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Statutory, Judicial, and Administrative Stays in Immigration Matters

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Statutory, Judicial, and Administrative Stays in Immigration Matters

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DISCLAIMER

The author is a litigator with the Immigration Law Section of the federal Department of Justice. He practiced immigration law in the regional offices of Quebec and Ontario. He received his Bachelor of Law from the University of Montreal and his Masters of Law from the University of Geneva and the Graduate Institute of International Studies.

While all care was taken, the responsibility for any errors or omissions, or any views expressed herein, remains with the author and cannot and should not be attributed to the Department of Justice of Canada.

Abstract

The vast majority of cases heard and determined by the Federal Court of Canada relate to immigration law; approximately 80% of the cases adjudicated by the Federal Court of Canada are immigration matters.[1] *Most immigration cases that reach the Federal Court of Canada eventually result in the individual's removal. A motion for a stay of removal is generally the last recourse a person can seek in order to avoid or, at least, delay his or her removal from Canada. Nearly 800 such motions were adjudicated by the Federal Court of Canada in 2008.*[2] *Despite such a considerable number of cases and the important role these proceedings play in a person's life, no author has ever attempted to organize and present the legislative and jurisprudential rules that govern stays. No books, articles or commentaries have been written to analyze the cases rendered on motions for a stay of removal. No document compiling decisions relating to stay of removal has ever been prepared. Similarly, universities and other institutions do not offer courses or professional development training on this subject. The law relating to stays consists exclusively of cases decided by the Federal Court. A lawyer is expected to prepare a stay motion almost intuitively. Yet, the urgent nature of these proceedings makes it practically impossible for inexperienced counsel to conduct adequate research and properly represent the interests of their client. Hence, many strong cases are lost due to a lack of experience and inadequate preparation. Many excellent lawyers practicing immigration law refuse to introduce such proceedings before the Federal Courts because they are not familiar with the principles governing stays. The law of stays in an immigration context resembles a legal patchwork because the case law is often inconsistent and at times contradictory. The main objective of this paper is to organize, present, and explain, in a clear and concise manner, the law of stays. In particular, this paper examines the three types of stays: legislative, administrative and judicial. The author is convinced that judges and practitioners alike will find this quick reference tool very useful when dealing with motions for a stay of removal.*

Key words: stay, removal, deportation, immigration, injunction, PRRA, Federal Court, litigation, Toth

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[1] Canada, Federal Court, *Statistics: Activity Summary – January 1 to December 31*, 2000-2008.

[2] Canada, Department of Justice Canada, *Statistics: Stay Motions, January 1 to December 31, 2008*.

Résumé

La grande majorité des causes tranchées par la Cour fédérale relève du droit de l'immigration. Environ 80% des causes plaidées devant la Cour fédérale sont en matière d'immigration. La plupart des causes qui se rendent à la Cour fédérale aboutissent au renvoi de la personne concernée. La requête en sursis est généralement le dernier recours que la personne peut exercer afin d'éviter ou à tout le moins retarder son renvoi du Canada. Près de 800 de ces requêtes en sursis ont été décidées par la Cour fédérale en 2008. Malgré un si grand nombre de causes et malgré le rôle important que ces requêtes peuvent jouer dans la vie d'une personne, aucun auteur n'a organisé et présenté les règles législatives et jurisprudentielles qui s'appliquent à ces procédures. Aucun livre, article ou commentaire n'a été rédigé sur ce sujet. De même, il n'existe aucun cours d'université ni de formations professionnelles sur les requêtes en sursis. Le droit des sursis consiste exclusivement de la jurisprudence des cours fédérales. Ainsi, on s'attend à ce qu'un avocat prépare une requête en sursis intuitivement. Toutefois, à cause de la nature urgente de cette procédure, il est pratiquement impossible pour un avocat inexpérimenté de se préparer adéquatement et de bien représenter les intérêts de son client. Beaucoup de causes ayant un fort potentiel sont perdues par manque d'expérience de l'avocat ou à cause d'une préparation inadéquate. La jurisprudence émanant de la Cour fédérale relativement aux sursis semble être incohérente et parfois même contradictoire. L'objectif principal de cet article est d'organiser, de présenter et d'expliquer de façon claire et concise le droit des sursis. Plus particulièrement, nous examinerons en détail les trois types de sursis – les sursis législatifs, administratifs et judiciaires. L'auteur est certain que tant les juges que les plaideurs trouveront cet ouvrage de référence utile dans la préparation et l'adjudication des causes.

Mots-clés : Sursis, renvoi, déportation, immigration, injonction, Toth, ÉRAR, Cour fédérale, litige

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMES

CBSA – Canada Border Services Agency

FC – Federal Court

FCA – Federal Court of Appeal

H&C – Humanitarian and compassionate (grounds)

IAD – Immigration Appeal Division of the Immigration and Refugee Board

ID – Immigration Division of the Immigration and Refugee Board

IRB – Immigration and Refugee Board

IRPA – *Immigration and Refugee Protection Act*

IRPR – *Immigration and Refugee Protection Regulations*

PRRA – Pre-Removal Risk Assessment

RPD – Refugee Protection Division of the Immigration and Refugee Board

I dedicate my thesis to my father Albert to whom I always turn for advice, support, and wise counsel.

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First, I want to express my gratitude to my professor France Houle for her guidance. She provided assistance in numerous ways. She carefully read and reviewed my work throughout my studies. This paper would not have been possible without her valuable comments. I would like to thank my friends and colleagues who generously offered to review my paper and to make suggestions. I am particularly grateful to my colleague and loyal friend Bassam Khouri; from his comments and suggestions, I realized how carefully he had read my work. Many thanks to my colleague and friend, Émilie Tremblay, for her valuable assistance. Also, I want to thank my assistant Sheila for agreeing to correct and edit my work. On a personal note, I would like to thank my wife Vassiléna and my daughter Jasmine for their indulgence and understanding throughout my studies. I spent countless hours away from them conducting research and drafting this paper.

STATUTORY, JUDICIAL, AND ADMINISTRATIVE STAYS IN IMMIGRATION MATTERS

INTRODUCTION

This paper explores the concept of stays in immigration law. Three types of stays can be encountered in the Canadian immigration law practice: statutory, administrative and judicial.

Statutory stays originate from the *Act* or the *Regulations*. Administrative stays are granted by the Minister or his representatives. Judicial stays are granted by the Courts.

A judicial stay is an interim relief against a federal board, agency, tribunal or any other federal decision-making body. It is similar to an interlocutory injunction, subject to the same tripartite test.[3] This tripartite test in immigration matters is now commonly referred to as the *Toth* test based on the leading case in respect of stays.[4] Put differently, a judicial stay is a decree in equity demanding that the immigration authorities refrain from executing or enforcing a given order. Most stay applications are sought to prevent the imminent removal of a foreign national from Canada. In such cases, unless there is a statutory stay of a removal order specified under the *Immigration and Refugee Protection Act*[5] (IRPA) or under the *Immigration and Refugee Protection Regulations*[6] (IRPR), the person who is on the verge of being removed must apply and obtain a stay of a removal order from the

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[3] *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321, [1987] 3 W.W.R. 1, 25 Admin. L.R. 20 (S.C.C.) [*Metropolitan Stores*] (principles to be used when deciding to grant stay being: assessment of a serious issue on the merits of the case, assessment of whether irreparable harm will be suffered and assessment of balance of inconveniences).

[4] *Toth v. Canada (M.E.I.)* (1988), 6 Imm. L.R. (2d) 123, 86 N.R. 302 (F.C.A.) [*Toth*].

[5] R.S.C. 2001, c. 27.

[6] SOR/2002-227.

Federal Court.[7] Hence, a motion for a stay of removal is generally the last recourse a foreign national can seek in order to avoid, or at least delay, his or her removal from Canada. Such a motion may give rise only to an order temporarily staying the foreign national's removal. The foreign national likely to rely on this proceeding would be either an unsuccessful refugee claimant who has exhausted the administrative recourses in Canada, a permanent resident stripped of his or her permanent status, or a temporary resident against whom a removal order became enforceable.

Since stay motions are mostly sought by foreign nationals who are in imminent danger of deportation, the federal departments responsible for immigration and border control[8] are the responding parties before the Federal Court. Occasionally, the roles may be reversed; it may happen that the Crown is the moving party and the foreign national is the responding party. The Crown often files a motion for a stay of proceedings seeking an interim order against an independent administrative board.[9] In cases where the Crown is the moving party, it generally seeks to prevent the release from custody of a person considered a danger to Canadians or who poses a flight risk.[10] A foreign national detained by the Canadian immigration authorities is

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[7] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.2 (allowing the Trial Division of the Federal Court to make such interim orders as it considers appropriate pending final disposition of application).

[8] Pursuant to section 4(2) of IRPA, the Minister of Public Safety is responsible for examinations at ports of entry, arrests, detentions, removals, determinations relating to inadmissibility on grounds of security, organized criminality or violating human or international rights. Conversely, section 4(1) of IRPA states that the Minister of Citizenship and Immigration is responsible for the administration of the Act with respect to all other issues.

[9] See e.g. *Canada (M.C.I.) v. Ambrose*, 2003 FCT 203, 228 F.T.R. 123 (T.D.) [*Ambrose*]; *Canada (M.P.S.E.P.) v. Ouerk*, 2008 FC 167 (T.D.) [*Ouerk*]; *Canada (M.P.S.E.P.) v. Iamkhong*, 2009 FC 52 (T.D.) [*Iamkhong*].

[10] But see *Canada v. Canadian Council for Refugees*, 2008 FCA 40 (F.C.A.) [*Safe Third-1*] where the Crown sought from the Federal Court of Appeal an Order staying the Judgment of the Trial Division which declared invalid the *Agreement*

entitled to detention review hearings.[11] During these detention review hearings, the Immigration Division of the Immigration and Refugee Board – an independent administrative board – is required to determine whether the detention should be maintained.[12] When the Board decides to order the person's release, the Minister of Public Safety might challenge this decision before the Federal Court by way of judicial review. However, the release order is effective immediately;[13] therefore, by the time the judicial review application is disposed of, the points in issue will become moot. To prevent the foreign national's release from detention before the disposition of the Judicial Review, the Crown (the Minister of Public Safety) will seek from the Federal Court an order requesting that the individual's release be stayed pending the final disposition of the judicial review application.

A stay of proceedings is generally requested or granted pending the disposition of the main or of the underlying application. Therefore, it is an accessory to another application – commonly known as the underlying application – and cannot exist without a principal or an underlying application.[14] For instance, a stay of removal may be requested pending the

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Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, also known as the *Safe Third Country Agreement* (STCA) between the Government of Canada and the Government of the United States of America (U.S.) in *Canadian Council for Refugees v. Canada*, 2007 FC 1262, 164 C.R.R. (2d) 130, 74 Admin. L.R. (4th) 176, 317 F.T.R. 246 (T.D.), rev'd 2008 FCA 229, 74 Admin. L.R. (4th) 79 (F.C.A.) [*Safe Third-2*].

[11] Section 57 of IRPA obliges the Immigration Division to review the reasons for the continued detention of a permanent resident or a foreign national once within 48 hours after he or she is taken into detention, once during the seven days following the first detention review, and at least once during each 30-day period following each previous review.

[12] This determination is made in light of the factors enumerated under section 58 of IRPA.

[13] *Immigration Division Rules*, SOR/2002-229, r. 11(3).

[14] See e.g. *Alaa v. Canada (M.P.S.E.P.)*, 2006 FC 14 at paras. 9-13 (T.D.) [*Alaa*].

disposition of a judicial review hearing, in which case a litigant or a party is asking the Court to stay or to delay his or her removal until it hears the case (i.e. the judicial review application) on its merits. In an immigration context, the underlying application is most of the time, if not always, an application for judicial review or an application for leave and for judicial review as described in subsection 72(1) of the *Immigration and Refugee Protection Act*.

The Federal Court of Canada adjudicated nearly 800 stay motions in immigration matters in 2008.[15] In the same year, over 5600 immigration-related proceedings were commenced.[16] This is to say that in 2008, parties filed a stay motion in one out of seven cases. The significance of the number of stays filed becomes clear when we contrast it with the total number of non-immigration proceedings commenced before the Federal Court. Approximately 1600 proceedings were commenced in the Federal Court, in cases that relate to matters other than immigration, including aboriginal law, intellectual property, admiralty, crown responsibility and so on.[17] Stays in immigration matters alone amount to 50% of these non-immigration proceedings. Yet, despite such a considerable number of stay applications and the important role these proceedings may play in a person's life, no author has ever attempted to organize and present the legislative and jurisprudential rules that govern them. Indeed, no books, articles or commentaries have ever been written to analyze and organize the law on stays. No document compiling decisions relating to stays has ever been prepared. Similarly, universities and other institutions do not offer courses or professional development training on this subject.

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[15] Canada, Department of Justice, *Statistics: Stay Motions, January 1 to December 31, 2008*.

[16] Canada, Federal Courts, *Statistics: Activity Summary – January 1 to December 31, 2008*.

[17] *Ibid*.

Litigators are expected to prepare a stay motion almost intuitively. However, stay motions are complex proceedings and require an in-depth knowledge of administrative law, immigration law and federal court procedure. In addition to these competencies, counsel must also be familiar with the jurisprudence or the case law that specifically applies to stays in immigration matters. Furthermore, the urgent nature of these proceedings makes it practically impossible for inexperienced counsel to conduct adequate research and properly represent the interests of their clients. Applicants almost never have more than two weeks, and at times they have as little as 24 hours, to prepare a motion record in support of their request for a stay of their removal.[18] Respondents almost never get more than 48 hours to respond to such a motion[19] and often have only a few hours to prepare their motion record. Needless to say, neither party has sufficient time to conduct exhaustive research and identify every argument that can be raised in support of their position. Yet both parties are expected to produce a sound factual and legal basis for their claims.

As litigation counsel for the federal Department of Justice, the author has witnessed many strong cases fail as a result of inexperience and inadequate preparation of counsel. In many cases, all of the elements required to succeed were present; nonetheless, a large proportion of these

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[18] As a rule, immigration authorities give at least a two-week notice to foreign nationals being removed except when they are detained, in which case the notice may be given 48 hours prior to the removal date. What is more, in cases where the moving party is the Crown, and the underlying application challenges a release order rendered by the Immigration Division during a detention review, Crown counsel often have less than 24 hours to prepare the motion record.

[19] *Federal Courts Rules*, SOR/98-106, r. 364(3), 365 (the applicant shall serve and file his motion record at least two days before the day set out in the notice of motion for the hearing of the motion whereas the respondent to this motion shall serve and file his motion record not later than 2:00 p.m. on the last business day before the hearing of the motion. In practice, these rules give 48 hours to the Respondent to prepare his Motion Record).

cases did not succeed because counsel arguing them failed to raise arguments that could have been decisive.

The complexity of the law of stays is exacerbated by the fact that this field of law resembles a legal patchwork: the case law is often inconsistent and even contradictory. Judges of the Federal Court have very little time to consider the facts and the legal arguments put forth by both parties; they are required to reach extremely important decisions within a few hours or at best within a few days. Hence, much depends on the values of the judge hearing the matter as well as on the particular facts of the case. Nevertheless, neither the urgent nature of these proceedings, the specific facts of a case, nor the values of the judge presiding the hearing make for an acceptable explanation or valid reason for the discrepancies that exist in the law relating to stays.

The main objective of this paper is to organize, present, and explain, in a clear and concise manner, the nature of various types of stays, their genesis, the case law that is applicable to them and the manner in which a motion for stay should be prepared, filed and argued. The author genuinely hopes that this paper will help create some consistency and coherence in the jurisprudence relating to stays. It will also allow counsel acting for both sides to represent more adequately the interests of their clients. The author is confident that judges and practitioners will find this quick reference tool very useful when dealing with motions for a stay of removal because they will find here readily applicable arguments and principles.

