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When a Refugee Claim is Denied: Next Steps and Options to Fight Removal from Canada

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Background: Negative Refugee Claim Decision

- Claim was filed at Port of Entry or Inland?
- If arrived through an irregular border crossing (Safe Third Country Agreement ('STCA') would not apply to them)
- If filed at the Canada/US Port of Entry: was he/she eligible under one of the exceptions to the STCA (family member exceptions, unaccompanied minors exception, document holder exceptions and public interest exceptions)?
- How and where the claim was made will determine the claimant's right to an appeal before the Refugee Appeal Division and/or the right to a judicial review

Negative RPD Decision: Overview of how to Advise the Client on Options

- First, what is the date the decision was made and when the client received the decision?

- Secondly, client is eligible for an appeal to the RAD or a judicial review to the Federal Court (to be discussed in more detail in the next section)?

- If the client's case upon review does not present sufficiently strong grounds to pursue an appeal or a judicial review, and the client does not have new evidence that was not reasonably available at the time of their refugee hearing to present on their refugee appeal, then you need to consider other options for the client:

    - Eligibility for a Pre-removal risk assessment (PRRA) after at least 12 months
    - Eligibility for a Humanitarian and compassionate permanent residency application (H&C) after 12 months[1] (unless meets one of the 2 exceptions[2] to this rule);

[1] *Immigration and Refugee Protection Act*, SC 2001, c 27, s.25 (1.2), ['*IRPA*']: The Minister may not examine the request if **(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12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.

[2] *Ibid*., s. 25(1.21), Exception to paragraph (1.2)(c):
25(1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national:

- Eligibility for a TRP after 12 months[3]

- If the client does not pursue an appeal and decides to file an H&C (based on one of the 2 exceptions or after 12 months has passed) you have to advise them that they will not have the benefit of a stay of removal while their H&C is pending;

- If the client faces removal while their H&C is pending, then you have to advise them on their right to seek a deferral of removal from CBSA and if necessary to bring a judicial review leave application to challenge a negative decision by CBSA on their deferral of removal request, along with a stay of removal motion to attempt to stop their removal;

- Similarly, if the client faces removal before becoming eligible for a PRRA after 12 months, you can seek a deferral of removal request, arguing that the client should be granted a deferral until they are eligible for and can submit a PRRA; if that request is denied, you can challenge the negative PRRA decision in Federal Court in a judicial review leave application along with a stay of removal motion to attempt to stop their removal

Refugee Appeal Division

- Section 110(1) of the Immigration and Refugee Protection Act ('IRPA') sets out the provision on the right of appeal to the RAD based on:

    - Questions of law
    - Fact or mixed law and fact

IRPA – Right of Appeal

- **110 (1)** Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection[4].

- Is your client eligible?

- **(a)** who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or
- **(b)** whose removal would have an adverse effect on the best interests of a child directly affected.

[3] *Ibid.*, s. 24 (4): A foreign national whose claim for refugee protection has been rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division may not request a temporary resident permit if less than 12 months have passed since their claim was last rejected or determined to be withdrawn or abandoned.

[4] *IRPA, supra* note 1, s. 110(1).

IRPA – Eligibility (s. 110(2))[5]:

- Person would not be eligible to file an appeal to the RAD if:
    - The person is a designated foreign national[6];
    - Refugee claim was withdrawn;
    - Refugee claims that have been found to have no credible basis;

[5] *IRPA, supra* note 1, s. 110 (2): No appeal may be made in respect of any of the following:
(a) a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a designated foreign national;
(b) a determination that a refugee protection claim has been withdrawn or abandoned;
(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded;
(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if
(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and
(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;
(d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);
(e) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased;
(f) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection.

[6] *IRPA*, section 20.1(1). Bill C-31 amended the *IRPA* to give the Minister of Public Safety (PS) the authority to designate the arrival of persons in Canada as an irregular arrival when, having regard to the public interest, the Minister is of the opinion that:

- the examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility of the persons involved in the arrival, and any related investigations concerning person in the group, cannot be conducted in a timely manner; or
- there are reasonable grounds to suspect that, in relation to the arrival of the group, there has been or will be, a contravention of subsection 117(1) related to organized human smuggling, for profit, or for the benefit of, at the direction of, or in association with a criminal organization or terrorist group.

- Refugee claims that would have been ineligible, but for an exception to the Safe Third Country Agreement;
- Refugee claims from a designated country of origin;
- Refugee claims subject to a cessation or vacation decision;
- A refugee decision made prior to 15 August 2012[7];
- A refugee claim deemed to be rejected because of an order of surrender for extradition under the *Extradition Act*[8].

