judicially reviewed and Mr. Justice Rennie recently granted that application on October 6, 2014, finding that an incorrect BIOC test had been applied
- The Applicants also submitted their PRRA application on Oct. 28 2013, and that decision is still pending

Etienne v. MPSEP: Respondent Arguing Mootness

- The Respondent focused its legal submissions in the judicial review of the CBSA officer's refusal to defer exclusively on the issue of mootness
- Mr. Justice Zinn granted leave in the JR on x mas eve (Dec. 24, 2013) despite these mootness arguments

Etienne v. MPSEP: Motion for Judgment Dismissed

- By mid Feb 2014 the Respondent served a Motion for Judgment again arguing mootness
- Mr. Justice Zinn dismissed that motion
- He said the Etienne case dealt with the risk of harm to a child who had never had a risk assessment
- And this was unlike the other PRRA bar cases before the court

Etienne v. MPSEP: CARL Intervention Granted

- In early March 2014, the Canadian Association of Refugee Lawyers ("CARL") brought a motion to be added as a party or in the alternative be granted leave to intervene in this case,

- Mr. Justice Zinn also granted that motion

  - "… the adversarial context will be present regardless of the interests of the personal Applicants" (para 12).
  - "Although judicial economy is served by refusing to permit this moot matter to be heard, it may be a false economy because it is very likely that the present situation will come back before the Court only with different litigants" (para 13).
  - "In this case, determining the issue of the constitutionality of paragraph 112(2)(b.1) is exactly the role of the Court. Its determination does not intrude into the role of Parliament any more than the current applications before this Court" (para 14).

Etienne v. MPSEP: PRRA Bar Breaches s. 7 of the Charter

- In the JR the challenge to the PRRA Bar was based on the violation of section 7 reinforced also by Canada's international obligations under numerous conventions
  - *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984 UNTS 1465 (entered into force 26 June 1987, accessing by Canada 24 June 1987)
  - *Convention on the Rights of the Child*, UNTS 1577, 20 November 1989 (entered into force 2 September 1990, accession by Canada 13 December 1991)

Etienne v. MPSEP: PRRA Bar Breaches s. 7 of the Charter

- We also insisted that the constitutional obligation to assess risk prior to removal had to be carried out in a procedurally fair manner & by a competent PRRA Officer
  - In *Lin v MPSEP* the Court specifically held that removal officers cannot assess risk but can determine whether to defer for a proper risk assessment
- The PRRA process engages section 7 and deprivation of section 7 rights have to be in accordance with PFC, with includes a fair process

Lin v Canada (Minister of Public Safety and Emergency Preparedness), 2011 FC 771

Etienne v. MPSEP: *PRRA Bar Breaches s. 7 of the Charter*

- The SCC has of course recognized in *Singh* and in *Suresh* that removal in the fact of a well-founded fear of persecution or a substantial risk of torture or other such treatment violates section 7 of the Charter

  Singh v Minister of Employment and Immigration, [1985] 1 SCR 177; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; *United States v Burns*, 2001 SCC 7 at paras 59-60).

- And this has been followed in a number of other FC decisions as set out in more detail in my power point slides

Etienne v. MPSEP: Due Diligence Justification?

- Despite this, the Respondent filed an affidavit from Senior Program Advisor, with 3 justifications: due diligence, security and economic efficiency
- With respect to due diligence, they argued, when facing removal,

> "… it is part of the office's **due diligence** to determine whether that risk is new and whether it has been previously assessed. Part of this due diligence **may** consist of reviewing the existing tribunal decisions on file such as the RPD decision. If the risk has not been previously assessed by a previous decision-maker and removal to that country is being pursued, the **usual and expected practice** is for the officer to consider a deferral of removal …" [Emphasis Added].

Etienne v. MPSEP: Due Diligence Justification?

- Senior Program Advisor stated:

  "I can confirm that in this situation consistent with the existing jurisprudence, an enforcement officer's consideration of the allegation of risk in light of the RPD's finding as to an available flight alternative could have led to a short deferral of removal to further consider the alleged risk allegations … [Emphasis Added].

Etienne v. MPSEP: Due Diligence Justification?

- The Senior Advisor seems to be suggesting that in the absence of legislation requiring the Officer to defer the Applicants' removal, where there is additional evidence of risk, the Officer may nonetheless as a matter of due diligence carry out his own risk assessment.
- This is somehow a "usual and expected practice" in deciding whether or not to defer removal
- Also interesting is that the officer "could have" rather than "should have" granted a deferral
- Which suggests this is simply a matter of Officer choosing as opposed to being required by law to defer removal

Etienne v. MPSEP: Due Diligence Justification?

- Realistically, CBSA Officers are not legislatively mandated to consult Legal Counsel to ensure deferral decisions are *Charter* compliant
- Nor do they have any expertise in the area of constitutional law or risk assessment
- CBSA Officers simply follow the current PRRA Bar regime, and in fact, their enforcement function can compromise the independence of their administrative function

Etienne v. MPSEP: Security Justification?

- With respect to the government's security justification, the denial of PRRA to **all Applicants** for one year means minors, the disabled, the elderly, and individuals that do not pose any risk to Canadian security, are caught by this regime
- The legislation lacks a rational connection and is both overbroad and arbitrary.
- The resulting impairment is also devastating, irreversible and grossly disproportionate as opposed to minimal.
- Therefore it is not a breach that can be justified under section 1 of the *Charter*

Etienne v. MPSEP: Efficiency Justification?

- Finally the Respondent also made a rather weak efficiency justification argument
- They said there are thousands of individuals who have remained in Canada despite government issuing removals
- And “the longer it takes to process a removal, the greater the cost and effort to remove the individual.”
- There are also thousands of individuals who have been issued removals but their whereabouts are unknown

Constitutional Question now before the Court in *Etienne v. MPSEP*

- Perhaps the Respondent did not have a chance to read the SCC Suresh decision … para 76 of that decision the Court stated:

> "The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the Charter…" [Emphasis Added]
>
> *Suresh*, supra, at para 76.

Etienne v. MPSEP: Efficiency Justification

- It has long been recognized that some rights are of the highest and most fundamental order
- to allow efficiency to justify a breach of section 7 of the *Charter* means Canada could be sending back a minor without any risk assessment, as the overall 'human cost' of enhancing the efficiency of the removal system

Etienne v. MPSEP: No Section 1 Justification

- Under s. 1, the focus is on whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest.
- The legislative objective of the PRRA Bar is presumably that it is in the public interest to ensure timely and efficient execution of removals and to protect the security of Canada

Etienne v. MPSEP: Efficiency Justification

- The Countervailing public interest to ensure procedural fairness and respect for Canada's Constitution, respect the rule of law and protect our fundamental human rights and international obligations;
- These are the objectives outlined in section 3 of IRPA
- There is no doubt the PRRA bar is unconstitutional and it must be struck down by the Courts in due time

Other PRRA Bar Cases Before Federal Court

- The Federal Court has granted a number of stays in applications for leave and judicial review
- Constitutionality of the PRRA bar also being challenged in *Balasingam* and *Srignanavel,* which have already been heard and are awaiting a decision

  – *Balasingam v Minister of Public Safety and Emergency Preparedness*, 2012 FC 1525
  – *Srignanavel v Minister of Public Safety and Emergency Preparedness,* IMM-13055-12, December 28, 2012.