This paper is divided into two parts. The first part deals with statutory and administrative stays. Statutory stays, described in the first section of part one, are stays of removal that result from the operation of law, whereas administrative stays, described in the second section of part one, are those granted by the immigration authorities.

With regard to statutory stays, we will explain the circumstances which give rise to them under the *Immigration and Refugee Protection Act*

and its *Regulations*. We will also explain the case law which interpreted different provisions of the *Immigration and Refugee Protection Act* and its *Regulations* as they pertain to statutory stays. The section on statutory stays provides the reader with text of the provision granting the statutory stay, and then further furnishes it with critical commentary and explanatory notes.

As regards the administrative stays, we will examine the duties of the decision-makers entrusted with the discretionary power of granting stays. These decision-makers are commonly known as removals officers or enforcement officers. These officials are often the last individuals a deportee will ever see in Canada because theirs is the responsibility of ensuring that a subject of an enforceable removal order is removed from Canada. In other words, these are the individuals in charge of the person's removal. We will briefly examine their role and the scope of their discretionary power.

The second part is the core of this paper, as it focuses on judicial stays – stays that are granted by the courts. In this part, we shall consider the history and nature of judicial stays. We will examine the origins and the equitable nature of this remedy. We will briefly consider the practical implications that the equitable nature of stays may have in litigation. We will discuss the jurisdiction of the federal and provincial courts. In particular, we will analyze the circumstances which grant the required jurisdiction to hear motions for a stay of removal to provincial courts. In the same section, we will also examine the conditions of the tri-partite test that an applicant is required to meet in order to obtain this remedy from the courts. It is to be observed that in order to succeed, the moving party needs to establish that he raised a serious issue, that he will suffer irreparable harm if the remedy is not granted and that the balance of inconveniences favors him. However, these three factors have a peculiar meaning in immigration matters. We will lay bare the meaning of the terms serious issue, irreparable harm, and the balance

of inconveniences. This section will also include an examination of the procedure that practitioners should follow when filing a stay motion.

Moreover, we will consider the most common arguments raised by moving parties when the underlying application challenges a refusal to grant permanent residence on humanitarian and compassionate grounds, when it challenges the rejection of a pre-removal risk assessment application or when it challenges a refusal to defer the applicant's removal. Similarly, we will examine the arguments that the Crown is likely to raise when seeking an order staying the release of a detained foreign national.

PROLIGOMENON

Before disserting on the subject of stays, it is worthwhile explaining when and how a person reaches the stage of his removal and would be contemplating filing a stay of removal. To understand the concept of removals, one must grasp the meaning of the terms "*removal order*", "*removal order that came into force*" and "*enforceable removal order*".

A removal order is not a term that is defined either in the *Immigration and Refugee Protection Act* or in its *Regulations*. Section 223 of the *Regulations* sets out the three types of removal orders that exist. These are (1) departure orders, (2) exclusion orders and (3) deportation orders.

The differences that exist between these removal orders are important because due to the enforcement of these removal orders, an individual might be required to obtain authorization to return to Canada. For instance, an enforced departure order is the least damaging of them all: it relieves the foreign national from having to obtain authorization in order to return to Canada.[20] The exclusion order, on the other hand, in most circumstances obliges the foreign national to obtain written authorization in order to return

[20] IRPR, *supra* note 6, s. 234.

to Canada for a period of one or two years after its enforcement.[21] The most damaging of them all is the deportation order, which, pursuant to section 226 of the *Regulations*, obliges the foreign national to obtain a written authorization to return to Canada at any time after the deportation order is enforced.

Removal orders may be issued by an officer,[22] by a minister's delegate[23] or by the Immigration Division of the Immigration and Refugee Board.[24] They may be subject to three degrees of imminence or intensity.

The least imminent type of order is the conditional removal order. This removal order may never come into force and it may be cancelled if, for instance, the subject of this conditional removal order is found to be a Convention refugee or a person in need of protection. In such cases, the removal order would simply fall or be cancelled by operation of law. A conditional removal order is normally made against a refugee protection claimant at the port of entry. As soon as an individual claims asylum in Canada, an officer issues a conditional removal order.[25] This conditional removal order is a departure order, which, as we mentioned earlier, is the least draconian type of removal order. The severity of this order is moderated if the individual complies with the removal order and leaves voluntarily, in which case he or she will not need a written authorization to return to Canada. A conditional removal order may then either fall or come into force. It falls when the person is granted asylum or the status of a person

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[21] *Ibid*., s. 225.

[22] See e.g. IRPA, *supra* note 5, s. 49; IRPR, *supra* note 6, s. 228(3) (for refugee protection claimants whose claim has been determined to be eligible to be referred to the Refugee Protection Division of the Immigration and Refugee Board).

[23] IRPA, *ibid*., s. 44(2).

[24] *Ibid*., s. 45(d).

[25] IRPA, *ibid*., s. 49(2); IRPR, *supra* note 6, s. 229(3).

in need of protection because the person can no longer be required to leave Canada. The second possible alternative for a conditional removal order is that it comes into force when one of the events listed in section 49 of IRPA occurs. A removal order that comes into force but is not yet enforceable reaches the second degree of imminence.

Essentially, a removal order made with respect to refugee protection claimants comes into force when their attempt to obtain a status in Canada fails. All other removal orders come into force on the day they are made if there is no right to appeal or on the day of the final determination of the appeal, if an appeal is made.[26]

Section 49 of the *Act* enumerates circumstances when removal orders come into force. This provision consists of two parts. Subsection 49(2) of the *Act* applies to refugee claimants, as it appears from the wording of the provision: "*… a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates…*". As for subsection 49(1) of the *Act*, it applies to all other cases, including foreign nationals with either temporary or permanent resident status.

Paragraph 49(1)(a) of the *Act* states that a removal order comes into force on the day it is made, if there is no right to appeal. Persons most likely to fall within the scope of this provision are those who were found to be inadmissible on grounds of security,[27] violating human or international rights,[28] serious criminality,[29] organized criminality[30] or health.[31] Once an

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[26] IRPA, *ibid*., s. 49(1).

[27] *Ibid*., s. 34.

[28] *Ibid*., s. 35.

[29] *Ibid.*, s. 36.

[30] *Ibid*., s. 37.

officer forms the opinion that a permanent resident or a foreign national is inadmissible on one or more of the grounds enumerated above, he prepares an inadmissibility report, which is then transmitted to the Minister or the Minister's delegate.[32] If the Minister's delegate finds the report well-founded, he or she may, depending on the circumstances of each case, refer the report to the Immigration Division for an admissibility hearing or he or she may issue a removal order.[33] If, instead of making a removal order, the Minister's delegate refers the matter to the Immigration Division, a removal order may still be issued by the latter.[34] The removal order made by the Minister's delegate or the Immigration Division may be final and without a right to appeal if subsection 64(1) of the *Act* applies to the individual. Subsection 64(1) of the *Act* deprives certain inadmissible individuals from their right to appeal; thus, they may be removed as soon as a removal order is made against them.[35] As stated, a removal order comes into force the day it is made if there is no right to appeal.[36]

Conversely, if there is a right to appeal, the removal order comes into force the day the appeal period expires and no appeal is made[37] or the day of

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[31] *Ibid*., s. 38.

[32] While subsection 44(1) of IRPA states that the report should be transferred to the Minister, section 6 of IRPA specifies that the Minister may delegate his powers in writing to designated individuals.

[33] IRPA, *supra* note 5, s. 44(2).

[34] *Ibid*., s. 45(d)

[35] *Ibid*., s. 64(1),(2). See also *Martin v. Canada (M.C.I.)*, 2005 FC 60, 127 C.R.R. (2d) 65, 268 F.T.R. 74 (T.D.) [*Martin*]; *Cartwright v. Canada (M.C.I.)*, 2003 FCT 792, 236 F.T.R. 98 (T.D.) [*Cartwright*]; *Medovarski v. Canada (M.C.I.)*, 2004 FCA 85, 238 D.L.R. (4th) 328, 116 C.R.R. (2d) 268, 248 F.T.R. 319 (F.C.A.) [*Medovarski*], aff'd 2005 SCC 51.

[36] IRPA, *supra* note 5, s. 49(1)(a).

[37] *Ibid*., s. 49(1)(b).

the final determination of the appeal by the Immigration Appeal Division.[38] The use of the term "final" in the English version of the text under paragraph 49(1)(c) of the *Act* may leave the impression that the removal order will not come into force until such time as there has been a final determination of any application for judicial review filed in a timely fashion challenging the Immigration Appeal Division's decision.[39] Such interpretation is inconsistent with the French version of the text where the term "*décision qui a pour résultat le maintien définitif de la mesure*" is used instead of the word "appel". An application for judicial review is not a decision that can maintain the removal order; only a decision rendered by the Immigration Appeal Division may have such an effect.

Subsection 49(2) of the *Act* applies to asylum claimants. This provision sets out circumstances which trigger the coming into force of the removal order against refugee protection seekers. For instance, paragraphs 49(2)(a) and 101(1)(e) of the *Act* stipulate that a removal order comes into force the day the claim is determined to be ineligible due to the fact that the claimant came to Canada from a country designated by the *Regulations*. Only the United States have been designated by section 159(3) of the *Regulations*.

Two important remarks must be made with respect to the designation of the United States. First, subsection 159(4) of the *Regulations* specifies that a claim will not be ineligible under paragraph 101(1)(e) of the *Act*, if the person coming from the United States seeks to enter Canada at a location that is not a port of entry or that is a port of entry which is a harbour port or an airport. In other words, the individual will not be removed immediately pursuant to 49(2)(a) of the *Act*, unless he enters Canada from the United States through a terrestrial border. Secondly, the person seeking to enter

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[38] *Ibid*., s. 49(1)(c)

[39] Lorne Waldman, *Canadian Immigration Law and Practice,* Loose-leaf ed. (Markham: LexisNexis Butterworths, 2008) at 11-131.

Canada from the United States must not be an American citizen or a habitual resident of the United States pursuant to paragraph 101(1)(e) of the *Act*.

Paragraph 49(2)(b) of the *Act* is applicable when an immigration officer determines that a person's claim is ineligible to be referred to the Refugee Protection Division for one of the reasons enumerated under section 101 of the *Act*, except for the reason mentioned under 101(1)(e) of the *Act*, which as we have already seen does not operate a stay of removal. According to paragraph 49(2)(b) of the *Act*, the removal order made against a person who falls within the ambit of section 101 of the *Act* will come into force seven days after the claim is determined to be ineligible. This seven-day delay is provided to allow the person sufficient time to file an application for leave to commence an application for judicial review of the ineligibility determination with the Federal Court.

However, this rule also has an exception. A stay of seven days will not apply if the subject of the removal order resides or sojourns in the United States or St. Pierre and Miquelon and is the subject of a report prepared under subsection 44(1) of the *Act* on their entry into Canada, which would normally result in an inadmissibility determination.[40]

Paragraphs 49(2)(c),(d), and (e) of the *Act* provide that a removal order comes into force 15 days after the final rejection of the person's claim by the Refugee Protection Division.

Finally, the third and the most imminent removal order (or the removal order with the greatest degree of imminence) is the *enforceable removal order*. The subject of this order is in imminent danger of deportation. This is when an individual should seriously consider filing a motion for a stay of removal. An enforceable removal order is defined in

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[40] IRPR, *supra* note 6, s. 231(3)(b).

section 48 of *IRPA* as a removal order which has come into force and is not stayed. When a removal order becomes enforceable the subject of this removal order has an obligation to leave Canada immediately and if he fails to do so, Canadian immigration authorities have an obligation to enforce the removal as soon as practicable.[41] Therefore, very often, a stay of a removal order is the individual's last recourse in Canada.

An understanding of the difference between a removal order that has come into force and an enforceable removal order is of paramount importance.[42] As it appears from subsection 48(1) of the *Act*, for a removal order to become enforceable, two conditions must be met: (1) the removal order must come into force; and (2) the removal order should not be stayed. In the previous paragraphs, we examined the realization of the first condition: the coming into force of a removal order. The following paragraphs deal with circumstances that prevent a removal order which has already come into force from becoming enforceable. These circumstances trigger a stay of the removal order which has already come into force.

PART I – STATUTORY AND ADMINISTRATIVE STAYS

At the outset, it is worthwhile pointing out that a stay, whether statutory, administrative or judicial, does not eliminate a removal order. It simply suspends its enforcement. A removal order which has been stayed becomes unenforceable for the duration of the stay.

A removal order may be stayed through three types of stays: statutory stays, administrative stays and judicial stays. The main distinction between these three kinds of stays is their source. To be more precise, statutory stays

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[41] IRPA, *supra* note 5, s. 48(2).

[42] See generally *Shephard v. Canada (M.P.S.E.P.)*, 2008 FC 379 at para. 32, 177 C.R.R. (2d) 92, 326 F.T.R. 162 (T.D.) [*Shephard*] (where the Federal Court draws a distinction between a removal order that has come into force and an enforceable removal order).

originate from the *Act* or the *Regulations* whereas judicial stays are granted by the Courts. Administrative stays are granted by the Minister or his representatives.

A. STATUTORY STAYS

Statutory stays may be found under several legislative and regulatory provisions. These provisions are: sections 50, 68, and paragraph 114(1)(b) of the *Act* and sections 231, 232, and 233 of the *Regulations*.

1. STATUTORY STAYS UNDER SECTION 50 OF THE ACT

Five situations calling for a statutory stay are enumerated under section 50 of the *Act*, which reads as follows:

Immigration and Refugee Protection Act

50. Stay – A removal order is stayed	50. Sursis – Il y a sursis de la mesure de renvoi dans les cas suivants:
(a) if a decision that was made in a judicial proceeding – at which the Minister shall be given the opportunity to make submissions – would be directly contravened by the enforcement of the removal order;	(a) une décision judiciaire a pour effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;
(b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;	(b) tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;
(c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;	(c) pour la durée prévue par la Section d'appel de l'immigration ou toute autre juridiction compétente;
(d) for the duration of a stay under paragraph 114(1)(b); and	(d) pour la durée du sursis découlant du paragraphe 114(1);
(e) for the duration of a stay imposed by the Minister.	(e) pour la durée prévue par le ministre.

The purpose of subsection 50(a) of the IRPA is to ensure that the immigration authorities do not remove an individual whose presence is

required by the Canadian Courts. The Courts construe this provision very carefully so that potential deportees do not place themselves in a situation where their presence is required with the sole objective of avoiding deportation. Hence, the Courts generally rule that a stay arises only if the person concerned is subject to a judicial order containing specific provisions which would be violated if a deportation order were to be enforced or executed.[43] According to the jurisprudence of the Federal Court, the expression "*direct contravention of a court order*" provided in subsection 50(a) of the Act requires that an express provision of an order be incompatible or irreconcilable with removal of the person concerned.[44]

Statutory provisions must be construed consistently with the scheme and object of the *Act* and the intention of Parliament. Therefore, in certain circumstances, even if an individual's removal may seem to contravene a Court order, the statutory stay will not be applicable. For instance, in *Cuskic,*[45] the Federal Court of Appeal considered whether the execution of a removal order against a person subject to a probation order that contained a direction to report to a probation officer on a specific, periodic basis, would directly contravene the probation order so as to invoke the statutory stay available under paragraph 50(1)(a) of the former *Immigration Act*. The Court of Appeal acknowledged that the obligation of the person concerned to report regularly to his probation officer required that he be in Canada. Notwithstanding this, the Court of Appeal found that paragraph 50(1)(a) could not be literally interpreted without giving appropriate consideration to the overall scheme of the former *Immigration Act*. The Court added at

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[43] *Mobtagha v. Canada (M.E.I.)* (1992), 53 F.T.R. 249 (T.D.) [*Mobtagha*].

[44] *Alexander v. Canada (Solicitor General.)*, 2005 FC 1147, [2006] 2 F.C.R. 681, 279 F.T.R. 45, 49 Imm. L.R. (3d) 5 (T.D.) [*Alexander*].