Merits of the Appeal

- If the client is eligible to file an appeal before the RAD, you then review the RPD decision to determine if the RPD Board Member made errors of law, if there were any issues relating to procedural fairness or the assessment of the decision-maker's assessment of credibility

Standard of Review

- Keep in mind that the governing law on the standard of review on an appeal to the RAD is set out by the FCA in *Canada (MCI) v Huruglica*[9]
- As per the Federal Court of Appeal decision in *Huruglica,* the RAD's role "is to intervene when the RPD is wrong in law, in fact, or in fact and law" through application of the correctness standard.
- The application of the correctness standard indicates no deference to either the outcome or reasoning of the RPD.
- In *Canada (MCI) v Huruglica*[10], the Federal Court of Appeal stated that while the RPD is in many cases better positioned to make credibility assessments, "the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim".[11]
- When credibility findings are in dispute upon appeal, the Federal Court of Appeal outlined two scenarios where the RAD could find that the RPD erred in its credibility finding, while acknowledging that it is not an exhaustive list:

[7] *Order Fixing August 15, 2012 as the Day on which Certain Sections of the Act Come into Force*, SI/2012-65, PC 2012-999 (2012), (26 July 2012): "Pursuant to subsections 60(3), 68 and 69 of the *Protecting Canada's Immigration System Act* (PCISA), assented to on June 28, 2012, and subsection 42(1) of the *Balanced Refugee Reform Act* (BRRA), assented to on June 29, 2010, that section 2 and 36 (as amended by the PCISA) and subsection 15(4) of the BRRA come into force on August 15, 2012".
[8] *IRPA*, s. 105(4).
[9] *Canada (MCI) v Huruglica*, 2016 FCA 93 at paras 67, 76-78, 96-98 ['*Huruglica*'].
[10] *Ibid*., at paras 70-73.
[11] *Ibid*., at para 70.

1) Where testimony was erroneously not found credible due to common sense; and, 2) where testimony was erroneously not found credible due to discrepancies that either did not exist or could not justify such a conclusion.

New evidence

- Does your client have new evidence to present before the RAD?
- s. 110(4) of *IRPA*[12] sets out the type of new evidence that may be presented on a RAD

IRPA – s. 110(4) Evidence that may be presented

> **(4)** On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

New Evidence Criteria:

- Same factors considered as the new evidence rule for pre-removal risk assessments but modified to the particular context in some cases

- See para 13 of *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385[13]

> [13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:
>
> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
>
> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:

[12] *IRPA*, *supra* note 1, s. 110(4).
[13] *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13.

(a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

(b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

(c) contradicting a finding of fact by the RPD (including a credibility finding)?

If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

(a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

(b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

- In *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96,[14] the Federal Court of Appeal concluded that the factors for determining the admissibility of new evidence in the PRRA context (as discussed in *Raza*, 2007 FCA 385) are for the most part, relevant to the RAD's evolution of evidence pursuant to s. 110(4)

> [44] Indeed, in my view it would be difficult to argue that the criteria set out by Justice Sharlow in *Raza* do not flow just as implicitly from subsection 110(4)as from paragraph 113(a). It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible. Indeed, paragraph 171(a.3) expressly provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances." It is true that paragraph 110(6)(a) also introduces the notion of credibility for the purposes of determining whether a hearing should be held. In that regard, however, it is not the credibility of the evidence itself that must be weighed, but whether otherwise credible evidence "raises a serious issue" with respect to the general credibility of the person who is the subject of the appeal. In other words, the fact that new evidence is intrinsically credible will not be sufficient to warrant holding a hearing before the RAD: this evidence would still be required to justify a reassessment of the overall credibility of the applicant and his or her narrative.

[14] *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96.

[45] The same would apply to relevance. This is a basic condition for the admissibility of any piece of evidence, and it would be difficult to imagine the introduction of new evidence being somehow exempt from this criterion. Indeed, Rules 3(3)(g)(iii) and 5(2)(d)(ii) of the *Refugee Appeal Division Rules*, S.O.R./2012-257 implicitly allude to this by providing that both the appellant's memorandum and memorandum in reply must include full and detailed submissions regarding how any documentary evidence the appellant wishes to rely on not only meets the requirements of subsection 110(4), but also how that evidence relates to the appellant (« la façon dont ils sont liés à l'appelant »).

[46] The newness criterion may appear somewhat redundant and does not really add to the explicit requirements of subsection 110(4).

[47] As for the fourth implicit criterion identified by this Court in *Raza*, namely, the materiality of the evidence, there may be a need for some adaptations to be made. In the context of a PRRA, the requirement that new evidence be of such significance that it would have allowed the RPD to reach a different conclusion can be explained to the extent that the PRRA officer must show deference to a negative decision by the RPD and may only depart from that principle on the basis of different circumstances or a new risk. The RAD, on the other hand, has a much broader mandate and may intervene to correct any error of fact, of law, or of mixed fact and law. As a result, it may be that although the new evidence is not determinative in and of itself, it may have an impact on the RAD's overall assessment of the RPD's decision.

[48] Under subsection 110(6) of the IRPA, a RAD hearing may be held, subject to three conditions associated with the existence of new documentary evidence. The principle whereby the RAD proceeds without holding a hearing, as set out in subsection 110(3), is subject to an exception only where the documentary evidence "(a) […] raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) […] is central to the decision with respect to the refugee protection claim; and (c) […] if accepted, would justify allowing or rejecting the refugee protection claim." These three conditions are unquestionably related to the materiality of the new documentary evidence that the RAD could be required to consider. If such is the case, as one would have reason to believe, it would be redundant to require materiality of evidence for it to be admissible as new evidence, to then subject the conduct of a hearing to the same criterion.

