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"As soon as possible" in s. 48(2) of *IRPA*: Not 'possible' to Enforce Removals in Breach of the Rule of Law and the *Charter*

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Generally A Narrow Discretion

- CBSA officers' discretion in the context of deferral of removal requests is quite narrow.
- Deferral to be reserved for situations where the failure to defer will expose the applicant to risk of death, extreme sanction or inhumane treatment.
- The Enforcement Officer must also assess the compelling circumstances particular to the Applicant and the consequences resulting from his removal.

  - *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 at para 48.
  - *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 51.

s. 48 (2): “As soon as possible”

- Last year, the *Protecting Canada’s Immigration System Act* replaced the term “as soon as reasonably practicable” with “as soon as possible” (Royal Assent: June 28, 2012; Came into force: Dec. 15, 2012).
- Section 48(2) of the *Immigration and Refugee Protection Act* (‘*IRPA*’) now states:

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

“As soon as possible” Does Not Mean No Discretion

- However, enforcement officers still have discretion and cannot fetter their discretion.
- “Wherever there is a discretionary power, discretion must be brought to bear on every case, and that each case must be considered on its own merits.”

  - *Alberta Teachers’ Association v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 19, [2011] AJ No 38 at paras 112-113 and 122.
  - *S.E.I.U., Local 333 v Nipawin District Staff Nurses Assn,* [1973] SCJ No 148, (1973) 41 DLR (3d) 6.
  - Jones & de Villars, Principles of Administrative Law (Carswell: 2009) at page 188.

"As soon as possible" Does Not Mean No Discretion

- Proof of fettering of discretion is a jurisdictional error.
- "As soon as possible" cannot translate to removal of applicants without any exercise of discretion and without consideration of the case on its merits.
  - Donald JM Brown, Q.C., & The Honourable John M Evans, Judicial Review of Administrative Action in Canada, loose-leaf (Toronto: Carswell, 2012) at page 12-48.
  - *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50.
  - *Wellesley Central Residences Inc. v.* Canada *(Minister of National Revenue - M.N.R.),* [2011] FCJ No 956 at para 14.
  - Jones & de Villars, Principles of Administrative Law (Carswell: 2009) at page 175.

"As soon as possible" Cannot Override Administrative Law Principles

- CBSA officers must comply with other relevant administrative law principles:
  - Their decisions must be reasonable.
  - Their decisions must be procedurally fair.
  - They must provide adequate reasons.

Removal Decision Must Also Be *Charter* Compliant

- The CBSA Officer's removal decision must respect rights and values entrenched in the *Canadian Charter of Rights and Freedoms* (*'Charter'*).
- CBSA officers are delegated authority by Parliament and that delegated authority does not extend to rendering decisions in breach of the *Charter.*
- The CBSA Officer's removal decision must also be guided by the relevant jurisprudence of the Courts and Canada's international obligations.

Applying the “Modern Approach" to Statutory Interpretation to s. 48(2)

- The SCC on the modern approach to statutory interpretation:

  “... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

  - Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at page 87.
  - *Re Rizzo and Rizzo Shoes Ltd,* [1998] 1 SCR 27 at 41.
  - *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667.

Applying the “Modern Approach" to Statutory Interpretation to s. 48(2)

- In interpreting the word ‘possible’ in subsection 48(2) of *IRPA* the Court must look to the text, context and purpose of that legislation.

- Other relevant statutory interpretation principles such as the presumption of constitutional validity and the principle of the rule of law must also be applied.

1. Text: Ordinary Meaning of 'Possible'

- Basic Meaning of the word "possible":
  - "likely or suitable in a particular situation for a particular purpose".
  - "within the limits of ability, capacity, or realization".

  - Macmilan Dictionary: http://www.macmillandictionary.com/dictionary/british/possible
  - Merriam-Webster Dictionary: http://www.merriam-webster.com/dictionary/possible

1. Text: Ordinary Meaning of 'Possible'

- The meaning of possible must be informed with what is 'reasonable':

> In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (Emphasis Added).

  - *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para. 47.

1. Text: Ordinary Meaning of ‘Possible’

- “Common sense” applies in determining the ordinary meaning of “possible” in context of s. 48(2).
- In *Begum v. Canada (Minister of Citizenship and Immigration)* Mr. Justice Harrington stated:

> If the Canada Border Services Agency is interpreting section 48 of the Immigration and Refugee Protection Act which now requires removal "as soon as possible" rather than "as soon as practical", so that the only way the removal can be stopped is by court order, then so be it! What happened to common sense? [my emphasis]

- *Begum v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 658 at para 16.

2. Context: “Faster and Fairer?”

- Amended version of s. 48(2) of *IRPA* was intended to make the inland refugee determination and the removal process both “faster and fairer”.