[45] *Cuskic v. Canada (M.C.I.)*, [2001] 2 F.C. 3, 148 C.C.C. (3d) 541, 186 F.T.R. 299 (F.C.A.) [*Cuskic*].

paragraphs 25 and 26 that a contrary interpretation would result in absurd and unjust consequences since it would defeat the purpose of the *Act*, which was under the former *Immigration Act* and still is under the current *Immigration and Refugee Protection Act* to remove quickly from Canada persons who are inadmissible.

Similarly, in *Alexander*,[46] the Court had to decide whether an order of the Ontario Court of Justice granting Ms. Alexander sole custody of her two Canadian born children, and further ordering that they not be removed from Ontario, created a statutory stay pursuant to subsection 50(a) of the *IRPA*, staying the operation of a valid removal order issued in respect of Ms. Alexander. The Federal Court determined that the Ontario Court's order would only be directly contravened if either of Ms. Alexander's children were removed from Ontario. The Court observed that the removal order applied only to Ms. Alexander, because her two children were Canadian citizens who enjoyed an absolute right to remain in Canada. Thus, the removal order did not interfere with the physical location of Ms. Alexander's children. The Court was of the view that faced with removal, Ms. Alexander could apply to the Ontario Court of Justice for a variation of its order, or Ms. Alexander could make arrangements to leave her children in Canada. The Court did not think that the granting of custody, or sole custody, necessitates the custodial parent maintaining physical care of a child at all times.

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[46] *Alexander*, *supra* note 44. Contra *Ball v. Canada (M.C.I.)*, 2005 FC 1609, 2005 CarswellNat 3927 (T.D.) [*Ball*] (where the Court had to decide whether the removal of an Applicant who applied for divorce and for custody of his three children, would contravene an order of the Quebec Superior Court prohibiting the removal of the children from Canada without the consent of the other parent. The facts of this case are particularly complicated because while two of the Applicant's children were Canadian born citizens and could not be removed, the oldest child was a foreign national. Moreover, the Applicant was asking for a deferral in order to be present at the hearing for custody. The Court distinguished *Alexander*, on the basis that in Ball the oldest child was a foreign national.)

Also, in *Perez*,[47] the Court found that subsection 50(a) of the *Act* is not applicable to an individual who was found not criminally responsible on the charge of first degree murder owing to his mental illness, and who after spending 11 years in a forensic psychiatric institution was released by the British Columbia Review Board under certain conditions. The Court did not believe that the Applicant's removal would directly contravene the conditions imposed by the Review Board, the conditions being that he had to appear for examination if summoned.

In *Garcia*,[48] the applicant removed her child from Mexico without the father's consent. The father filed a motion with the Superior Court of Quebec in accordance with section 20 of the *Act respecting the civil aspects of international and interprovincial child abduction*. The Quebec Court of Appeal dismissed the motion deciding that the child was already settled in his new environment. On the basis of this decision, the child's mother asked for a stay of removal in accordance with subsection 50(a) of the IRPA alleging that the Quebec Court of Appeal prohibited the child's removal. The Federal Court agreed and granted the stay motion. The Minister appealed the decision, claiming that the Court erred in determining that the Quebec Court of Appeal's decision amounted to an order prohibiting the child's removal. The Federal Court of Appeal reversed the trial division's decision and concluded that the Quebec Court of Appeal merely dismissed the motion filed by the child's father and that dismissal could not be interpreted as an order not to remove the child from Canada.

Furthermore, for subsection 50(a) of the *Act* to apply, the removal must contravene an order reached at a judicial proceeding. In *Perez*, the

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[47] *Perez v. Canada (M.C.I.)*, 2005 FC 1371 (T.D.) [*Perez-1*].

[48] See also *Garcia v. Canada (M.C.I. and M.P.S.E.P.)*, 2007 FCA 75, 289 D.L.R. (4th) 378, 41 R.F.L. (6th) 13 (F.C.A.), rev'g 2006 FC 311, [2006] 4 F.C.R. 455, 271 D.L.R. (4th) 565, 289 F.T.R. 77 (T.D.) [*Garcia*].

Minister's representative conceded that a proceeding before a review board was a judicial proceeding. In our opinion, it is not. The *Mobtagha*[49] decision provides support for our position. In that case, the Court held that a removal which contravenes an order emanating from the Lieutenant-Governor of a province does not trigger the application of an equivalent provision under the former *Immigration Act* because it is not an order made by a judicial body. The order was to place an individual found not guilty of an offense due to insanity in custody into a psychiatric clinic.

A classic example that would trigger a stay of removal under subsection 50(a) of the *Act* would be the case of an individual who has an outstanding charge in the criminal courts or was served with a subpoena. Section 234 of *IRPR* leaves no doubt that this type of situation will result in statutory stays under subsection 50(a) of the *Act*. Section 234 of the *Regulations* reads as follows:

Immigration and Refugee Protection Regulations

234. For greater certainty and for the purposes of paragraph 50(a) of the Act, a decision made in a judicial proceeding would not be directly contravened by the enforcement of a removal order if	**234.** Il est entendu que, pour l'application de l'alinéa 50a) de la Loi, une décision judiciaire n'a pas pour effet direct d'empêcher l'exécution de la mesure de renvoi s'il existe un accord entre le procureur général du Canada ou d'une province et le ministre prévoyant :
(a) there is an agreement between the Department and the Attorney General of Canada or the attorney general of a province that criminal charges will be withdrawn or stayed on the removal of the person from Canada; or	(a) soit le retrait ou la suspension des accusations au pénal contre l'étranger au moment du renvoi;
(b) there is an agreement between the Department and the Attorney General of Canada or the attorney	(b) soit le retrait de toute assignation à comparaître ou sommation à l'égard de l'étranger au moment de son renvoi.

[49] *Mobtagha*, *supra* note 43.

> general of a province to withdraw or cancel any summons or subpoena on the removal of the person from Canada

It is important to point out that the burden is on the Minister to prove that section 234 of the *Regulations* is applicable. Therefore, it is always more prudent for the Minister to adduce into evidence a formal written agreement between the Attorney General of Canada or of a province. In *Del Milagro*,[50] the Minister attempted to prove that such an agreement existed by producing a sworn declaration from an immigration officer attesting that the Minister and the Attorney General's office reached an oral agreement to withdraw the criminal charges on removal of the Applicant. The Court concluded that such evidence of an agreement was insufficient since the removal of persons from Canada against their will is a matter of great significance to them. The Court ruled that an agreement should be evidenced in writing and such evidence should be properly placed before the Court where the respondent takes the position that paragraph 50(a) of the *Act* does not operate a stay of removal of a person.

Subpoenas and summons may also trigger a stay of removal. Yet, they should not be mistaken for a Notice of Examination in a civil action. The latter does not operate a stay of removal.[51]

In sum, three important observations may be made from the Federal Court's recent case law with respect to subsection 50(a) of the *Act*. First, the Federal Court seems to have given a narrow scope to the analysis under subsection 50(a), particularly to the words "directly contravened". Secondly, the Court readily refers to the case law surrounding paragraph 50(1)(a) of the former *Immigration Act* because of the similarity between these two

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[50] *Del Milagro v. Canada (M.C.I.)*, 2003 FC 1196 (T.D.) [*Del Milagro*].

[51] *Shulgatov v. Canada (M.C.I.)*, 2002 FCT 12 (T.D.) [*Shulgatov*].

provisions. Finally, the Court cautions against reading the wording of subsection 50(a) of the *Act* in isolation. Instead, the Court prefers construing the provisions of the *Act* harmoniously with its scheme and object and with the intention of Parliament, including the consideration that non-citizens do not have an unqualified right to enter or remain in Canada, and that a valid deportation order must be enforced as soon as is reasonably practicable.[52]

A statutory stay of removal will also apply when the foreign national is completing his or her sentence of imprisonment in Canada. The Courts are often faced with the argument that probation, parole and conditional discharge are "terms of imprisonment" pursuant to subsection 50(b) of the *Act*; therefore, a person under a probation order or parole cannot be removed. Subsection 128(3) of the *Corrections and Conditional Release Act*[53] provides that for the purposes of the *Immigration and Refugee Protection Act,* the sentence of an offender who has been released on full parole or statutory release is deemed to be completed unless the full parole or statutory release has been suspended, terminated or revoked. In addition, in *Mokelu*,[54] the Court specified that a "term of imprisonment" in subsection 50(b) of the *IRPA* means a sentence of incarceration served in a penitentiary, jail, reformatory or prison. Therefore, non-custodial sentences served outside a penitentiary, jail, reformatory or prison are not terms of imprisonment for the purposes of subsection 50(b) of the *Act*. It is now settled law that for the purposes of section 50 of the *Act*, probation,[55] parole,[56] conditional

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[52] *Perez-1*, *supra* note 47 at para. 16.

[53] R.S.C. 1992, c. 20.

[54] *Mokelu v. Canada (M.C.I.)*, 2002 CFPI 757 [*Mokelu*].

[55] *Charles v. Canada (M.C.I.)*, 2005 FC 799 (T.D.) [*Charles*]; *Mokelu, ibid.*

[56] *Jones v. Canada (M.C.I.)*, 2002 FCT 392 (T.D.) [*Jones*]; *Gordon v. Canada (Solicitor General)*, [1993] F.C.J. No 832 (T.D.) [*Gordon*].

sentences,[57] and conditional discharge[58] are not terms of imprisonment and do not bar removal. However, according to an older case, a judicial interim release order by way of recognizance may prevent an individual's removal if it contains a condition requiring the individual to appear before a court.[59]

It is somewhat curious that a conditional sentence is deemed not to be a term of imprisonment for the purposes of subsection 50(b). A conditional sentence is not a probationary measure and its primary goal is not rehabilitative. Probation is primarily a rehabilitative sentencing tool. By contrast, conditional sentences include both punitive and rehabilitative aspects.[60] In certain cases, a conditional sentence may be as onerous as, or perhaps even more onerous than, a term of imprisonment, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.[61] It is reasonable to contemplate that in such circumstances, the courts will apply subsection 50(b) of the *Act* so as to stay the individual's removal in order to allow full reparation to the victim and the community.

A statutory stay may also result from an order rendered by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. Subsection 50(c) coupled with subsection 68(1) of the *Act* provide that in certain circumstances the IAD may stay a removal order. To be able to apply to the IAD for a stay of removal, the person must have a right of appeal to the IAD and must be under an enforceable removal order. Such persons would

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[57] *Mokelu, supra* note 54.

[58] *Perez-1, supra* note 47 at para. 23.

[59] *Williams v. Canada (M.C.I.)*, [1984] 2 F.C. 269 [*Williams*].

[60] *R. v. Proulx*, 2000 SCC 5, 182 D.L.R. (4th) 1, [2000] 4 W.W.R. 21, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 142 Man. R. (2d) 161, [2000] 1 S.C.R. 61 (S.C.C.).

[61] *Ibid.*, p. 92.

most likely fall under the description of subsections 63(2) and 63(3) of the *Act*. These individuals are permanent residents or protected persons against whom a removal order has been made.

In paragraph 70(1)(b) of the former *Immigration Act* a test was set out for the granting of discretionary relief. It is similar but not identical to the test enunciated in section 68(1) of the *IRPA*. Both provisions direct the IAD to consider "all the circumstances of the case". However, subsection 68(1) of the *Act* contains two additional requirements. First, the IAD must consider whether sufficient humanitarian or compassionate considerations exist which could justify the requested relief and second, the IAD is expected to consider the best interests of any child directly affected by the decision.

These slight but important amendments did not affect the IAD's broad discretion in assessing the appropriateness of a stay order. The factors that must be taken into consideration by the IAD vary depending on the facts in evidence. The factors outlined in *Ribic*[62] provide a framework in which discretionary power may be exercised. The *Ribic* factors are the following: (1) the seriousness of the offence leading to the deportation order; (2) the possibility of rehabilitation; (3) the length of time spent in Canada and the degree to which the appellant is established here; (4) the family in Canada and the dislocation to the family that deportation would cause; (5) the support available to the appellant, not only within the family but also within the community; (6) the degree of hardship that would be caused to the appellant by his return to his country of origin.

There may be appeals where some of the listed factors are not relevant. There may also be other factors relevant to an appeal, which are not captured in the list, as this list is not exhaustive. The weight given to any factor may also vary depending upon the facts of the case. In two subsequent

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[62] *Ribic v. Canada (M.E.I.)*, [1985] I.A.B.D. No. 4 (QL) (I.A.D.) [*Ribic*].

and relatively recent decisions, the Supreme Court upheld the factors set out in *Ribic*.[63]

Subsection 68(2) of the Act allows the IAD, when ordering a stay of removal, to impose conditions, to vary or to cancel them. When an individual who was successful in obtaining a stay from the IAD breaches a condition imposed by the IAD, his stay may be cancelled. The IAD is empowered to cancel the stay on application by the Minister or on its own initiative.[64]

A removal order is also stayed for the duration of a stay under paragraph 114(1)(b) of the *IRPA*, which states:

Immigration and Refugee Protection Act

114.(1) Effect of decision – A decision to allow the application for protection has … (b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the Applicant was determined to be in need of protection.	**114.(1) effet de la décision** – La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

Subsection 112(3) of the *Act* concerns an individual who was determined to be either inadmissible on grounds of security, violating human rights, organized criminality, serious criminality or is excluded pursuant to Article 1(F) of the 1951 *Convention relating to the Status of Refugees* or named in a certificate referred to in subsection 77(1) of the *Act*. In other words, even though an individual who was determined to be inadmissible,

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[63] *Chieu v. Canada (M.C.I.)*, 2002 SCC 3, [2002] 1 S.C.R. 84 (S.C.C.) [*Chieu*]; *Al Sagban v. Canada (M.C.I.)*, 2002 SCC 4, [2002] 1 S.C.R. 133, [2002] S.C.J. No. 2 (S.C.C.) [*Al Sagban*].

[64] IRPA, *supra* note 5, s. 68(2)(d).

excluded or was named in a Security Certificate cannot obtain refugee protection in Canada, he may nonetheless be entitled to an indeterminate stay of removal in accordance with paragraph 114(1)(b) of the *Act*.

Before granting a stay under this provision, the Minister will conduct three separate assessments.[65] First, the Minister will conduct a Pre-Removal Risk Assessment (PRRA) under provisions 112(3) and 113(d) of the *IRPA*. These paragraphs provide that applicants who are inadmissible, excluded or named in *security certificates* will have their PRRA applications considered based only on the factors set out in section 97 of the *IRPA*. If the PRRA determination is unfavorable for the Applicant, it ends there – no stay of removal will result. However, if the PRRA results suggest that the Applicant would be at risk of torture if deported to his country, then the second assessment becomes necessary.

The second assessment consists of determining whether the individual is a danger to the security of Canada or to the public in Canada. It may also consist of weighing the severity of the acts committed by the individual.

The third assessment is commonly known as a "restriction assessment". It is a balancing test conducted under section 172 of the *Regulations*. The balancing test consists of weighing the risk to national security or to the public against the risk faced by the foreign national in his country of origin.

A stay under paragraph 114(1)(b) of the *Act* will be granted only in those circumstances where the risk to national security represented by the foreign national is less significant than the risk of torture faced by the Applicant in his country.[66] It is so, because in *Suresh*, the Supreme Court of

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[65] *Sogi v. Canada (M.C.I.)*, 2004 FC 853, 254 F.T.R. 129 (T.D.) [*Sogi*].

[66] *Ibid*.

Canada made it clear that, before deciding to return a person to a country where he or she faces a risk of torture, there must be evidence of a serious threat to national security.[67]

A stay under paragraph 114(1)(b) of the Act is not permanent. According to subsection 114(2), the stay will be cancelled if the Minister determines that the circumstances surrounding the stay have changed. For instance, the country conditions where the individual is being removed to may change so drastically that he or she is no longer at risk. However, certain formalities must be followed in the process of re-examining the stay granted. These formalities are prescribed in 173 of the *Regulations* and they include: a notice of re-examination and another three-stage assessment.