[49] Subject to this necessary adaptation, it is my view that the implicit criteria identified in *Raza* are also applicable in the context of subsection 110(4). For the reasons set out above, I am not satisfied that the differing roles of the PRRA and the RAD, and the separate status of persons who perform these functions, are sufficient to set aside the presumption that Parliament intended to defer to the courts' interpretation of a legislative text when it chose to repeat the same essential points in another provision. Not only are the requirements set out in *Raza* self-evident and widely applied by the courts in a

range of legal contexts, but there are very good reasons why Parliament would favour a restrictive approach to the admissibility of new evidence on appeal.

- Recently, Federal Court case *Mavagou v Canada (Citizenship and Immigration)* , 2019 FC 177 summarized the interplay of *Singh* & *Raza*:[15]

> [25] These criteria from *Raza* do not replace the three conditions mentioned in subsection 110(4) of the IRPA but add to them, since they are necessarily implied from the purpose of the provision (*Singh* at subsection 63). Thus in deciding whether new evidence is admissible, the RAD must determine whether the criteria of credibility, relevance, newness and materiality set out in *Raza* are met (*Singh* at para 49). However, the criteria set out in *Raza* require some adaptations when applied to subsection 110(4): for example, the newness test is redundant with subsection 110(4), and the materiality test is less rigid since the RAD has a broader mandate and can accept new evidence that, while not determinative, has an impact on the overall assessment of the claim (*Singh* at paras 46, 47).
>
> [26] I would point out that the newness of documentary evidence cannot be tested solely by the date on which the document was created (*Raza* at para 16). What matters are the facts or circumstances that are sought to be established by the documentary evidence, and that is what must postdate the date of the rejection of the claim. Similarly, the relevance of the document must be demonstrated because it would be difficult to imagine that the presentation of new evidence could be somehow exempted from this test (*Singh* at para 45).

Appeal in writing or oral hearing?

- RAD proceeds in writing but may hold an oral hearing but only if requirements of section 110(3) and 110(6) of *IRPA* are met:

> **110 (3)** Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

[15] *Mavagou v Canada (Citizenship and Immigration)*, 2019 FC 177.

110 (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

- RAD can confirm or substitute an RPD decision, or refer the case back to the RPD for a new hearing[16]
- RAD is taking over 1 year and up to 2 years to make a decision

Judicial Reviews

- Likelihood that the FC will grant leave in your case, meaning you have to present an arguable case[17]
- Credibility findings are difficult to overcome before the FC
- New evidence is not permitted on a judicial review, so the review will be based on the same evidence which was presented to the RPD or RAD, except with respect to procedural fairness issues that couldn't have been raised in the first instance
- Timelines for a judicial review of an RPD or RAD decision: 15 days to file a notice of JR and then 30 days to perfect the JR Application; 10 days for Reply; set for hearing within 30 – 90 days
- The Federal Court may[18]

  (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

  (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

- A number of grounds of review[19] that FC can consider:

  (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

[16] *IRPA*, *supra* note 1, s. 111.
[17] *Bains v. Minister of Employment and Immigration* (1990), 47 Admin. L.R. 317, 109 N.R. 239, paragraph 1 (F.C.A.).
[18] *Federal Courts Act*, RSC 1985, c. F-7, s. 18.1(3).
[19] *Ibid.*, s. 18.1(4).

> **(b)** failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> **(c)** erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> **(d)** based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> **(e)** acted, or failed to act, by reason of fraud or perjured evidence; or
>
> **(f)** acted in any other way that was contrary to law.

- Since SCC decision in *Dunsmuir v. New Brunswick*, deference to first level decision-maker and SOR of reasonableness applied, other than to questions of procedural fairness, jurisdictional questions, constitutional law questions and legal questions of central importance[20]

- The *Minister of Citizenship and Immigration v Vavilov* case before the SCC is now pending a final decision and it is expected to once again adjust the SOR jurisprudence, balancing the ongoing tension between the rule of law and the need for predictability/certainty versus legislative supremacy & delegation of power to administrative decision-making with specialized expertise and decision-making;

- The SCC will likely take an incremental approach and make some adjustments to *Dunsmuir,* maintaining deferential approach but setting out criteria for when the rule of law should prevail in the face of persistent discord in the jurisprudence, particularly with respect to questions of statutory interpretation

Pre-Removal Risk Assessments

- PRRA is essentially a mechanism to ensure an individual's risk is assessed before their removal from Canada is enforced (based on ss. 96 & 97 of the IRPA)
- Based on the principle of non-refoulement and Canada's obligations under the *Refugee Convention*[21], the *Convention against Torture*[22] and *Canada's Charter of Rights and Freedoms*[23]

[20] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 55.
[21] Convention Relating to the Status of Refugees, Canada, 04 June 1969, 189 UNTS 137 (entered into force 22 April 1954).
[22] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Canada, 23 August 1985, 1465 UNTS 85 (entered into force 26 June 1987).
[23] *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.