  - Julie Béchard and Sandra Elgersma, “Legislative Summary of Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act” *Social Affairs Division,* 29 February 2012, at section 1.1.

2. Context: “Faster and Fairer”

- Enforcement Officers in their administrative capacity have a duty of fairness.

- They are legitimately expected to be aware of the purpose of *IRPA* and the requirements of the *Charter* when balancing expediency with fairness in removal decisions.

3. Purpose & Objectives of *IRPA*

- Subsection 48 (2) of IRPA must be read in tandem with s. 3(1)(i) of *IRPA* which states that the objective of *IRPA* is "to promote international justice and security by fostering respect for human rights (…)" [Emphasis Added].

- And s. 3(2)(c) of *IRPA* which states that Canada must grant "fair consideration to those who come to Canada claiming persecution"[Emphasis Added].

3. Purpose & Objective of *IRPA*

Most significantly, s. 3(3)(d) and (f) of *IRPA* state:

> **3.**(3) This Act is to be construed and applied in a manner that
>
> (d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms* …
>
> …
>
> (f) complies with international human rights instruments to which Canada is signatory [Emphasis Added].

- *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 48(2), 3(1)(i), and 3(2)(c).

So Then What Does "As Soon As Possible" Mean?

- Considering the text, context and purpose of s. 48 (2) *IRPA*, "as soon as possible" still means reasonably, practically and legally possible.
- Not a green light to enforce removals in breach the *Charter*, and in violation of procedural fairness.
- Not a green light to ignore Canada's international law commitments.
- Not a green light to implementing illegal removals.

‘Rule of law’ as the Guiding Principle

- “The rule of law” as a fundamental guiding principle, serving as the basis for a number of interpretive rules.

- The “rule of law” is explicitly mentioned in the preamble to the *Charter* and was also recognized by the Supreme Court of Canada in the *Secession Reference* as one of the four “fundamental organizing principles of the Constitution”.

  - *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at paras 32 and 48.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- The Applicants are originally from Haiti.
- They moved to the Turks and Caicos Islands in 1995, where they were persecuted due to their Haitian background.
- Simeon, Mr. Etienne's youngest child, was repeatedly subjected to harsh punishments by his teachers.
- He was frequently beaten, denied access to the washroom, and prevented from eating lunch.
- The physical and emotional abuse he suffered at his school in Turks and Caicos resulted in severe anxiety, nightmares and post-traumatic stress disorder ('PTSD'), symptoms which persisted after his move to Canada.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- The Applicants arrived in Canada in December 2010 and claimed protection arising from the persecution they suffered in the Turks and Caicos as a consequence of their Haitian origin.
- They sought protection in Canada but the Refugee Protection Division ('RPD') rendered a negative decision in their case on September 4, 2012.
- The decision was based on the presumed availability of a valid internal flight alternative ('IFA') in the United Kingdom, but the Applicants' risk was never assessed.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- They were subject to a removal order to Turks and Caicos to be enforced on August 31, 2013, just four days before they would become eligible for a pre-removal risk assessment ('PRRA').
- On August 27, 2013, the Applicants received a negative decision from the Enforcement Officer on their deferral of removal request
- They had 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.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- On August 27, 2013, the Applicants filed a notice of leave for judicial review of the Officer's decision ('JR of the removal decision')as well as a notice of motion for the stay of their removal.
- Applicants also challenged the constitutionality of s.112(2)(b.1) of *IRPA* (the 'PRRA bar')
- In effect, the case relates to both the exercise of discretion by the Enforcement Officer under s. 48(2) and the constitutionality of the PRRA bar.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- The Officer's decision to remove the Applicants "as soon as possible", without affording them a PRRA was legislatively made possible by the PRRA Bar combined with the new language of "as soon as possible".
- Relying on "as soon as possible", the Officer was in effect saying that it was "possible" to remove the Applicants without exercising his discretion to allow a short deferral (of few days) to ensure they received a risk assessment.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- On August 30, 2013 the Honourable Mr. Justice Zinn granted a stay of the Applicants' removal:
  - "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].
  - "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).

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- On September 12, 2013, the Applicants received a negative decision on their H&C application, which they had filed a year earlier.
- The decision was dated August 30, 2013, the same day Justice Zinn granted a stay in this case.
- On September 25, 2013, the Applicants filed an Application for Leave and for Judicial Review of this decision ('JR of H&C decision'), which is currently pending.
- On October 28, 2013, the Applicants also submitted a PRRA application, which is also currently pending.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- The Respondent did not argue the merits of the case in the JR of the removal decision before the Court but instead focused on one argument: mootness of the issues the Applicant had raised.