A stay of removal is also provided for under paragraph 50(e) of the *Act*, which must be read in conjunction with section 230 of the *Regulations*. These two provisions are often referred to as "temporary suspension" or "moratorium". The Minister may impose a stay on removal orders with respect to a country if the circumstances in that country pose a generalized risk to the entire civilian population as a result of an armed conflict within the country, an environmental disaster or any other similar situation. The enforcement division of the Department of Public Safety has a list of countries to which removals cannot be enforced. This list is subject to change depending on circumstances. The stay of removal under paragraph 50(e) of the *Act* and subsection 230(1) of the *Regulations* is also indeterminate in that the Minister may cancel the stay if the circumstances no longer pose a generalized risk to the entire civilian population. Also, this "moratorium" stay does not apply to a person who is inadmissible on grounds

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[67] *Suresh v. Canada (M.C.I.)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159 (S.C.C.) [*Suresh*].

of human rights violations, on grounds of criminality or to a person who was excluded under section 98 of the *Act*.[68]

2. STATUTORY STAYS UNDER SECTIONS 231, 232 and 233 OF THE REGULATIONS

Pursuant to section 231 of the *Regulations*, if a person has been determined by the Refugee Protection Division not to be entitled to refugee protection, the removal order against that person will be automatically stayed until such time as the delay for the filing of the application for leave before the Federal Court has elapsed and, if the application for leave is filed, until it is finally disposed of by the court, provided that the applicant files that application for leave within the prescribed fifteen day period.

Thus, the removal order may not be enforced until the Federal Court, the Federal Court of Appeal or the Supreme Court, as the case may be, dismisses the applicant's challenge of the IRB's decision either at the leave stage or upon a judicial review hearing if leave has been granted. However, there are exceptions to this rule.

A stay under subsection 231(2) of the *Regulations* does not apply in cases where the Refugee Protection Division found that the person's claim had "no credible basis".[69] Also, if the person is inadmissible on grounds of serious criminality, his removal will not be stayed pursuant to section 231(3) of the *Regulations*. Similarly, if an immigration officer determines that a person's claim is ineligible for referral to the Refugee Protection Division for one of the reasons enumerated under section 101 of the *Act*, then the removal order against that person will come into force seven days after the claim is

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[68] IRPR, *supra* note 6, s. 230(3).

[69] Section 107(2) of the IRPA confers on the RPD the power to reach a conclusion of "no credible basis" when the Applicant presents no credible or trustworthy evidence on which the RPD could have made a favorable decision.

determined to be ineligible, as provided by section 49(2)(b) of the *Act*. This seven-day delay is provided to allow the person sufficient time to file an application for leave to commence an application for judicial review of the ineligibility determination with the Federal Court. A stay of removal will not operate if the subject of the removal order resides or sojourns in the United States or St. Pierre and Miquelon and is the subject of a report prepared under subsection 44(1) of the *Act* on their entry into Canada, which would normally result in an ineligibility determination.[70]

A removal order is also stayed as soon as the person is notified of his right to file a PRRA application. That stay will remain effective until the final determination of that application. Normally, before removing any individual from Canada, the Department of Citizenship and Immigration must provide that individual with an opportunity to make a PRRA application.[71]

Therefore, the stay of removal under section 231 of the *Regulations* will normally continue operating under section 232 of the *Regulations* once all proceedings before the IRB have ended. Thus, in most situations, a stay of removal under section 231 of the *Regulations* will inevitably lead to a stay of removal under section 232 of the *Regulations* because subsection 160(3) of the *Regulations* obliges the Minister to notify the person of his right to a PRRA application.

It is worthwhile pointing out that only the first PRRA application may operate a stay under section 232 of the Regulations. Indeed, section 165 of the *Regulations* specifically provides that subsequent PRRA applications do not result in a stay of the removal order. This however does not prevent applicants from seeking a judicial stay of their removal until the final determination of their second PRRA application.

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[70] IRPR, *supra* note 6, s. 231(3)(b).

[71] *Ibid*., s. 160(3).

Finally, another statutory stay of removal exists for those who apply for a permanent resident status from within Canada. An application for consideration to remain in Canada on humanitarian and compassionate grounds under section 25(1) of the *Act* is comprised of two separate and distinct assessments.[72] The first assessment consists of determining whether the Applicant should be exempted from the selection criteria related to becoming permanent resident from outside Canada. The second assessment consists of determining whether or not the Applicants intend to establish permanent residence in Canada and whether they are admissible.[73] The stay provided for in section 233 of the *Regulations* comes into effect only after the Minister has assessed the H&C application under the first step of the process and determined that H&C considerations or public policy considerations justify an exemption.

> *It is clear from the text that the stay contemplated by the regulation applies to pending applications for permanent resident status if and only if the Minister has reached the opinion that there are pertinent humanitarian and compassionate or policy considerations. The applicant's H&C application has not yet reached that stage, and therefore, this regulation is not applicable to her situation.*[74]

This stay will operate until the Minister reaches a final determination under the second step of the process. If the application for permanent residence is rejected under the second step, the stay will no longer operate and the removal order will become enforceable.

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[72] *Ibid*., s. 68. See also Department of Citizenship and Immigration, Operation Manual IP-5 "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" 12 May 2008 at para. 5.5.

[73] IRPR, *supra* note 6, s. 68, 72(b), (e).

[74] *Horvath v. Canada (M.C.I.)*, 2004 FC 194 (T.D.) at para. 7.

B. ADMINISTRATIVE STAYS

Administrative stays are not prescribed by law. They are granted by administrative agencies, boards or tribunals. In the context of immigration law, a stay of removal, commonly known as a "deferral to remove" is granted by enforcement officers or expulsion officers, also known as "removal officers". "Removal officer" is a generic term which is often used by the Courts and practitioners in reference to officers who are responsible for the enforcement of the *Act*. A more accurate term for this position is either "enforcement officer" or "expulsion officer". The difference between these two types of officers is that the expulsion officer has powers of arrest whereas an enforcement officer does not.

The Act contains no reference to removal officers, enforcement officers or expulsion officers. The power to defer removal was discovered by the Federal Court in the wording of section 48 of the former *Immigration Act*, which is the equivalent of subsection 48(2) of the *IRPA*. The first case to recognize such power was *Poyanipur*[75] where the Federal Court reasoned as follows:

> *[...] removal officers have some discretion under the Immigration Act concerning, among other things, the pace of the removal once they become involved in making deportation arrangements. This is so because the May Affidavit indicates in paragraph 8 that removals are to be carried out as soon as "reasonably" practicable. This language is also found in section 48 of the Immigration Act. In my view, this language covers a broad range of circumstances which might include a consideration of whether it would be reasonable to await a pending decision on a H&C application before removal.*

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[75] *Poyanipur v. Canada (M.C.I.)* (1995), 116 F.T.R. 4 (T.D.) [*Poyanipur*]; see also *Pavalaki v. Canada (M.C.I.)*, [1998] F.C.J. No. 338 (T.D.) [*Pavalaki*]; *Lewis v. Canada (M.C.I.)* (1996), 37 Imm. L.R. (2d) 85 (T.D.) [*Lewis*]; *Saini v. Canada (M.C.I.)*, [1998] 4 F.C. 325 (T.D.) [*Saini*].

> *Accordingly, the removal officer does appear to have some decision-making power which is subject to judicial review.*

Since then, several important decisions were rendered by the Federal Court where the scope of a removal officer's discretion was thoroughly examined. In particular, the Courts have attempted to define in these decisions the scope of a removal officer's discretion to defer a removal. Although, removal officers' duties and the scope of their discretionary power under section 48 of the *Act* have been discussed extensively in the jurisprudence of the Federal Court, the case law does not provide an exhaustive list of factors that should be considered by the officer. On the contrary, with regard to the relevance of various factors, decisions of the Trial Division are not entirely consistent. This is particularly true with respect to pending applications on humanitarian and compassionate grounds.

It is, however, generally agreed that where a removal order is valid and effective, immediate removal is the rule and deferral is the exception.[76] The courts also recognize that a removal officer may consider travel arrangements when deciding whether to defer a removal.[77] Such arrangements may include ensuring that the subject has all necessary documents to travel or that there are no medical impediments to travel. It would not be reasonably practicable to remove someone who did not have a travel document or who was seriously ill.

In addition to these factors, the most recent jurisprudence of the Federal Court also instructs that a removal officer may consider in the

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[76] *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 at para. 45, 2001 FCT 148, 204 F.T.R. 5 (T.D.) [*Wang*]; *Prasad v. Canada (M.C.I.)*, 2003 FCT 614 at para. 29, 234 F.T.R. 67 (T.D.) [*Prasad*].

[77] *Pavalaki*, *supra* note 75; *Simoës v. Canada (M.C.I.)* (2000), 7 Imm. L.R. (3d) 141, 187 F.T.R. 219 (T.D.) [*Simoes*]; *Wang*, *ibid*; *Boniowski v. Canada (M.C.I.)*, 2004 FC 1161 (T.D.) [*Boniowski*].

exercise of his discretion the best interests of a child[78] and the existence of a pending H&C application that was filed in a timely manner.[79] These issues will be discussed below in much greater detail.

1. DUTIES OF THE OFFICER

The primary responsibility of enforcement officers is to make removal arrangements for persons ordered removed. Enforcement officers are responsible for escorting or accompanying a person subject to removal from Canada. They are also responsible for the safekeeping of documents belonging to foreign nationals under a removal order.

Although a removal officer has no jurisdiction to consider risk allegations, in certain circumstances, he may be required to exercise his discretion and defer removal to allow for the assessment of new evidence related to the alleged risks.[80]

a) Duty to Render a Decision

Every time an agency decides to do something or to do nothing it renders a decision.[81] However, not every communication of information amounts to a decision. For instance, a Direction to Report for Removal is not

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[78] *Munar v. Canada (M.C.I.)*, 2005 FC 1180, 279 F.T.R. 90, [2006] 2 F.C.R. 664 (T.D.) [*Munar*]; *Simoës, ibid*; *Boniowski, ibid*; *Poyanipur*, *supra* note 75; *Melo v. Canada (M.C.I.)*, 188 F.T.R. 39, [2000] F.C.J. No. 403 (T.D.)(QL) [*Melo*]; *Paterson v. Canada (M.C.I.)*, [2000] F.C.J. No. 139 (T.D.)(QL) [*Paterson*]; *John v. Canada (M.C.I.)*, [2002] F.C.J. No. 466 (T.D.)(QL) [*John*].

[79] *Simoës*, *supra* note 77; *Antablioghli v. Canada (M.C.I.)*, 2003 FC 1245 (T.D.) [*Antablioghli*].

[80] *Haghighi v. Canada (M.P.S.E.P.)*, 2006 FC 372 at para. 24, 289 F.T.R. 150 (T.D.).

[81] Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure before the Administrative Tribunals*, Loose-leaf ed. (Toronto: Thomson Carswell, 2004) at 22-1.

a reviewable decision.[82] The same can be said of a letter from a visa officer indicating that the decision would not be reconsidered; such a letter is viewed as a simple courtesy response.[83]

The Federal Court considers the removal officer's exercise of discretion to be a decision-rendering process.[84] In the absence of a legislative provision specifying the form decisions must take, there is no required format for decisions.[85] A decision can be oral or written.[86] Thus, theoretically, a removal officer has no duty to provide a written decision. While there is no requirement to make a request to defer removal in writing, it is preferable for evidential purposes to submit a request in writing. Moreover, a written request is more likely to culminate in a written response. By the same token, communicating a decision orally, especially through the telephone, may be problematic. In *Hinson*,[87] the Court refused to recognize as a decision a simple telephone call, in response to a written inquiry, from a departmental official in which the official advised the applicant that his request for admission to Canada on humanitarian and compassionate (H&C) grounds had been granted. Following this telephone call, Hinson received a letter denying his H&C application. The Court explained that given the repercussions of such a decision on an applicant, a simple telephone call could not be a final determination of an application and consequently was not a reviewable decision.

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[82] *Tran v. Canada (M.C.I)*, 2005 FC 394 at para. 2 (T.D.) [*Tran*]; *Alaa*, *supra* note 14.

[83] *Brar v. Canada (M.C.I.)*, (1997), 140 F.T.R. 163 (T.D.).

[84] *Adviento v. Canada (M.C.I.)*, 2003 FC 1430 at para. 19 (T.D.) [*Adviento*]; *Huseine v. Canada (M.C.I.)*, 2005 FC 388 (T.D.) [*Huseine*].

[85] Macaulay and Sprague, *supra* note 81 at 22-53.

[86] *Shooters Sports Inc. v. Nova Scotia (Liquor License Board)* (1996), 45, Admin. L.R. (2d) 112 (N.S.S.C.).

[87] *Hinson v. Canada (M.C.I.)*, (1994), 29 Admin. L.R. (2d) 114 (T.D.) [*Hinson*].

A removal officer's decision also has important repercussions on an applicant. If a removal officer decides to inform the applicant of his decision by telephone, the applicant may find himself in a difficult situation in case he decides to seek a judicial review of that decision because the courts may follow the *Hinson* case and not view a telephone call as a reviewable decision.

However, such scenarios are hypothetical because removal officers have a practice of replying in writing to requests for deferral. Officers send a standardized letter wherein they inform the applicant that they considered his or her request to defer, but did not think that it was justified in the circumstances. A typical refusal to defer removal by a removal officer would state that:

> *The Minister has an obligation under section 48 of the Immigration and Refugee Protection Act to carry out removal orders as soon as practicable. Having considered your request, I do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case.*

These types of letters were held to be sufficient in many recent decisions of the Federal Court.[88]

The nature of the removal officer's decision is one where the decision-maker has a very limited discretion. Therefore, the Courts are of the view that no actual, formal decision is mandated in the legislation or regulations to defer removal.[89] Instead, the jurisprudence instructs that an officer must acknowledge that he or she has some discretion to defer removal, if it would not be "reasonably practicable" to enforce a removal order at a particular

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[88] *Wright v. Canada (M.C.I.)*, 2002 FCT 113 (T.D.) [*Wright*]; *Boniowski, supra* note 77; *Charles, supra* note 55; *Mann v. Canada (M.C.I.)*, 2004 FC 1763 (T.D.) [*Mann*].

[89] *Boniowski*, *ibid*.

point in time.[90] It is sufficient for an officer to mention that he or she considered the request and did not think that a deferral was appropriate or justified.

Although the Courts recognize that written reasons are not required, in many cases they urge removal officers to take notes.[91] In *Boniowski* the Court explained that the recording of written notes which set out the reasons for an administrative decision fosters better decision-making, and provides a basis of explanation if such decision is challenged on judicial review.

b) Duty to Consider all the Evidence

In support of his or her request, the applicant must submit the evidence justifying the deferral. A failure to present all the evidence to the removal officer in support of his request for deferral will prevent the applicant from relying on this evidence in support of a motion to stay the removal order with an underlying application challenging the removal officer's decision. It is trite law that on judicial review, as well as on stay applications, the Court can consider only the evidence which was placed before the decision-maker.[92]

Although a request to defer removal is a proceeding which need not include a face-to-face hearing, the decision-maker must nonetheless review all the evidence and arguments submitted in support of the application.[93] Failure to consider relevant evidence constitutes a breach of natural justice. However, the officer has no duty to make further inquiries or obtain

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[90] *Ibid*.

[91] See e.g. *Boniowski*, *supra* note 77 at para. 12.

[92] *Pandher v. Canada (M.C.I.)*, 2006 FC 80 (T.D.) [*Pandher*]; *Gallardo v. Canada (M.C.I.)*, 2003 FCT 45 at paras. 7-8, 230 F.T.R. 110 (T.D.) [*Gallardo*].