- If 12 months has passed since your client's refugee decision was made (or since their last PRRA), your client may be eligible for a PRRA
- With the exception of applications at the port of entry and subsequent applications, person has to wait to be notified and given the PRRA Application
- When a person is notified (as per section R160) of their entitlement to apply for a PRRA, the removal order against them becomes subject to a regulatory stay of removal (R232).
- Once the person is removal-ready, the CBSA issues a 'PRRA Notification', advising them that they are entitled to apply for PRRA.
- The notice informs the person that they have 15 days in which to apply, plus an additional 15 days in which to provide written submissions in support of their application.
- pursuant to paragraph A112(2)(b), a person is not entitled to apply for PRRA if their claim for refugee protection was determined to be ineligible because they came to Canada directly or indirectly from a safe third country (United States)

Relevant provisions of IRPA and the Immigration and Refugee Protection Regulations:

Application for protection

- **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).

  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;

  (b.1) 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 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 Appeal Division;

  (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.

Consideration of application[24]

113 Consideration of an application for protection shall be as follows:

- **(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;
- **(b)** a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

Hearing — prescribed factors[25]

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

- **(a)** whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;
- **(b)** whether the evidence is central to the decision with respect to the application for protection; and
- **(c)** whether the evidence, if accepted, would justify allowing the application for protection.

Stay of removal — pre-removal risk assessment[26]

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:

- **(a)** the Department receives confirmation in writing from the person that they do not intend to make an application;
- **(b)** the person does not make an application within the period provided under section 162;
- **(c)** the application for protection is rejected;
- **(d)** [Repealed, SOR/2012-154, s. 12]

[24] *IRPA*, *supra* note 1, s. 113.
[25] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 167 [*'IRPR'*].
[26] *Ibid*., s. 232.

- **(e)** if a decision to allow the application for protection is made under paragraph 114(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
- **(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.

Humanitarian and Compassionate Grounds PR Application

- If your client is not yet PRRA eligible but meets one of the exceptions to the 12-month H&C Bar set out in s.25 (1.21) of the Act[27] (adverse effect on best interest of the child or lack of adequate medical or health care), then you can file a H&C PR application for them

Best interest of the child

- The child will be personally affected by the removal – need to state specific reasons why the removal is not in the best interests of the child;
- There is credible evidence that the removal would have a direct and adverse impact on the child
- The child is under 18 years of age
- The child is either the applicant or a dependent of the applicant
    - Could still ask to assess BIOC for a child who is not a dependent but will need to show that the child's interests are directly affected

Medical condition posing a risk to life

- Where the applicant has a medical condition and will face a risk to life upon removal because medical treatment is not available in their country of origin
- Applicant has to show that removal will result in risk to life that is (1) real, (2) imminent, and (3) foreseeable
- Required evidence:

    - Documents from the applicant's doctor confirming that they were diagnosed with a condition posing a risk to life, the appropriate treatment, and that treatment for the condition is vital to the applicant's survival

[27] *IRPA*, *supra* note 1, s. 25(1.21): Paragraph (1.2)(c) does not apply in respect of a foreign national
- (a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or
- (b) whose removal would have an adverse effect on the best interests of a child directly affected.

- Confirmation from a reliable source in the country of origin (health authorities) attesting to the fact that an acceptable treatment is not available in the applicant's country of origin
  - Based on IRCC policy, it seems that the officer will actually verify themselves whether the medical treatment is available in the specific country
  - Sources they consult include:
    - UK Home Office Country of Origin Reports
    - World Health Organization
    - UNAIDS (for HIV cases)
    - International Organization for Migration

- In general, the application is assessed based on these factors[28]:
  - BIOC
  - Establishment and family ties in Canada
  - Hardship (country conditions, family separation, health considerations etc).
  - Ability to establish in Canada (overseas applicants)
  - Unique/exceptional circumstances that might merit relief

H&C Grounds

Best interests of the child

- Any child directly affected → can be a child inside or outside Canada
- The child must be under 18 years of age when the application is received
- Parent-child relationship not always necessary → but need to show how the child will be directly affected by the applicant's removal
- No hardship threshold for children
- Looking at every factor relating to a child's welfare (non-exhaustive list):
  - The child's age
  - The level of dependency between the child and the H&C applicant
  - The child's establishment in Canada
  - The child's link to the country being assessed
  - Country conditions and potential impact on the child
  - Medical issues or special needs the child may have
  - Impact on the child's education
  - Matter's related to child's gender
- Framework of analysis:
  - What is in the child's best interest?

[28] *Chieu v Canada (Citizenship and Immigration)*, 2002 SCC 3 at paras 40-41; *Ribic v Canada (Employment and Immigration)*, [1985] IABD 4 (IAB T84-9623).