- Despite these mootness arguments, Justice Zinn granted leave for judicial review of the Enforcement Officer's decision on Dec. 24, 2013.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- On February 19, 2014, the Respondent served a Motion for Judgment arguing that a judgement should be granted in this matter without a hearing again on grounds of mootness, without considering the merits of the Applicants' case.
- On March 14, 2014, the Federal Court dismissed the Minister's Motion for Judgment.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- Justice Zinn found that although the situation facing the Applicants would never arise for them again, it may well arise for other individuals in similar situations.

- The Etienne case dealt with the risk of harm to a child and, unlike the individuals involved in the other cases currently before the Court, the Applicants had never received a risk assessment.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- On Friday, March 7, 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.
- CARL argued that the PRRA bar could result in failed refugee claimants being returned to countries where they will face violations to their rights to life, liberty or security of the person and that this would lead to violations of rights guaranteed under the *Charter* and international law.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- In his decision on the Motion for Judgement, Justice Zinn outlined the criteria set out by the Supreme Court in *Borowski v. Canada (Attorney General),* [1989] 1 SCR 342 to decide whether to hear a matter that is moot, namely:

  (1) the presence of an adversarial context;

  (2) concern for judicial economy; and,

  (3) the need for the Court to be sensitive to its role as the adjudicative branch in the political network.

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- With respect to the presence of an adversarial context, Justice Zinn noted that the Canadian Association of Refugee Lawyers (CARL) has now brought forth a motion to be added as a party to the application or, in the alternative, to be granted leave to intervene.

- If CARL's motion is granted, "the adversarial context will be present regardless of the interests of the personal Applicants" (para 12).

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- With respect to judicial economy, Justice Zinn stated, "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).

Case Study on Application of s. 48(2): *Etienne v. MPSEP*

- Finally with respect to the role of the courts, Justice Zinn stated, “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).

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

- The Applicants argue that section 112(2)(b.1) of the IRPA violates section 7 of the *Charter*, is not in accordance with principles of fundamental justice and not saved under section 1.
- The PRRA Bar also violates Canada's international obligations under numerous conventions, including the *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) the *Convention on the Rights of the Child*, UNTS 1577, 20 November 1989 (entered into force 2 September 1990, accession by Canada 13 December 1991).

Constitutional Question now before the Court in Etienne v. MPSEP

- Section 7 is engaged in decisions to deport or extradite if there is the potential for a deprivation of life, liberty or security of the person (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 44; *United States v Burns*, 2001 SCC 7 at paras 59-60)).
- By virtue of section 112(2)(b.1) of *IRPA*, a provision added to *IRPA* by the *Balanced Refugee Reform Act*, failed refugee claimants like the Applicants who may have never had a risk assessment (or may not have had their additional risk assessed since their negative RPD decision) can be subject to removal before they become PRRA eligible.

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

- Many refugee claimants who find themselves in the situation of the Applicants, including children, individuals suffering from serious medical conditions or disabilities and other vulnerable individuals.
- Often, such applicants also have difficulty accessing justice due to their financial circumstances, and access to legal aid and timely legal services is not guaranteed.
- *Charter* protected rights enshrined in our Constitution must be *guaranteed* and administrative decision-makers including Enforcement Officers must be required to comply with its requirements in exercising their discretion.

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

- The gap currently created by the PRRA Bar legislation effectively shifts the onus on Applicants upon receiving a notice of their removal date (in 2-3 weeks) to come up with the necessary funds to bring a stay of removal motion, to ensure their constitutional rights are not violated.
- This is procedural unfair, extremely risky and is not in accordance with the principles of fundamental justice.

Supporting SCC Jurisprudence

- Relevant Supreme Court and federal courts jurisprudence includes:

  Singh v Minister of Employment and Immigration, [1985] 1 SCR 177; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC; *Németh v Canada (Justice)*, 2010 SCC 56; *Orelien v Minister of Employment and Immigration*, [1991] FCJ No. 1158; *Nguyen v Minister of Employment and Immigration*, [1993] FCJ No 47; *Farhadi v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 646; *Ragupathy v Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] FCJ No 1717).

Conclusion

- Removal decisions & “as soon as possible”:
  - Does not eliminate discretion
  - Must be Reasonable: within a range of possible, acceptable outcomes which are defensible in respect of the facts and law
  - Must be fair: expediency does not override procedural fairness
  - Must accord with context and purpose of IRPA
  - Must comply with the *Charter*
  - Must comply with Canada’s international obligations

Conclusion

- The PRRA Bar combined with “as soon as possible” can result in illegal and unconstitutional removals.
- Judicial consideration of s. 48(2) to clarify the exact meaning of “as soon as possible” is necessary.
- Judicial determination of the constitutionality of the PRRA Bar is essential (“as soon as possible”).