[93] *Hailu v. Canada (M.C.I.)*, 2005 FC 229 at para. 22, 27 Admin. L.R. (4th) 222 (T.D.) [*Hailu*]; R. Macaulay and J. Sprague, supra note 81, at 22-7.

additional information from anywhere else, including other agencies.[94] In *Hailu*,[95] the Applicant was alleging that the removal officer had a duty to obtain the applicant's PRRA Application from the Department of Citizenship and Immigration. The Court rightly dismissed this argument. Similarly, the removal officer has no obligation to seek out and analyze the submissions in the H&C application even when he knows that such an application has been submitted.[96] Furthermore, the officer has no duty to defer removal on his own initiative if no request to do so has ever been made.[97]

c) Duty to Provide Reasons

As mentioned previously, to the extent that it is practical to do so, an agency must always strive to provide reasons for its decision.[98] The Supreme Court of Canada outlined a number of purposes that reasons may serve.[99] With respect to removal officers, the Federal Court acknowledges that while note-taking is not mandatory, the recording of written notes by removal officers should be encouraged.[100] However, a question that needs to be answered is whether these notes should be taken to constitute the removal officer's reasons. In some cases, the Courts viewed that they did.[101]

The most recent case law indicates that even the complete absence of written reasons from a removal officer is not in and of itself a reason for the

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[94] *Hailu*, *ibid.*

[95] *Ibid*.

[96] *Haghighi*, *supra* note 80 at para. 30.

[97] *Mann, supra* note 88; *Thompson v. Canada (M.P.S.E.P.)*, 1 December 2008, Imm-5188-08, de Montigny J. [*Thompson*].

[98] Macaulay and Sprague, *supra* note 81, at 22-55.

[99] *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, 243 N.R. 22, 14 Admin. L.R. (3d) 173 (S.C.C.) [*Baker*].

[100] *Boniowski*, *supra* note 77 at para. 12.

[101] *Osei v. Canada (M.C.I.)*, 2005 F.C.J. No.1667 (T.D.).

reviewing Court to intervene.[102] There is however one case where the Court stated in an *obiter* that a complete absence of reasons raises a serious issue:

> *Notwithstanding the decision of the Court in Hailu v. Canada (Solicitor General), 2005 FC 229 (where no question was certified), with great respect, I would likely have concluded that a serious issue arose from the absence of any explanation anywhere for the decision not to defer removal (i.e. whether contained in the officer's notes, in the decision letter or by affidavit). This Court has held that a refusal of deferral may carry profound implications for the person concerned. (See, for example, Thomas v. Canada (M.C.I.) 2003 F.C. 1477). Accordingly, I wish to underscore the Court's comments in Boniowski v. Canada (M.C.I.), 2004 FC 1161 that the respondent minister should "encourage" as a regular practice the keeping of notes by removals officers with respect to the exercise of their discretion whether to defer removal. Such notes fulfill any reasons requirement and would allow the Court to consider allegations of bias, fettering of discretion, breach of principles of fairness and the like. The absence of any note, affidavit or meaningful statement in a decision letter as to why deferral was refused should not, in my view, be allowed to immunize from effective judicial review the exercise of an, albeit limited, discretion.*[103]

Moreover, if the removal officer took notes and the applicant requests them in accordance with the law, the officer is obliged to provide them.[104] Failure to provide these notes upon request, if such notes exist, may raise a serious issue at the stage of a judicial stay application.[105] If, however, the

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[102] *Boniowski*, *supra* note 77; *Mann, supra* note 88; *Charles, supra* note 55; *Hailu, supra* note 93.

[103] *Man v. Canada (M.C.I.)*, 2005 FC 454 at para 13 (T.D.) [*Man*]. *Cf. Jones v. Canada (M.C.I.)*, 2007 FC 302 at para. 14 (T.D.) [*Jones-1*].

[104] *Thomas v. Canada (M.C.I.)*, 2003 FC 1477 (T.D.) [*Thomas*]; *Guizar v. Canada (M.C.I.)*, 10 july 2006, IMM-3730-06, Gauthier J (T.D.).

[105] *Thomas*, *ibid*; *Guizar*, *ibid.*

applicant fails to request the officer's reasons or her notes to file, he will be barred from raising this issue in an application for a stay of removal before the Federal Court.[106]

PART II – JUDICIAL STAYS

A. POWER AND JURISDICTION OF THE COURT

1. PROVINCIAL SUPERIOR COURTS

The jurisdiction of the provincial superior courts is general and inherent. Their jurisdiction to administer federal as well as provincial law is to be presumed.[107] This presumption admits of exceptions. Where, in accordance with section 101 of the *Constitution Act*, the federal Parliament sets up additional courts for the better administration of some federal statutes, the Parliament thereby shows an intention to derogate from the principle that provincial superior courts have jurisdiction in those matters.[108] In other words, when Parliament grants exclusive jurisdiction to a special court for the administration of specific laws, provincial superior courts are stripped of their jurisdiction over the same laws.[109]

There are two limitations to the federal Parliament's power to encroach on provincial superior courts' jurisdiction. First, the jurisdiction conferred upon the special court must be founded on exclusive federal powers under section 91 of the *Constitution Act*.[110] Secondly, the federal Parliament

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[106] *Chavez v. Canada (M.P.S.E.P.)*, 2006 FC 830 at para. 17 (T.D.) [Chavez].

[107] *Board v. Board*, [1919] A.C. 956 at 962-963 (J.C.P.C.); *Ontario (A.G.) v. Canada (A.G.)*, [1947] A.C. 127 at 151 (J.C.P.C.); *Three Rivers Boatman Ltd. V. Conseil canadien des relations ouvrières*, [1969] S.C.R. 607 at 618-619 (S.C.C.); *Northern Pipeline Agency v. Perehinec*, [1983] 2 S.C.R. 513 at 521-522 (S.C.C.).

[108] *Canada v. Foundation Co. of Canada*, [1980] 1 S.C.R. 695 (S.C.C.).

[109] *Canada (A.G.) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 328-329 (S.C.C.).

[110] *Ibid*.

lacks the constitutional authority to strip the provincial superior courts of the power to declare a federal statute unconstitutional.[111]

The federal Parliament exercised its power under section 101 of the *Constitution Act* and established the Federal Courts. The principal grant of exclusive jurisdiction to the Federal Courts is in respect of judicial review of federal administrative tribunals.

Since the inception of the Federal Courts, the provincial superior courts no longer have jurisdiction to hear applications for a judicial review of decisions emanating from federal administrative tribunals, unless the constitutionality of a statute or that of a provision is in issue.[112] For this reason, the Federal Court has an exclusive mandate over immigration matters.[113] Thus, provincial superior courts have no jurisdiction to hear stays of removal which do not involve constitutional issues. Only in those cases where challenges to the constitutionality of a statute or the Charter are raised, do the superior courts have concurrent jurisdiction with the Federal Courts to entertain stay motions.[114] Regrettably, litigants, who are unsuccessful before the Federal Court, often bring stay motions before provincial superior courts and raise constitutional issues only in order to grant jurisdiction to the superior courts. The superior courts consistently refuse to hear such

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[111] *Ibid*.

[112] *Pringle v. Fraser*, [1972] S.C.R. 821 at 826 (S.C.C.); *May v. Ferndale Institution*, 2005 SCC 82, 261 D.L.R. (4th) 541, [2006] 5 W.W.R. 65, 204 C.C.C. (3d) 1, 34 C.R. (6th) 228, 136 C.R.R. (2d) 146, 38 Admin. L.R. (4th) 1, 49 B.C.L.R. (4th) 199 (S.C.C.).

[113] *Pringle v. Fraser*, *ibid*.; *May v. Ferndale Institution*, *ibid*.; *Zundel v. The Queen*, (2004) 186 O.A.C. 196, 241 D.L.R. (4th) 362 at 366.

[114] *Zundel*, *ibid*. at 366; *Torres-Samuels (Guardian ad item of) v. Canada (M.C.I.)* (1998), 42 Imm. L.R. (2d) 290 (B.C.S.C.), at 298 [*Torres-Samuels*], aff'd 158 D.L.R. (4th) 254, [1999] 1 W.W.R. 343, 49 B.C.L.R. (3d) 7 (BC.C.A.).

applications and refer parties back to the Federal Court.[115] The Supreme Court, as well as provincial courts of appeal, confirmed that in immigration matters, superior courts should yield jurisdiction to the Federal Court even when both courts have a concurrent jurisdiction.[116] The Courts explained that the legislator has put in place complete, comprehensive and expert procedure for the review of administrative decisions in immigration matters and the Federal Court is rather the effective and appropriate forum.

In *Nagalingam*, the Ontario Superior Court held that : "*In rare immigration cases where the constitutional or Charter issue is preeminent, it may be appropriate for this Court to assume jurisdiction, as the Court of first instance, not by a back door attempt at an appeal when all other remedies run dry. Such was the case in Ahani v. Canada (Attorney General) [2002] O.J. No. 90 (C.A.)*".[117] If the *lis* of the application can be properly characterized as an immigration matter, the superior Court should refuse to hear it.[118] In *Ahani*,[119] the provincial superior court refused to decline jurisdiction and heard the stay motion. In that case, the issue was whether the applicant had a constitutional right as a principle of fundamental justice guaranteed by s. 7 of the Charter, not to be removed from Canada until his petition to the United Nations Human Rights Committee had been considered.

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[115] *Nagalingam v. Canada (A.G.)*, 5 December 2005, Wilson J., (Ont. Gen. Div.) [*Nagalingam*]; *Zolfiqar v. R.* (1998), 49 Imm. L.R. (2d) 116 (Ont. Gen. Div.); *Torres-Samuels, ibid.*; *Hazinsky c. Canada (P.G.)*, [2004] J.Q. no 9237 (Q.S.C.); *Gosczyniak v. Lewis*, (2001) 16 Imm. L.R. (rd) 74; *R. v. Judge*, [1998] Q.J. No. 2322 (QL); *Sara Centre de prévention Parthenais*, [1995] J.Q no. 2465.

[116] *Reza v. Canada*, [1994] 2 S.C.R. 394; *Francis (Litigation guardian of) v. Canada (M.C.I.)*, [1999] O.J. No. 3853, (1999) 179 D.L.R. (4th) 421 (Ont. C.A.) [*Francis*]; *Zundel, supra* note 113, at 366; *Torres-Samuels, supra* note 114; *Re Peiroo v. Canada (M.E.I.)* (1989) 69 O.R. (2d) 253 (Ont. C.A.).

[117] *Nagalingam v. Canada (A.G.)*, *supra* note 115 at para. 37.

[118] *Francis*, *supra* note 116 at para. 12.

[119] *Ahani v. Canada (A.G.)*, [2002] O.J. No. 90 (Ont. C.A.).

This case revolved more around the Charter and international law issues than around immigration law. Therefore, the provincial superior Court had as much expertise in these matters as the Federal Court did. Moreover, Ahani had not exhausted his remedies before the Federal Court before turning to the provincial courts.

One last point worth mentioning is the superior courts' *parens patriae* jurisdiction. *Parens patriae* is a part of a superior court's general jurisdiction as opposed to its inherent jurisdiction.[120] It is founded on the need to act for the protection of those who cannot care for themselves.[121] Children of prospective deportees bring applications to the superior courts of a province asking them to order a stay of their parents' removal. The Courts systematically refuse to hear these applications, either on the basis that *parens patriae* jurisdiction should be exercised only where the legislative scheme in place contains a gap which needs to be filled by the court in order to protect the best interests of a child,[122] or on the basis that the *lis* of these applications is an immigration matter and the Federal Court is a more appropriate forum.[123] In Quebec, the Superior Court does not have *parens patriae* jurisdiction because family law issues are entirely governed by the Civil Code of Quebec.

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[120] T.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curt. L. Prob. 23 at 51; *Torres-Samuels*, *supra* note 114.

[121] *Re Eve*, [1986] 2 S.C.R. 388 at 425.

[122] *Torres-Samuels*, *supra* note 114.

[123] *Francis*, *supra* note 116; *John (Litigation guardian of) v. Canada (M.C.I.)*, [1998] O.J. No. 2215 (Ont. Gen. Div.), aff'd [2000] O.J. No. 883 (Ont. C.A.); *Khair v. Canada (A.G.)*, 2006 QCCS 1246 2006 J.Q. 2057 (QL).

2. FEDERAL COURTS

The jurisdiction of the Federal Court is exceptional and statutory; thus, it cannot be presumed.[124] Unless a specific jurisdiction is assigned to the Federal Court by the Parliament in exercise of its powers under section 101 of the *Constitution Act of 1867*, the Federal Court has no *ratione materiae* over a particular subject-matter. It is to be contrasted with the jurisdiction of the provincial superior courts, which is general and inherent. Section 18.2 of the *Federal Courts Act* empowers the Federal Court to grant an interim relief against a federal board pending the disposition of the judicial review application. It is on this basis that the courts are enabled to grant stay orders.

B. NATURE AND SCOPE OF A JUDICIAL STAY

There are three basic characteristics of a judicial stay application. First, a stay application is an interim relief. Second, it is an equitable remedy. Third, it is an interlocutory or an incidental proceeding.

1. INTERIM RELIEF

Normally, an order staying the removal of a person under the *IRPA* expires by its own terms upon the disposition of the application for Leave or the application for Judicial Review upon which it is grounded.[125] A typical order granting a stay of removal would state that the order will end upon the disposition of the underlying application. Section 18.2 of the *Federal Courts Act* unequivocally states that an interim relief may be granted pending the disposition of the underlying judicial application. Hence, a stay order, which is an interim order, cannot extend beyond the final disposition of the underlying application. In some instances, a stay order may expire even

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[124] David Sgayias, *Federal Court Practice*, (Toronto: Thomson Canada, 2005), at 1.

[125] *Kocak v. Canada (M.C.I.)*, 2006 FC 54 at para. 4 (F.C.A.) [*Kocak*].

earlier than upon the disposition of the underlying application. These are the cases that would usually involve a pending permanent residence application on humanitarian and compassionate grounds under section 25 of the *IRPA*. For instance, when an applicant files a stay motion asking the Court to suspend his removal until the determination of his pending H&C application, the Court may grant a stay stating that it will remain effective until the earliest of the following: disposition of the underlying application or the final determination of the H&C application. Such orders ensure that the Applicant does not get from the Court more than what he asked for. That is to say, if the applicant's pending H&C, or any other kind of application, has been determined, there is no need to wait for the final disposition of the underlying application. Such orders should convene the immigration authorities as well because they have control over the length of the stay granted. Indeed, the pace at which an individual's H&C application is dealt with is a matter within the discretion of the immigration authorities. Therefore, the authorities can minimize the period for which the stay granted will be operative by promptly making a final determination on the pending H&C application.

In other instances, however, the Courts have gone further and granted a stay which remained operative even after the disposition of the underlying application. In our view, these types of orders constitute an error of law or possibly an excess of jurisdiction. For instance, in *Edwards*,[126] the Federal Court granted a stay of a departure order stating that it would expire when the applicant's application for permanent residence by sponsorship was decided. At the time of the hearing, this application had still not been filed. The difficulty with this order was that the disposition of the underlying application was likely to take place before the determination of the sponsorship application. Consequently, the stay order would remain

[126] *Edwards v. Canada (M.C.I)*, 27 September 2004, Simpson J.

operative even after the disposition of the underlying application, which goes against the wording of section 18.2 of the *Federal Courts Act*.

The Minister appealed this decision to the Federal Court of Appeal despite the fact that an interlocutory judgment cannot be appealed pursuant to paragraph 72(2)(e) of the *IRPA*. In support of his appeal, the Minister invoked the only exception to this rule, which allows appeals of interlocutory judgments in cases where the motion judge exceeded his or her jurisdiction. The Minister was arguing that the Court exceeded its jurisdiction since it granted a relief with greater effects than those prescribed by section 18.2 of the *Federal Courts Act*. Yet, the Federal Court of Appeal disagreed. It declined jurisdiction relying on paragraph 72(2)(e) of the *IRPA* explaining that the motions judge may have committed an error of law, but that there were no jurisdictional errors.[127]

However, in at least one previous case – *Forde*[128] – the Federal Court of Appeal allowed the Minister's appeal in similar circumstances. In *Forde*, the trial division of the Federal Courts, after dismissing the underlying application for the first stay of removal, granted a second stay of removal until the determination by the Federal Court of Appeal of the *Williams* case. The Minister appealed the decision arguing that the trial division exceeded its jurisdiction by granting a stay that had no underlying application. The Court of Appeal agreed with the Minister's position that the motions judge exceeded his jurisdiction by granting a stay that had no longer an underlying application. As mentioned previously, the Court of Appeal was able to intervene because the nature of the error was jurisdictional. In the absence of a jurisdictional error, privative clauses apply and it becomes impossible to appeal an interim order.