  - To what degree will these interests be compromised by the decision?
- Have to be specific with how removal will affect that particular child

Hardship

- Adverse country conditions → war, natural disaster, unfair treatment of minorities, political instability, economic situation, widespread crime/violence etc.
- Discrimination is also a relevant factor – applicant does not have to be targeted personally
- Not an assessment of risk
- Outside Canada applicants → officer will consider the applicant's circumstances relative to others in the country

Establishment in Canada

- Looking at the initiatives the Applicant undertook while in Canada
- Should not be a comparison with whether the Applicant can re-establish in their country of origin
- Not only looking at conventional markers of establishment → non-conventional markers such as making friends and community involvement should also be considered
- Some of the factors to consider
  - Length of time in Canada
  - Applicant's history of stable employment
  - A pattern of sound financial management
  - Integration into the community
  - Professional, linguistic or other studies
  - Good civil record in Canada
  - Circumstances that resulted in the Applicant remaining in Canada
  - Whether the applicant has cooperated with Canadian authorities

Prospective Establishment

- Only applicable to individuals who are not in Canada → not a factor for standalone H&C applications
- Have to show that the applicant will not be a burden to Canada
- Some considerations:
  - Employment history
  - Sound financial management
  - Support available for them in Canada
  - If they were previously in Canada, did they integrate into the community?
  - Do they have a good civic record?

<u>Gathering Evidence</u>

- Required documents in IMM 5280[29]
- Evidence to support your client's H&C factors:
    - Best interest of the child
        - Interests will vary case-by-case depending on whether the child will be separated from the parent, whether the child will face risk/adverse conditions because will have to leave with parents, etc.
        - Some examples:
            - Impact of separation from parent
            - Benefits of having two parents involved
            - Risk to life in the country to which will be removed
            - Impact on education in the country to which will be removed
    - Establishment/Ties to Canada
        - Canadian education certificates, learning programs certificates
        - Proof of employment in Canada, bank statements, notices of assessment, property ownership
        - Proof of involvement in community, volunteering, membership in organizations, attendance at places of worship
        - Letter from family in Canada, proof of family's permanent status in Canada, family photos
    - Hardship upon return to country of nationality/residence
        - Sometimes the client will not know what we mean by hardship
        - Will vary depending on the client's profile – ex. Gender, race, religion, availability medical treatment
- Evidence to address any particular issues in the case – for example:
    - Criminality
    - Credibility concerns for failed refugee claimants – where relying on same grounds in the H&C application as in the refugee claim

Temporary Residency Permits

- A TRP can be granted with respect to any ground of inadmissibility, no matter how serious.
- A TRP can be issued to a foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of the *Immigration and Refugee Protection Act* (IRPA) [A24(1)].[30]
- It is issued at the discretion of the delegated authority and may be cancelled at any time.
- The Officer will determine whether

[29] This form can be found online in PDF at: https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/kits/forms/imm5280e.pdf.
[30] *IRPA*, *supra* note 1, s. 24.

- the need for the foreign national to enter or remain in Canada is compelling; and
- the need for the foreign national's presence in Canada outweighs any risk to Canadians or Canadian society.

- The issuance of a TRP confers temporary resident status on the holder [A24][31]
- A person who has been issued a TRP for a validity period of at least six months can apply in Canada for a work or study permit and may be given access to health or other social services.
    - Under paragraph 65(b)(i) of the *Immigration and Refugee Protection Regulations* (IRPR), TRP holders with medical inadmissibility [A38(1)] are eligible for permanent residence after three continuous years in Canada.[32]
    - Under paragraph R65(b)(i), TRP holders inadmissible under paragraph A42(1)(a) on grounds of an accompanying family member who is inadmissible under subsection A38(1) or paragraph A42(1)(a) are eligible for permanent residence after three continuous years in Canada.[33]
    - Under paragraph R65(b)(ii), TRP holders with inadmissibilities other than security [A34], violation of human or international rights [A35], serious criminality [A36(1)] and organized criminality [A37] are eligible for permanent residence after five years of continuous residence in Canada[34]

Ministerial Relief

- Ministerial Relief is the only process for permanently overcoming inadmissibility under A34, A35, and A37 (security, human or international rights violations and organized criminality).
- The leading case is *Agraira v Canada (MPSEP)*, 2013 SCC 36[35]
- Although it hasn't been litigated, the range of relevant considerations may now be narrowed by section 42.1(3) of the *IRPA*, which says the following:

> **42.1 […] (3)** In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.

[31] *Ibid*.
[32] *IRPR*, *supra* note 25, s. 65(b)(i); *IRPA*, *supra* note 1, s. 38(1).
[33] *IRPR*, *supra* note 25, s. 65(b)(i); *IRPA*, *supra* note 1, ss. 38(1), 42(1)(a).
[34] *IRPR*, *supra* note 25, s. 65(b)(ii); *IRPA*, *supra* note 1, ss. 34, 35, 36(1), 37.
[35] *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36.

- Other recent changes were the introduction of a formal application and the requirement that the client can only make the application after they receive a final determination of inadmissibility (including the exhaustion of any rights to apply for leave and for judicial review).
- These are governed by sections 24.1 to 24.5 of the *Regulations*
- The CBSA also has its own guide for the application which is worth reading and it is where you can find the form: https://www.cbsa-asfc.gc.ca/travel-voyage/gadr-gddd-eng.html
- Realistically, Ministerial relief is a total illusion. The processing times exceeds a decade. There are over 200 applications in the backlog, and the Minister only decides a handful of cases every year.
- However, the Federal Court does allow applications for *mandamus* in this area. That is a function of the particular facts and circumstances, but the Federal Court held that 4 years was at the outer limit of what was reasonable in *Tameh v Canada (MPSEP)*, 2017 FC 288.