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[127] *Canada (M.C.I) v. Edwards*, 2005 FCA 176 (F.C.A.) [*Edwards*].

[128] *Canada (M.C.I) v. Forde*, (1997), 210 N.R. 194 (F.C.A.) [*Forde*].

In *Edwards*, The Federal Court of Appeal distinguished *Forde* by simply stating that in *Forde* the stay was granted after the disposition of the underlying application. Therefore, in the Court's view, there was no longer an underlying application to whose disposition a stay application could be attached, whereas in *Edwards* the stay order was made in the context of a pending application for leave in the Federal Court. Unfortunately, *Edwards* was followed by the Federal Court of Appeal in two subsequent decisions.[129]

In our view, the distinguishing made by the Federal Court of Appeal in *Edwards* is incorrect. In *Edwards*, there would certainly come a moment where the stay order would remain operative despite the expiration of its underlying application. For instance, if the underlying Leave application is dismissed, the stay order which is effective until the determination of the H&C will continue having effect. At that point, the difference between the facts in *Edwards* and those in *Forde* would fade away because there would be a valid stay order without an underlying application.

The state of the law on this issue is indeed unclear. The Federal Court of Appeal has recently shown reluctance to intervene in such cases under the pretext that granting a stay beyond the final disposition of the underlying application is not an excess of jurisdiction. Yet, the Court of Appeal also refused to state whether such orders constitute an error of law. The trial division would not grant stays that remain operative after the final disposition of the underlying application if the Federal Court of Appeal clearly stated that such practice constitutes an error of law. It should be pointed out however that the Trial Division admitted on one occasion that it committed an error by ordering a stay of removal until the determination of the Applicant's pending H&C application when the underlying application was an application for leave with respect to a negative PRRA decision. In

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[129] *Lazareva v. Canada (M.C.I.)*, 2005 FCA 181 (F.C.A.); *Kocak*, *supra* note 125.

Razzaq, the Court granted the Minister's motion for reconsideration and explained:

> *Upon reconsideration of the issue it appears to me that the Minister is right. The matter before the court was an application to stay the decision of the removal officer pending the outcome of the underlying application for leave and, should leave be granted, the application for judicial review of the negative PRRA decision. The issue of the H&C application was not before the court. This is a question of jurisdiction that was overlooked. It thus becomes a matter that can be reconsidered under Rule 397.*[130]

Similarly, in *Kim*,[131] the Court explicitly ruled that it lacked jurisdiction to grant a stay until such time as a decision is made on an H&C application. In our view, the Court's decision in this case is well founded in law since the Federal Court is a statutory court whose authority is determined by the language of the *Federal Courts Act*. Therefore, for the Federal Court to have authority over a matter there must be a statutory grant of authority by the Federal Parliament.[132] Section 18.2 of the *Federal Courts Act*, which grants the statutory authority to make interim orders on an application for judicial review, implicitly states that the Federal Court does not have jurisdiction to grant interim orders that extend beyond the final disposition of the underlying application. Thus, the mere failure to comply with the statutory requirements granting the power amounts to a jurisdictional error.

The Court has recently confirmed in *Muhammad*[133] and *Malagon*[134] that its jurisdiction is limited by statute so that a stay may only be granted

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[130] *Razzaq v. Canada* (*Sollicitor General)*, 2006 FC 442 at para. 9 (T.D.) [*Razzaq*].

[131] *Kim v. Canada (M.C.I.)*, 2006 FC 629 (T.D.) [*Kim*].

[132] *Roberts v. Canada*, [1989] 1 S.C.R. 322 at paras. 13-15; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626.

[133] *Muhammad v. Canada (M.C.I.)*, 2006 FC 156 (T.D.).

pending the final disposition of the leave application, as opposed to any other external event.

This issue has not been fully resolved. Nevertheless, in our opinion, the question deserves to be certified on an application for judicial review so that the Federal Court of Appeal may settle the matter once and for all.

2. EQUITABLE REMEDY

A stay application, like an injunction, is an equitable and discretionary remedy. Hence, in principle, a person who is seeking the remedy must deserve it.[135]

a) Clean Hands

According to a well established principle "*he who has committed inequity…shall not have equity*".[136] This principle means that in order to obtain an equitable relief, the law of equity requires that the applicant come before the court with "clean hands".[137] In a recent decision,[138] the Federal Court of Appeal clarified the application of the clean hands doctrine to equitable remedies. Although *Thanabalasingham* deals with judicial reviews application, it is transposable to stay motions since they are both equitable remedies.

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[134] *Malagon v. Canada (M.C.I.)*, 2008 FC 1068 at para. 64 (T.D.).

[135] *Murugappah v. Canada (M.C.I.)*, [2000] F.C.J. No. 1075 (T.D.); *Antonucci v. Canada (M.C.I.)*, [1996] F.C.J. No. 1320 (T.D.) (QL) [*Antonucci*].

[136] *Jones v. Lenthal* (1669) 1 Ch. Ca. 154.

[137] *Ksiezopolski v. Canada (M.C.I)*, 2004 FC 1402 (T.D.) [*Ksiezopolski*]; *Chen v. Canada (M.C.I)*, 2003 FC 1464 (T.D.) [*Chen*]; *Mohar v. Canada (M.C.I)*, 2005 FC 952 (T.D.) [*Mohar*]; *Antonucci*, *supra* note 135; *Samra v. Canada (M.C.I)*, 2005 FC 247 (T.D.) [*Samra*]; *Brunton v. Canada (M.P.S.E.P.)*, 2006 FC 33 (T.D.) [*Brunton*]; *Gabra v. Canada (M.C.I)*, 2003 FC 1491 (T.D.) [*Gabra*].

[138] *Thanabalasingham v. Canada (M.C.I)*, 2006 FCA 14, 263 D.L.R. (4th) 51 (F.C.A.) [*Thanabalasingham*].

The Court of Appeal was asked to answer the following certified question : "*When an applicant comes to the Court without clean hands on an application for judicial review, should the Court in determining whether to consider the merits of the application, consider the consequences that might befall the applicant if the application is not considered on its merits?*" The Court explained in that case that in determining whether to exercise its equitable power in favor of an applicant who does not come before the Court with clean hands, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights.

The appellant – the Minister of Citizenship and Immigration – was advancing that where the applicant does not come to the Court with clean hands, the Court must refuse to hear or grant the application on its merits notwithstanding the consequences it could have on the applicant. The Court of Appeal disagreed, stating that a consideration of the consequences of not determining the merits of an application for judicial review is within the Judge's overall discretion with respect to the hearing of the application and the granting of relief. The Federal Court of Appeal added that the factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question; the need to deter others from similar conduct; the nature of the alleged administrative unlawfulness; the apparent strength of the case; the importance of the individual rights affected; and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

As a procedural remark, it should be noted that, on several occasions, the Federal Court has orally cautioned counsel appearing for the Crown against merely writing letters to the Federal Court asking it not to entertain

stay applications filed by applicants who appear before the Court without clean hands. The Court has advised counsel rather to make submissions on clean hands in their Memoranda.

Several types of conduct may cause the applicant not to have "clean hands".

i) Previous Failure to Appear for Removal

The ultimate stage of an unsuccessful immigration process is the removal of refused refugee claimants or of other types of foreign nationals. Before removing an individual, the immigration authorities notify the individual that he is under an enforceable removal order and they ask him to appear for his removal at a specific date and place. Often, applicants under an enforceable removal order fail to appear for their removal, which results in an automatic issuance of a Canada-wide arrest warrant. Many of these individuals are eventually arrested and detained. In these circumstances, the last and the only chance for these individuals to remain in Canada is to bring a motion for a stay of their removal.

The Federal Court regularly refuses to entertain stay applications brought by applicants who have disobeyed Canadian immigration laws and have failed to appear for their removal. The case law of the Federal Court suggests that applicants who have failed to show up for their removal do not come before the Court with clean hands, therefore do not deserve the exercise of the Court's discretionary and equitable power to grant stays.[139] As stated by the Court in *Araujo*:

> *The Court routinely hears, on an urgent basis, applications to stay the execution of deportation orders. However, in the present case, the applicant failed to*

[139] *Ksiezopolski*, *supra* note 137; *Chen*, *supra* note 137; *Mohar*, *supra* note 137; *Antonucci*, *supra* note 135.

> *institute his proceedings in a timely manner, and he chose to disobey a valid deportation order. As a result, he is in Canada unlawfully and a warrant is outstanding for his arrest. In the circumstances, the applicant cannot request the Court to exercise its equitable jurisdiction to stay the order that he has chosen to disobey. The request for an urgent hearing is therefore denied.*[140]

This is even more the case when an applicant fails to attend as requested for his removal after his first stay application is dismissed by the Federal Court. The applicant who then brings a second stay motion hoping to be heard by a different judge will usually get no sympathy from the Court.[141]

ii) Disregard for Canadian Laws

According to some decisions, applicants who have shown in the past a constant and persistent disregard for Canadian laws do not have clean hands and do not deserve an equitable remedy.[142] Entering Canada with false identity papers, lying to the immigration authorities, fabricating a story, concealing one's identity and having a lengthy criminal record were considered to be sufficient reason to deny an equitable remedy.[143] Similarly, a disregard for Canadian family laws, such as violations of custody and access rights, may also be taken into consideration in the relevant circumstances.[144]

Occasionally, the Courts have entertained and even granted stays to individuals who had lengthy criminal records and who were manifesting a

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[140] *Araujo v. Canada (M.C.I.),* 27 August 1997, IMM-3660-97 McGillis J. (T.D.).

[141] See e.g. *Antonucci*, *supra* note 135; *Chavez*, *supra* note 106; *Manohararaj v. Canada (M.C.I.)*, 2006 FC 376 (T.D.).

[142] *Brunton, supra* note 138; *Ksiezopolski*, *supra* note 137; *Gabra*, *supra* note 137.

[143] *Gabra*, *supra* note 137; *Ksiezopolski*, *supra* note 137; *Jaouadi v. Canada (M.C.I.)*, 2003 FC 1347, 257 F.T.R. 161 (T.D.) (in a context of a Judicial Review application).

[144] *Brunton*, *supra* note 138.

total disregard for Canadian laws.[145] This inconsistent pattern suggests that much depends on the values of the judge hearing the application for a stay as well as on the facts of the case.

iii) Misrepresentation

In a few cases, the Federal Court has also held that applicants who have made misrepresentations to the Canadian immigration authorities or who have tried to mislead the Court do not appear before the Court with clean hands.[146] As prevarication may vary as widely as the individuals making the misrepresentations, the following are a few of the primary examples of case law with regard to this matter:

In *Samra*,[147] the Applicants tried to mislead the Court by alleging that they had not filed an H&C application and that their children's best interests had not yet been considered. When the Court found out that their H&C application had been denied and their children's best interests had already been considered, the Court refused to entertain the motion on the basis of a lack of clean hands.

In *Gonzague*,[148] the Applicant claimed refugee status under a false identity and tried to mislead the Refugee Protection Division by giving it false information.[149] The Court concluded that the Applicant did not come before it with clean hands, and thus refused to hear the Applicant.

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[145] See *Vaseekaran c. Canada (M.C.I)*, 2004 FC 913 (T.D.); *Dennis v. Canada (M.C.I.)*, 2004 FC 196 (T.D.); *Hernandez-Andasol v. Canada (M.C.I.)*, 2000 F.C.J. 100 (T.D.); *Yusufzai v. Canada (M.C.I.)*, 2005 FC 113 (T.D.).

[146] *Gabra*, *supra* note 137; *Samra, supra* note 137.

[147] *Samra*, *ibid*.

[148] *Gonzague v. Canada (M.C.I.)*, 2001 FCT 1292 (T.D.).

[149] See also *Mohar*, *supra* note 137.

Similarly, in *Bascombe*,[150] the Applicant omitted from his submissions the fact that he had a serious criminal conviction in Canada. The Court held that the Applicant did not have clean hands.

In *Duboulay*,[151] the Court also emphasized the importance of applicants having to include all relevant facts in their materials when seeking a stay on an urgent basis. The Court noted that facts relating to an applicant having disobeyed the law and eluded removal were highly relevant in this regard. The Court decided not to entertain the applicant's motion, "*which would have the effect of rewarding the applicant for her decision not to respect Canada's laws*."

b) Delay Defeats Equity

In many cases, applicants know the date of their removal well in advance but choose to file their motion 24 or 48 hours before their departure. Applicants who become aware of their removal date one month before their departure are expected to file their motion in a timely fashion and in accordance with the Federal Court Rules. If they attempt to file their motion on a last-minute basis, their stay application might fail on for that reason alone, since one of the rules of equity is that "delay defeats equity".[152] In *Matadeen*,[153] the honorable Justice Pinard held that "'*last minute' motions for stays force the respondent to respond without adequate preparation, do not facilitate the work of this Court, and are not in the interest of justice; a stay is an extraordinary procedure, which deserves thorough and thoughtful consideration*". This decision has been followed by the Federal Court in a

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[150] *Bascombe v. Canada (M.C.I.)*, 1 June 2007, IMM-2218-07, Shore J. (T.D.).

[151] *Duboulay v. Canada (M.P.S.E.P.)*, 7 January 2007, IMM-216-07, Tremblay-Lamer J. (T.D.).

[152] *Estimé v. Canada (M.C.I.)*, 2001 FCT 209 (T.D.).

[153] *Matadeen v. Canada (M.C.I.)*, 22 June 2000, IMM-3164-00, Pinard J. (T.D.) [*Matadeen*].

number of other cases, most recently in *Madi*,[154] and *Casanova*,[155] where Justice de Montigny pointed out:

> *I am also deeply concerned by the fact that these last minute applications leave counsel for the Respondent very little time to receive instructions from their clients; this is not only unfair, but it is also not in the best interests of the administration of justice. This, in and of itself, would be sufficient to dispose of these applications.*
>
> *This Court has indicated on a number of occasions its reluctance to hear last minute applications for stays of removal.*[156]

3. INCIDENTAL PROCEEDING

Because a stay motion is an incidental proceeding, certain procedural requirements must be met in order for it to be successfully filed.

a) There Must Be an Underlying Application

First, a stay motion must be filed as part of a principal application. In other words, it should be appended as an accessory to a principal application, which is also known as an underlying application. There may be more than one underlying application, but there must be at least one. In an immigration context, most of the time, an underlying application is an Application for Leave and for Judicial Review pursuant to section 72(1) of the IRPA.

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[154] *Madi v. Canada (M.C.I)*, 2007 FC 648 (T.D.) [*Madi*].

[155] *Casanova v. Canada (M.C.I.)*, 2006 FC 232 (T.D.) [*Casanova*]; see also *Kulbir Singh v. Canada (M.C.I.)*, 30 January 2003, IMM-530-03 (T.D.); *Varadi v. Canada (M.C.I.)* 23 June 2003, IMM-4705-03, Simon Noël J. (T.D.); *Idowu v. Canada (M.C.I.)*, 7 July 2000, IMM 3558-00, Tremblay-Lamer J. (T.D.); *Korogodova v. Canada (M.C.I.)*, 29 January 29 2001, IMM-376-01, Lutfy.C.J. (T.D.); *Vaccarino v. Canada (M.C.I.)* [1992] F.C.J. No. 518 (T.D.).

[156] *Casanova*, *ibid*.