Deferral of Removal Requests and Stay of Removal Motions

- Your client's refugee claim has failed
- Person decided to file a H&C PR application
- You have explained that H&C PR application will not afford them a stay of removal
- They also understand they may have to wait 1 to 1½ years for a first stage decision and 3 years for a final decision
- While your client's H&C PR is pending, CBSA decides to enforce their removal from Canada
- They are called in and receive notice (called a "Direction to Report") that they are going to be removed and they are typically given 3 weeks
- They often come to see you for advice if there is anything you can do to stop their removal
- You will start the process by asking about the procedural history of their case (assuming you were not representing them from the outset) in order to decide on the best strategy:

    - When did they file their refugee claim and what was the decision (request copy of their refugee decision and all of their refugee claim forms, personal and documentary evidence filed at the RPD)
    - Has there been a H&C application filed? If yes, when was it filed? This is important because you need to determine if the client filed a "timely" H&C PR application, which can help with their chances on their deferral of removal request
    - If they filed a H&C decision and a decision was made, ask for a copy of the decision and read it to see if there is any merit for a judicial review
    - Were they PRRA eligible (has 12 months passed since their refugee claim was decided)? If not, when do they become PRRA eligible?
    - If there is a PRRA that was decided, ask for a copy of the decision and review it for whether there is any merit for a judicial review leave application (within 15 days of filing the decision)
    - If there are grounds to challenge the PRRA decision in Federal Court, then you may not need to request a deferral of removal and can apply for a stay of removal motion directly in that same judicial review leave application (see stay of removal motion section below and the test the client would have to meet)

- If they have a pending H&C, you need to assess the merits of the H&C and ask for a deferral of removal until a decision has been made on the H&C application

- Similarly, if they are not yet PRRA eligible, but will become eligible you can request a deferral of removal until the client has become PRRA eligible and can file a deferral of removal

Deferral of Removal: Legislative Provisions and Jurisprudence

Legislative provisions

- The authority granted to enforcement officers is set out in section 48 of the *Act*, which reads as follows[36]:

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

- Under section 48(2) of the *Act*, enforcement officers are required to enforce valid, legal and constitutional removal orders "as soon as possible."
- This section has been interpreted to grant officers a limited discretion to consider requests to defer removals.[37]
- However, the Justices of the Federal Court have continued to apply well-established jurisprudence in assessing the reasonableness of an enforcement officer's refusal to defer a removal.
- Significantly, the Court has also determined that "as soon as possible must mean as soon as legally possible."[38]
- Enforcement officer has a duty of fairness in rendering his decision.
- While Parliament was concerned with expediency, fairness was also a paramount concern.
- Parliament never intended to eliminate the discretionary power of enforcement officers to defer removals in cases where good judgment and reasonableness militated in favour of a deferral.[39]

Governing jurisprudence

[36] *IRPA*, *supra* note 1, s. 48.
[37] *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 ['*Baron*']; *Simoes v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15668 (FC); *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 48.
[38] *Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 550; *Etienne v Canada (Minister of Public Safety and Emergency Preparedness)* [2015] F.C.J. No. 408, para 30 ['*Etienne*'].
[39] Julie Bechard 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, section 1.1.

- The Federal Court of Appeal has recently set out the role of the removal officers in *Peter v Canada (Public Safety and Emergency Preparedness)*, affirming that they cannot conduct a risk assessment themselves.

- Their role is instead to assess whether there is evidence of risk presented in order to decide if they should defer a removal to allow IRCC to conduct a full risk assessment: [40]

> Enforcement officers are not to conduct a full assessment of the alleged risks, nor come to a conclusion as to whether the person is at risk. Rather, officers are to consider and assess the risk-related evidence in order to decide whether deferring removal is warranted in order to allow a full assessment of risk.

- The Court of Appeal further affirmed that officers may defer removal where a failure to defer will expose the applicant to a risk of serious personal harm, death, extreme sanction, or inhumane treatment.[41]

- The Federal Court of Appeal in *Atawnah v Canada (Public Safety and Emergency Preparedness)* specified the scenarios which require the enforcement officer to assess evidence of risk, including deterioration of country conditions, evidence of new risk or evidence of the Applicant's changed circumstances, as well as risks that have never been assessed by a competent decision-maker:[42]

> **20** In *Toth v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1051,… the… Federal Court held, at paragraph 23, that if there is evidence either of changed circumstances of an applicant, or of changed conditions within the country the applicant is to be removed to, with the result that the applicant faces a new or increased risk that has not previously been assessed, or the ability of the state to provide protection has been compromised, "the enforcement officer must assess that risk and determine if a deferral of removal is warranted" (emphasis added).
>
> **21** To similar effect, in *Kopalakirusnan v. Canada (Public Safety and Emergency Preparedness)*, 2013 FC 330, an enforcement officer refused to defer the applicant's removal until he was eligible for a PRRA. The Federal Court stayed the applicant's removal, stating at paragraph 7 of the reasons that, subsequent to an assessment of risk, circumstances may arise that call into question whether an applicant can be removed in a manner that is Charter compliant. An applicant is entitled to adduce evidence of this and "if there is clear and compelling evidence that either the applicant's circumstances have changed or that the conditions in the country to which he is being returned have changed or deteriorated such that the applicant faces a risk of inhumane treatment or death, the applicant is entitled to

[40] *Peter v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 51 at para 7 (Emphasis Added).
[41] *Ibid.*
[42] *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at paras 20-22 ['*Atawnah*']; citing *Toth v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1051; and *Kopalakirusnan v. Canada (Public Safety and Emergency Preparedness)*, 2013 FC 330; and *Etienne*, *supra* note 38.

have his risk assessed in light of that new evidence". Moreover, the evidence in support of the risk need not be conclusive. The mere fact that the evidence involves an element of speculation is not determinative.