Pursuant to rule 302 of the *Federal Courts Rules*, an application for judicial review shall be limited to a single decision in respect of which relief is sought. Similarly, an application for leave pursuant to section 72 of the Immigration and Refugee Protection Act shall also be limited to a single administrative decision.[157] A leave application must challenge an administrative decision, order, act or proceeding which is reviewable as contemplated in subsection 18.1(2) of the *Federal Courts Act*. Otherwise, there can be no underlying application. For instance, in *Alaa*,[158] the applicant filed an application for leave challenging the *Direction to Report for Removal* requiring him to appear for his removal and appended to that application a motion for a stay of removal. The respondent argued that a Notice of Direction was not a reviewable administrative decision and that since the underlying application was not challenging a reviewable administrative decision, it was not valid. The respondent also argued that there could be no stay motion without a valid underlying application. The Court agreed and dismissed the application.

Similarly, in *Tran*,[159] the Applicant was also contesting a direction to report for removal. The Court rightly held that a direction to report for removal is not a decision or order, as contemplated in section 18.1(2) of the *Federal Courts Act*, and it is thus not reviewable by way of an application for judicial review. However, in *Tran*, the Court did not strike out the stay motion for this reason alone because there was a second underlying application in this matter, properly filed, which was challenging a PRRA decision. It is to be contrasted with *Alaa*, where no other valid underlying application existed.

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[157] *Hisseine v. Canada (M.C.I.)*, 2005 FC 388 at para. 3 (T.D.); *Iamkhong v. Canada (M.P.S.E.P.)*, 2008 FC 1349 at para. 21 (T.D.).

[158] *Alaa*, *supra* note 14.

[159] *Tran*, *supra* note 82.

In Thompson, the Federal Court followed these two decisions:

> *Moreover, I agree with counsel for the respondent that this Court has no jurisdiction to entertain this stay motion, as the underlying application challenges the direction to report for removal, which is not a decision, order, act or proceeding reviewable under paragraph 1 8.1(2) of the Federal Courts Act. Indeed, this case is indistinguishable from Alaa v. Canada (Minister of Citizenship and Immigration and Minister of Public Security and Emergency Preparedness), 2006 FC 14 and Tran v. Minister of Citizenship and Immigration, 2005 FC 394, which both held that a Direction to Report for Removal is not a decision or order reviewable by way of an application for judicial review.*[160]

[160] *Thompson*, *supra* note 97.

b) Underlying Application Must Be Filed on Time

The underlying application must not only challenge a valid administrative and reviewable decision, but it must also be filed within the time limits. Before hearing the stay motion on its merits, the Court must be satisfied that the underlying application does not require an extension of time. Paragraph 72(2)(b) of the IRPA requires that the application for leave be initiated within fifteen days (or within sixty days in the case of a matter arising outside Canada) of the applicant being informed of the decision he or she seeks to challenge. If this underlying application was filed late, the Court must first hear the applicant's application for an extension of time. If the Court denies the extension of time to file the underlying application, the underlying application falls. Consequently, the stay motion should also fall as there can be no motion for a stay, without an underlying application.[161]

As an extension of time is a condition precedent to the consideration of a late underlying application, the applicant must establish that the motion for an extension itself raises a serious issue. To do so, the applicant must demonstrate that there are special reasons, as required by IRPA paragraph 72(2)(c), for extending the time for filing and serving the underlying application.[162] The principles governing the granting of an extension of time for the service and filing of a leave application are those set out by the Federal Court of Appeal in *Hennelly*.[163] The applicant must show a continuing intention to pursue the application; that it has "some merit"; that

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[161] *Contreras Melendez v. Canada (M.C.I.)*, 2005 FC 1646 (T.D.); *Dessertine v. Canada (Minister of Citizenship and Immigration)*, 14 August 2000, IMM-3931-00, Tremblay-Lamer J. (T.D.); *Paredes c. Canada (M.C.I.)*, 20 October 1997, IMM-3989-97, Noël J. (T.D.)

[162] *Semenduev v.Canada (M.C.I.)*, [1997] F.C.J. No.70 (T.D.); *Akpataku v. Canada (M.C.I.)*, 2004 FC 698 (T.D.).

[163] *Canada (A.G.) v. Hennelly* (1999), 244 N.R. 399.

no prejudice to the respondent arises from the delay; and that a reasonable explanation for the delay exists.

C. PROCEDURAL REQUIREMENTS

A motion for a stay of removal is governed by the *Federal Courts Rules* applicable to motions.

1. NOTICE OF MOTION

Pursuant to Rule 359 of the *Federal Courts Rules*, a motion is initiated by a notice of motion. The notice sets out the time, place, estimated duration of the hearing of the motion, the relief sought, the grounds intended to be argued and a list of the documents or other material to be used at the hearing. It is mandatory that a notice of motion be made according to Form 359.[164] The Courts are reluctant to strike a motion solely because the notice does not comply with Form 359, but they will generally order an amendment of the notice.[165]

2. MOTION RECORD

Rule 364 of the Federal Courts Rules requires that the applicant serve a motion and file three copies thereof.

a) Style of Cause

Because a stay motion is an incidental proceeding, the style of cause should be the same as the one on the Application for Leave and for Judicial Review. Pursuant to the coming into force of the *Department of Public Safety and Emergency Preparedness Act*,[166] all the responsibilities of the Canadian Border Services Agency including those with respect to removals

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[164] *Grand Tank (International) Inc. v. Destiny Oilfield Rentals*, 2004 FC 1082 (T.D.).

[165] *Ibid*.

[166] S.C. 2005, c. 10, s. 5.

have been transferred to the Minister of Public Safety. Therefore, when the underlying application concerns decisions rendered by an enforcement officer, who is an employee of the Canadian Border Services Agency, the Minister of Public Safety must be a party to the proceedings. As a rule of thumb, it is probably always prudent to mention the Minister of Public Safety in the style of cause because the enforcement of the removal is always performed by this Department irrespective of what the underlying application is. The Minister of Citizenship and Immigration must also be a party to those proceedings where the underlying application concerns a decision that was rendered by an immigration officer. For instance, Pre-Removal Risk Assessment decisions, and decisions on permanent residence applications based on humanitarian and compassionate grounds, are the responsibility of the Minister of Citizenship and Immigration. Thus, in a stay motion where the underlying application pertains to such decisions, the Minister of Citizenship and Immigration must appear in the style of cause.

In any event, a mistake in the style of cause is never detrimental and a party may make an oral request during the hearing to have the style of cause amended.

b) Contents

A Motion Record should minimally contain a table of contents, the notice of motion, an affidavit, written representations and the exhibits. With regards to the exhibits, it is worthwhile mentioning that a party may produce evidence by the means of an affidavit only. Any documentation intended to be used in an application or a motion should be properly sworn to through the use of an affidavit. The Record should also contain the decision that the applicant challenges in his underlying application.[167] The underlying application for

[167] *Mohar*, *supra* note 137; *Atwal v. Canada (M.C.I.)*, 2004 FC 76; *Bayavuge c. Canada (M.C.I.)*, 17 April 2007, Imm-1492-07, Blais J. (T.D.); Direction of Justice Shore issued on July 13, 2007, in *Garza Galan v. Canada (M.C.I.)*, 13 July 2007,

leave and for judicial review must also contain an affidavit. An application for leave not supported by an affidavit is incomplete and cannot succeed.[168] The 30-page limit on memoranda of fact and law imposed by rule 70 also applies to written representations for motions under rule 364.[169]

c) Timing

Normally, a stay motion shall be served and filed at least two days before the day set out in the notice for the hearing of the motion.[170] For instance, in Montreal, Toronto and Vancouver, the general sittings of the Federal Court for the hearing of motions are held on Mondays.[171] Therefore, a Motion Record should be served and filed at the latest on Wednesday.

i) Premature Applications

Generally, a Direction to Report is given to a person after the departure order becomes a deportation order pursuant to subsection 224(2) of the IRPR. A departure order does not require an authorization to return to Canada whereas the deportation order does.[172] Hence, applicants may be tempted to move for a stay of their removal before receiving a direction to report for their removal and before their departure order becomes a deportation order so that they do not need to obtain an authorization before returning to Canada. According to many cases, an application for a stay of removal is premature if it is filed before a date of removal is set and before

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Imm-2613-07 (*Toutes requêtes visant à obtenir un sursis de renvoi devraient contenir une copie de la décision et les motifs. Si la requête ne contient pas ceux-ci, l'agent du greffe doit aviser le procureur de soumettre dans le plus bref délai une copie des motifs*).

[168] *Metodieva v. Canada (M.E.I.)* (1991), 132 N.R. 38, 28 A.C.W.S. (3d) 326 (F.C.A.); *Dhillon v. Canada (M.C.I.)*, 2009 FC 614 (T.D.).

[169] *Chung v. Canada (M.C.I.)*, 2003 FC 1150 (T.D.).

[170] *Federal Courts Rules*, *supra* note 19, r. 362(1).

[171] *Ibid*., r. 34(1)(b).

[172] IRPR, *supra* note 6, s. 226(1).

the departure order becomes a deportation order. In other words, the stay motion is premature if the arrangements to remove the applicant from Canada are not in place.

In the ordinary course of events, a person subject to an enforceable removal order will be called in by CBSA officers. The person will be given a Direction to Report which is a document specifying the date of the person's removal from Canada. As mentioned earlier, if no such Direction has been given, the stay motion is likely to be ruled premature.[173]

In certain cases, applicants argued that dismissing a stay motion because no date of departure has been set is needlessly punitive of those who choose to pursue their rights in a timely fashion. However, this argument has been dismissed on several occasions. The Courts view a Departure order as a favorable discretion encouraging a voluntary compliance with the *Act*. When a person chooses not to avail himself or herself of the benefit of this favorable discretion by voluntarily leaving Canada within 30 days, he or she will be treated as all other deportees. This simply amounts to a determination that one cannot get the benefit of a departure order by agreeing to leave Canada and then seek to retain the benefit of that order by filing a stay motion.[174]

There are, however, isolated cases where the Court ruled that a motion for a stay of removal is not premature simply because the person was not directed to report for his or her removal. In *Singh*, for instance, the Federal Court reasoned as follows:

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[173] *Rajan v. Canada,* [1994] F.C.J. No. 1618, (1994), 86 F.T.R. 70 (T.D.); *Essiaw v. Canada (M.C.I.)*, 2001 FCT 1108 (T.D.); *Gonzalez v. Canada (M.C.I.)*, 2002 FCT 511; *Verich v. Canada (M.C.I.)*, [1996] F.C.J. No. 400 and *Weir v. Canada (M.C.I.)*, [1998] F.C.J. No. 494, 1998 CanLII 7757, 17 April 1998, IMM-1679-98 (T.D.); *Kathirvelu v. Canada (M.C.I.)*, 2003 FC 1404; *Ball, supra* note 46; *Obatta v. Canada (M.P.S.E.P.)*, 2007 FC 619.

[174] *Essiaw*, *ibid*. at para. 13.

> *There is no reason in principle why a person who is subject to a removal order should not be permitted to seek an interim injunction that would prohibit the removal officers from deciding to issue a direction to report. In substance, that is what Mr. Singh is asking the Court do so. The legal tests for the issuance of such an injunction would be substantially the same as for a stay of execution. However, I am not persuaded that, in the absence of a direction to report, Mr. Singh is at risk of irreparable harm.*[175]

Similarly, in *Clark*,[176] the Federal Court granted a stay of removal even though no date of removal had been set and no arrangements for the person's removal had been made. In this case, the applicant was arguing that the issuance of the deportation order was preventing him from accessing Accelerated Day Parole and Unescorted Temporary Absences, to which he would otherwise be entitled, as a result of subsection 128(4) of the *Corrections and Conditional Release Act*. This provision provides that an offender against whom a removal order has been made under the *Immigration and Refugee Protection Act* is ineligible for day parole or an unescorted temporary absence until the offender is eligible for full parole. By obtaining a stay of his departure order, the applicant could access the accelerated day parole program. Consequently, the Court held that the motion was not premature.

However, in *Fox*,[177] a case with similar facts, the Federal Court of Appeal reached a different conclusion. In this matter, the National Parole Board directed that Fox, a first-time non-violent offender, be released on day parole. Yet, a removal order was about to be issued against Fox in which

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[175] *Singh v. Canada (M.C.I.)*, 1999 CanLII 9171, 3 December 1999, IMM-5306-99, Sharlow J. (T.D.); see also *Calderon v. Canada (M.C.I.)*, [1995] F.C.J. No. 393, 92 F.T.R. 107, 30 Imm. L.R. (2d) 256, 54 A.C.W.S. (3d) 316 (T.D.).

[176] *Clark v. Canada (M.P.S.E.P.)*, 2006 FC 1512 (T.D.).

[177] *Fox v. Canada (M.C.I.)*, 2009 FCA 346 (F.C.A.).

case the day parole would automatically become inoperative on the day the removal order was to be made and, as a result, Fox would be re-incarcerated until his full parole eligibility date. Fox asked the Immigration Division to adjourn his admissibility hearing and his request was granted. The Minister appealed the Immigration Division's decision to adjourn. The Federal Court agreed with the Minister that the Immigration Division had exceeded its jurisdiction by adjourning the admissibility hearing. Fox appealed the decision rendered by the Trial Division and requested from the Federal Court of Appeal a stay motion. The Federal Court of Appeal dismissed his motion stating that despite the harsh consequences a removal order may have on the offender's release on day parole, a stay order was not warranted.

In some decisions, the Federal Court held that it had no jurisdiction to grant a stay that was filed prematurely.[178] Several other decisions state the contrary (and we lean their way): a premature motion is not a jurisdictional issue. In appropriate circumstances, the Court has jurisdiction to stay a removal order before the person is directed to report for removal.[179]

An applicant need not request an administrative stay before filing a stay motion before the Federal Court. However, if an applicant did request an administrative stay, he must give the Minister an opportunity to reply to his request before requesting a judicial stay from the Courts. A stay motion will be found premature if an applicant requests an administrative stay and then files within a few hours of that request a stay motion without allowing the enforcement officer sufficient time to reply to that request:

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[178] *Markhevka v. Canada (M.C.I.)*, 1998 CanLII 8519 (T.D.) at para. 13; *Weir, supra* note 173; *Verich, supra* note 173.

[179] *Muncan v. Canada (M.C.I.)*, 1998 CanLII 7401, 24 February 1998, Imm-2701-97, Campbell J. (T.D.)

> *The Applicants' scheduled deportation is two weeks away. It is a waste of scarce judicial resources to bring this motion where an expectation remains that a timely decision will be rendered and where the outcome of that process is presently unknown.*
>
> *The Court has enough urgent stay motions before it dealing with actual decisions that it cannot be burdened with premature motions of this sort. In appropriate cases where fairness and due process require a temporary stay order, the Court has the authority to preserve the status quo until a decision has been made or to allow a party enough time to put a proper evidentiary record before the Court. It is not appropriate for an applicant to deem a decision to have been made because the Respondent has failed to respond by a deadline which the applicant unilaterally imposed. The Respondent is under no legal obligation to respond to such demands and it is entitled to process these types of requests in a fair and orderly manner.*[180]

When the Court determines that a stay motion is premature, it may either dismiss the motion[181] or adjourn it *sine die*.[182]

ii) Late and Last-Minute Applications

An applicant who requests pursuant to rule 362(2) of the *Federal Courts Rules* that a stay motion be heard on less than two days notice files a late or a last-minute application. In such cases, an applicant must satisfy the Court of the urgency of the motion; otherwise, an urgent motion will not be heard. Last-minute motions will not be entertained by the Court especially if

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[180] *Aslam v. Canada (M.P.S.E.P.)*, 2008 FC 416 (T.D.) at paras. 8-9; see also *Jackson v. Canada (M.P.S.E.P.)*, 2007 FC 56 at para. 16 (T.D.).