22 Finally, in *Etienne* an enforcement officer again refused a request to defer removal. The Federal Court set aside the officer's decision, stating that when the enforcement officer determined that the applicants would not be removed to the internal flight alternative identified by the Refugee Protection Division of the Immigration and Refugee Board, the officer was required to consider and assess the evidence presented, and if the evidence showed that the applicants might be at risk in the country they were to be removed to, the officer "was required to defer removal in order that the risk could be assessed" (emphasis added) (reasons, at paragraph 53). The Federal Court went on to note that the risk the … enforcement officer was required to consider was not restricted to a "new" risk in the sense that it arose after a refugee determination or other process. Rather, the risks an enforcement officer is required to consider include risks that have never been assessed by a competent decision-maker (reasons, at paragraph 54). [Emphasis Added]

- However, the discretion to defer removal is not limited to these cases alone.

- The Court of Appeal in *Atawnah*, emphasized that enforcement officers also retain discretion to defer removal in cases where the applicant will not face risk of death, extreme sanction or inhumane treatment, such as in cases where there is unassessed risk:[43]

> [12] As this Court recognized in *Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646, 257 N.R. 158, at paragraph 3, "a risk assessment and determination conducted in accordance with the principles of fundamental justice is a condition precedent to a valid determination to remove an individual" from Canada.
>
> [13] In the specific context of an enforcement officer's discretion to defer removal, in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 …, at paragraph 51, this Court stated 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".
>
> [14] Thereafter, in *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286 …, at paragraphs 41 and 42, Justice Evans, writing for the Court, observed that if Mr. Shpati had produced some new (post PRRA) evidence of risk, the

[43] *Atawnah*, *supra* note 42, citing *Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646 at para 3, 257 N.R. 158; *Baron*, *supra* note 37; *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286; *Etienne*, *supra* note 38.

enforcement officer would have been required to consider whether the evidence warranted deferral and to exercise his discretion accordingly.

[15] As the Federal Court noted in *Etienne v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 415…, at paragraph 48, after this Court's decision in *Shpati*, the Canada Border Services Agency issued Operational Bulletin: PRG-2014-22 entitled "Procedures relating to an officer's consideration of new allegations of risk at the deferral of removal stage". This bulletin gives enforcement officer's broader discretion to defer removal than the discretion described in *Shpati*:

> In the case of *Shpati*, the FCA confirmed that deferral should be reserved for those applications where:
>
> - failure to defer removal will expose the applicant to the risk of death, extreme sanction or inhumane treatment;
> - any risk relied upon must have arisen since the last Pre-Removal Risk Assessment (PRRA) (or since the last risk assessment); and,
> - the alleged risk is of serious personal harm.
>
> Note that while this case law provides important guidance, officers nevertheless retain discretion to defer removal in cases where these three elements are not strictly met. For example, new evidence may substantiate an allegation of risk that was previously considered. Similarly, evidence that pre-dates the last risk assessment may arise for which there are reasons it was not presented before the last risk assessment.
> [Emphasis added]

[16] Enforcement officers are instructed to "consider/assess the evidence submitted, when there are allegations of risk to the applicant upon execution of their removal order". When an officer concludes that deferral of removal is warranted, the allegations of risk are to be forwarded to Citizenship and Immigration Canada, now Immigration, Refugees and Citizenship Canada, for consideration under section 25.1 of the Act. Among other things, section 25.1 allows the Minister, on his own initiative, to exempt a foreign national from the application of the PRRA bar contained in paragraph 112(2)(b.1) of the Act.[44]

- In addition, the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*[45] held that that officers retain discretion to defer removal where there are "special considerations."

[44] *Atawnah, supra* note 42 at para 12-16.
[45] *Baron supra* note 37.

- Recently, in *Newman v Canada (Public Safety and Emergency Preparedness)*[46], the Federal Court categorized some of the circumstances whereby an officer may defer removal, including special considerations such as a timely application for permanent residence:

> In other instances, both prior to and after Baron, decisions from this Court have recognized that particular circumstances arising in the context of H&C applications can amount to a "special consideration" reasonably supporting a deferral of removal. For example, this Court has referred to "exigent personal circumstances" as a ground to justify a deferral of removal, singling out situations involving children and the impact of the removal on their health or medical condition (*Kampemana v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060 (CanLII) at para 34; *Shase v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1257 (CanLII) at paras 15-19; *Ramada v Canada (Solicitor General)*, 2005 FC 1112 (CanLII) [*Ramada*] at para 3). The Court also pointed out to "compelling individual circumstances" such as personal safety or health issues (*Hardware* at para 14, *Prasad* at para 32; *Ramada* at para 3). The existence of family violence and an abusive relationship was also found to be a factor potentially covered by the "special considerations" (*Blackwood v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 567 (CanLII) at para 37) [Emphasis added].[47]

Stay of Removal Motions

- The test for a stay of removal was set out by the Federal Court of Appeal in *Toth v Canada (Minister of Employment and Immigration)*:
  (1) a serious issue to be tried must be raised;
  (2) the applicant would suffer irreparable harm if a stay order were not granted; and
  (3) the balance of convenience, considering the overall situation of parties, favours granting the order.[48]

Serious Issue

- In *RJR-MacDonald v Canada (Attorney General)*, the Supreme Court of Canada set a low threshold for a serious issue: "[o]nce satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial.
- However, on judicial reviews of a refusal to defer a removal, a higher standard is applied

[46] *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 ['*Newman*'].
[47] *Ibid*., at paras 28, 31-33.
[48] *Toth v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 587 (QL); *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ['*RJR-MacDonald'*].

- The Court must closely examine the merits of the underlying application, and conclude that the applicant has put forward "quite a strong case" (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII) at para 67; *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148 (TD) (CanLII)).
- This is because granting a stay of removal is tantamount to granting the relief sought in the underlying application for leave and for judicial review, namely a deferral of removal.

Irreparable Harm

- The test for irreparable harm does not require that the harm be of a particular magnitude.
- Rather, the Supreme Court of Canada set out the following test in *RJR-MacDonald v Canada (Attorney General)*:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[49]

- In context of a stay of removal motion, there are some inconsistencies in the case law with respect to how this test is applied.
- In *Tesoro v Canada (Citizenship and Immigration)*, Mr. Justice John Evans observed that "it is not surprising to find some inconsistency in the case law" since such motions "can come on at very short notice and decisions are often rendered under severe time constraints."[50]
- Stay motions are consequently highly fact-specific, and the resolution of any particular conflict in the case law largely depends on the facts of the case.
- The ultimate question is always this: can the harm be repaired if the application for judicial review is successful?
- In addition, in order to make out irreparable harm, the Applicant must demonstrate "that removal will result in a reasonable likelihood of harm".[51]
- Irreparable harm also arises from "an obvious threat of ill treatment in the country to which removal will be effected".[52]
- For example, the Courts have consistently held that irreparable harm is clearly made out where the Applicant's life, liberty or safety might be at risk. In *Sivakumar v Canada (Minister of Employment and Immigration)*, the Federal Court of Appeal accepted that threat to life or liberty would constitute irreparable harm.[53] Similarly, in *Membreno-*

[49] *RJR-MacDonald, supra* note 48 at 341 (Emphasis added).
[50] *Tesoro v Canada (Citizenship and Immigration)*, 2005 FCA 148 at para 33, [2005] 4 FCR 210 (CanLII).
[51] *Ellero v Canada (Public Safety and Emergency Preparedness*), 2008 FC 1364 at paras 36-37, [2008] FCJ No 1746; *Soriano v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15040, 188 FTR 58.
[52] *Ali v Canada (Minister of Citizenship and Immigration)*, 2007 FC 751 at para 35, [2007] FCJ No 1003; *Mikhailov v Canada (Minister of Citizenship and Immigration)*, 191 FTR 1, [2000] FCJ No 642 (FCTD) (QL); *Frankowski v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 935 (FCTD) (QL), 98 ACWS (3d) 641; *Louis v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1101 (FCTD) (QL), 94 ACWS (3d) 541.
[53] *Sivakumar v Canada (Minister of Citizenship and Immigration)*, [1996] 2 FC 872 at paras 12, 33, [1996] FCJ No. 707.

Garcia v Canada (Minister of Employment and Immigration), Justice Reed concluded that a possible risk to life would constitute irreparable harm.[54]

Balance of Convenience

- If the Court is satisfied that there is a serious issue and irreparable harm in the context of a pre-removal risk assessment, then the balance of convenience should ordinarily favour the Applicant.[55]
- While the government has a responsibility to remove individuals as soon as possible, that duty is premised on the notion that those individuals have had access to a fair and reasonable pre-removal risk assessment. That is why the legislation grants a stay until a decision is made in the first place. If there is a serious issue that the risk assessment was unreasonable and unreliable, then the public interest in enforcing the removal order is significantly diminished.[56]
- Instead, the focus should shift to the other government objectives set out in section 3 of the *Act*, including the objective "to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution", and to not return people to possible situations of persecution.[57]

[54] *Membreno-Garcia v Canada (Minister of Employment and Immigration*), [1992] 3 FC 306, [1992] FCJ No 535.
[55] *Figurado v Canada (Solicitor General)*, 2005 FC 347 at para 45; *Natoo v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 402 at para 38, 311 FTR 234.
[56] *IRPR*, *supra* note 25, s 232.
[57] *IRPA*, *supra* note 1 ss. 3(2)(c), 115.