[181] *Aslam, ibid.*

[182] *Gonzalez*, *supra* note 173.

the applicant was aware of the date of his departure for a long time and failed to bring a timely motion.[183] In *Matadeen*, the Court explained that:

> *[…] last minute motions for stays force the respondent to respond without adequate preparation, do not facilitate the work of this Court, and are not in the interest of justice; a stay is an extraordinary procedure, which deserves thorough and thoughtful consideration.*[184]

Is the refusal by the motions judge to entertain last-minute motions tantamount to a refusal to exercise jurisdiction? In *Ouardi*, the Federal Court of Appeal answered this question in the negative:

> *In the present case, the facts are that the stay application could have been made on or shortly after January 7, 2005, when the appellant was advised of her scheduled removal date. In these circumstances, I tend to think that Blais J. properly exercised his discretion not to entertain the very late stay motion, that it was within his jurisdiction to do so, even though he may not have considered the merits of the application, and that the matter is not appealable to this Court.*[185]

In *Wambui Kahiga*, the Federal Court explained that unless cogent reasons exist to explain the filing of late or last-minute motions, the courts should not countenance such unfair tactics: "*on this basis alone I am satisfied this Court should not exercise its discretion in favor of the Applicant*".[186]

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[183] *Madi*, *supra* note 154; *Kroonenfeld v. Canada* (1995), 29 Imm. L.R. (2d) 231 (T.D.); *Nananso v. Canada (M.E.I.)*, (1992), 56 F.T.R. 234; *Cyrous Moghaddam v. Canada (M.C.I.),* 31 May 2004, IMM-4879-04, Martineau J. (T.D.); *Iliescu v. Canada (M.C.I.)*, 1 June 2004, IMM-4725-04, Kelen J.

[184] *Matadeen*, *supra* note 153; see also *Casanova*, *supra* note 155; *Ping Shi v. Canada (M.P.S.E.P.)*, 2007 FC 534 (T.D.); *Madi*, *supra* note 154.

[185] *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42 at para. 7 (F.C.A.).

[186] *Assumpta Wambui Kahiga v. Canada (M.P.S.E.P.)*, 7 December 2009, Imm-6135-09, Mainville J. (T.D.).

d) Method of Serving and Filing of Record

An originating document, such as an Application for Leave, shall be served personally in the manner set out in rule 128 of the *Federal Courts Rules*. The manner of serving personally on the Crown is set out in rule 133 of the *Federal Courts Rules*. Also, rule 134 of the *Federal Courts Rules* allows that the personal service of a document be effected by the acceptance of service by the party's solicitor. A stay motion is not an originating document; therefore, it need not be served personally. However, an applicant who decides to serve the underlying leave application at the same time as the stay motion should serve the proceedings personally. If the application for leave is not properly filed, the stay motion may be struck for absence of an underlying application. Non-personal service may be effected in any one of manners described in rule 140 of the *Federal Courts Rules*. Although a motion record is not an originating document, it may not be served by fax without the consent of the recipient.[187]

3. RESPONDENT'S MOTION RECORD

a) Contents

The Respondent's Motion Record shall minimally contain a table of contents and written representations. Filing affidavits or any other material in support of the Respondent's Motion Record is not a requirement. There can be no cross-examinations on affidavits because rule 12(2) of the *Federal Courts Immigration and Refugee Protection Rules* contemplates that no cross-examination of a deponent on an affidavit filed in connection with an application is permitted before leave to commence an application for judicial review is granted. An affidavit in support of a stay motion where the underlying application is an application for leave is no doubt filed in

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[187] *Federal Courts Rules*, *supra* note 19, r. 143.

connection with that leave application; therefore, rule 12(2) applies to such affidavits. It is however unclear whether a cross-examination on affidavit is permitted where a stay motion is filed after leave is granted.

As mentioned previously, the 30-page limit on memoranda of fact and law under rule 70 of the *Federal Courts Rules* is applied to written representations under rule 364 of the *Federal Courts Rules*.[188]

b) Timing

The Respondent shall serve a copy of his Record and file three copies thereof not later than 2:00 p.m. on the last business day before the hearing of the motion. In Montreal, Toronto and Vancouver, a Respondent is expected to serve and file his record not later than Friday 2:00 p.m.

c) Method of Serving and Filing of Record

The Respondent's Motion Record is not an originating document; therefore, it need not be served personally. Non-personal service may be effected in any one of the manners described in rule 140 of the *Federal Courts Rules*. Although a motion record may not be served by fax without the consent of the recipient, the Respondent's Motion Record may be served by fax if it does not exceed 20 pages.[189] The English text of paragraph 143 of the *Federal Courts Rules* creates confusion because it uses the term "motion record" which may mean either the Applicant's Motion Record or the Respondent's Motion Record.[190] However, the French text of paragraph 143(a) of the *Federal Courts Rules* is clear as it uses the term "*dossier de requête*" as opposed to "*dossier de l'intimé*".

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[188] *Chung*, *supra* note 169.

[189] *Federal Courts Rules*, *supra* note 19, r. 143.

[190] Compare sections 364 and 365 of the *Federal Courts Rules*.

D. TEST FOR OBTAINING A STAY

In Immigration matters, this Court established in *Toth*[191] that an applicant who seeks a stay of proceedings must meet the stringent test similar to that for an interlocutory injunction. The test requires, for the granting of such an order, that applicants demonstrate: (a) that they have raised a serious issue to be tried in the underlying judicial review application; (b) that they would suffer irreparable harm if no stay of their removal was granted; and (c) that the balance of convenience considering the situation of both parties, favours the grant of the stay. The test is conjunctive; if applicants fail to meet one part of the test, their motion cannot succeed.

1. SERIOUS ISSUE

Under the first prong of the test, applicants must establish that they have raised a serious issue to be tried in the underlying judicial review application. The meaning of the term "serious issue" is derived from the decisions of the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*[192] and *RJR-MacDonald Inc. v. Canada (Attorney General)*.[193] In these two cases, the Supreme Court explained that the term "serious issue" means that the application is not frivolous or vexatious. Therefore, the threshold is low and involves a preliminary assessment of the merits of the case. A prolonged examination of the merits is neither necessary nor desirable.[194] Once satisfied that the application is neither vexatious nor frivolous, the motions judge should generally conclude that the serious issue has been raised and should proceed to consider the

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[191] *Toth*, *supra* note 4.

[192] *Metropolitan Stores*, *supra* note 3.

[193] [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114 (S.C.C.) [*RJR-MacDonald*].

[194] *Ibid*, at 335, 337-338.

second and third prongs of the test. The threshold of the "serious issue to be tried" is in fact much lower than the threshold of a *prima facie* case.[195]

Two exceptions apply to the general rule that a motions judge should not engage in an extensive review of the merits. The first exception arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right or the remedy which the applicant seeks to protect or to obtain can only be exercised immediately.[196] For instance, when the underlying application of a stay motion challenges the enforcement officer's refusal to defer removal, the motions judge should engage in a more extensive review of the merits because the grant of the stay of removal will have the practical effect of nullifying the enforcement officer's decision. Indeed, once the stay of removal is granted, the underlying application is likely to become moot.

> *[…] where a stay would effectively grant the relief sought on the underlying application, the "serious issue" threshold is not merely that the question raised is not frivolous or vexatious. Where a motion for a stay is made with respect to a refusal to defer removal, the judge hearing the motion ought not simply apply the "serious issue" test, but should go further and closely examine the merits of the underlying application.*[197]

In such cases, the court will require the applicant to meet the

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[195] *North American Gateway Inc. v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1997] F.C.J. No. 628, 214 N.R. 146, at pp. 148-149 (C.A.); *North of Smokey Fishermen's Assn. v. Canada (Attorney General)*, 2003 FCT 33 at para. 18, 2003 FCT 33.

[196] *RJR-MacDonald*, *supra* note 192 at 344.

[197] *Padda v. Canada (M.C.I.)*, 2003 FC 1081 at para. 6 (T.D.) [*Padda*]; see also *Wang, supra* note 76; *Castillo v. Canada (M.P.S.E.P.)*, 2008 CF 172; *Holubova v. Canada (M.C.I.)*, 2004 FC 527; *Perez v. Canada (M.P.S.E.P.)*, 2007 FC 627; *Baron v. Canada (M.P.S.E.P.)*, 2009 FCA 81 (F.C.A.) para. 66 [*Baron*].

threshold of "likelihood of success" or a *prima facie* case.[198]

The second exception to the prohibition on an extensive review of the merits arises when the serious issue is a question of constitutionality that presents itself as a simple question of law.[199] For instance, in a motion for a stay of removal where the only issue raised by an applicant is the constitutional validity of a provision, then the motions judge should settle the constitutional question on its merits.

The nature of the serious issue depends on the administrative decision being challenged in an underlying application. If the underlying application challenges a negative Pre-Removal Risk Assessment decision, then the serious issue should relate to this risk assessment. Similarly, if an underlying application challenges a refusal to grant an exemption for humanitarian and compassionate grounds, the serious issue should relate to the H&C decision. As a rule, if the issue raised by an applicant has already been certified for appeal by a Judge of the Federal Court, the "serious issue" prong is easily satisfied.[200]

Although the threshold of a serious issue on a stay motion is lower than the threshold of an arguable issue on an application for leave,[201] it cannot be argued that the serious issue prong of the *Toth* test is automatically met if the application for leave has been granted.[202] Conversely, if a stay

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[198] *Amsterdam v. Canada (M.C.I.)*, 2008 FC 244 at para. 16 (T.D.); *Canada (M.C.I.) v. Thanabalasingham*, [2003] 4 F.C. 491, 231 F.T.R. 103 (T.D.); *Wang, supra* note 76.

[199] *RJR-MacDonald*, *supra* note 192 at pp. 346.

[200] *Palka v. Canada (M.P.S.E.P.)*, 2008 FCA 165 at para. 9, 379 N.R. 239 (F.C.A.) [*Palka*].

[201] *Vazquez Lopez v. Canada (M.C.I.)*, 2007 FCA 1135 (T.D.); *Londono Echeverry v. Canada (M.C.I.)*, 2007 FC 497 at para. 16 (T.D.); *Brown v. Canada (M.C.I.)*, 2006 FC 1250 at para. 5 (T.D.);

[202] *Londono Echeverry*, *ibid.* at para. 15.

motion is granted, it does not mean that the applicant raised an arguable case for the purposes of a leave application.[203] Indeed, an application for leave may be disposed of on the basis of certain evidence (or lack of it) and the stay motion may be decided on the basis of additional or entirely different evidence. Hence, the stay motion should not automatically influence the outcome of the leave application and vice versa.

There can be an indeterminate number of issues raised on an underlying application challenging a negative PRRA decision, a negative H&C decision or a decision refusing to defer a removal. Counsel for the applicant should be familiar with the legal principles applicable to these decisions in order to correctly identify issues that are likely to meet the "serious issue" test. It is beyond the scope of this paper to make an exhaustive list of issues that may be raised with respect to H&C and PRRA applications as well as with respect to refusals to defer removal; this subject is covered more extensively in treatises on substantive immigration law. Nevertheless, we will identify the most common issues raised in stay motions.

a) Serious Issue – When Underlying Application is a PRRA Decision

When an applicant challenges a PRRA decision, very often the arguments raised by an applicant pertain to procedural fairness or natural justice issues. In the context of a PRRA application, the legislator specified the procedure to be followed by the PRRA officer when examining such an application. In particular, the IRPA and its *Regulations* contain provisions that deal with the type of evidence that can be considered and the circumstances calling for an oral hearing.

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[203] *Ibid*.; see also *Streanga v. Canada (M.C.I.)*, 2007 FC 792 at para. 8 (T.D.).

i) Ignoring New Evidence

Paragraph 113(a) of the Act contains three categories of admissible evidence. The first category is "*new evidence that arose after the rejection*" of the claim by the Refugee Protection Division. The second category is evidence that "*was not reasonably available*". The third category is evidence "*that the applicant could not reasonably have been expected to have presented*". Paragraph 113(*a*) of the IRPA refers to three distinct possibilities and these three possibilities must be read disjunctively.[204] Initially, the wording of paragraph 113(a) of the IRPA was supposed to contain only the first category that is to say "new evidence that arose after the rejection". As it appears from the parliamentary debates, the second and third categories of evidence were not part of the proposed legislation. In other words, evidence that "was not reasonably available" and "that the applicant could not reasonably have been expected to have presented" were not destined to be admissible. They were added at the request of one of the members of the Standing Committee on Citizenship and Immigration:

> ***Ms. Anita Neville:*** *Well, clause 113 currently says that the rejected applicant can only present new evidence. What I'm proposing is "only new evidence that arose after the rejection or was not reasonably available", and then the added words that are important, "or that the applicant could not reasonably have been expected in the circumstances to have presented". So that will give clarity to the issue of the abused spouse that we were talking about.*[205]

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[204] *Elezi v. Canada (M.C.I.),* 2007 FC 240 at para. 26 (T.D.).

[205] Standing Committee on Citizenship and Immigration, "C-11 an Act Respecting Immigration to Canada and the Granting of Refugee Protection to Persons who are Displaced, Persecuted or in Danger" in *Official Report of Debates (Hansard)*: Evidence, 37th Parliament, 1st Session, Meeting 27, May 17, 2001.

Two schools of thought emerged within the jurisprudence of the Federal Court. The first school of thought was in favour of a more restrictive interpretation of paragraph 113(a) of the IRPA. Indeed, many Federal Court cases interpreted paragraph 113(a) of the IRPA quite restrictively. Some judges of the Federal Court were of the view that none of the three categories of admissible evidence enunciated in paragraph 113(a) of the *Act* could relate to facts that had already been examined by the RPD. In other words, in some cases it was held that even if the evidence was not reasonably available, it could not be adduced before the PRRA officer if it related to incidents or events that had already been found not credible by the RPD. For instance, in *Perez*, Madam Justice Snider reasoned as follows:

> *"The purpose of the PRRA*
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> *It is well-established that a PRRA is not intended to be an appeal of a decision of the RPD.[…] The decision of the RPD is to be considered as final with respect to the issue of protection under s. 96 or s. 97 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (IRPA), subject only to the possibility that new evidence demonstrates that the applicant would be exposed to a new, different or additional risk that could not have been contemplated at the time of the RPD decision. Thus, the PRRA Officer is under no obligation to assess the alleged risks now identified by the Applicant."*[206]

Similarly, in *Jaouadi*, Mr. Justice Blanchard held that:

> *"The PRRA procedure is not an appeal procedure or a level of review for IRB decisions. The purpose of the PRRA is to assess risks to which a person may be subject on removal to his or her country of origin,*

[206] *Perez v. Canada (M.C.I.)*, 2006 FC 1380 at para. 12 (T.D.).

> *based on new facts which may have come to light after the decision on the refugee application."*[207]

In the same vein, in *Herrada*, Mr. Justice Shore ruled that:

> *"The only objective of the PRRA program is to assess the risks that a person could face if they were to be removed to their native country, in light of new facts arising after the RPD's decision on the refugee claim.*
>
> *[...]*
>
> *Contrary to what is required by the Act, Mr. Salomon Herrada and his family simply submitted the same allegations in support of their PRRA application as the allegations that they presented to the RPD.*
>
> *[...]*
>
> *Accordingly, when deciding the PRRA application, the officer was not entitled to proceed to reassess the credibility of Mr. Salomon Herrada and his family or to set aside the RPD's credibility findings. More specifically, the PRRA officer could not rely on the fact that Mr. Salomon Herrada and his family had been targeted by the Shining Path, given the RPD's findings on that issue".*[208]

In *Quiroga*, Mr. Justice Kellen wrote that "*the PRRA application cannot be allowed to become a second refugee hearing. It is intended to assess new risk developments between a hearing and the removal date. The PRRA officer is not to act as a court of appeal from a prior refugee board decision*."[209]

The second school of thought is more liberal and allows a broad interpretation of paragraph 113(a) of the *Act*. Most decisions fall into this

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[207] *Jaouadi v. Canada (M.C.I.),* 2006 FC 1549 (T.D.).

[208] *Herrada v. Canada (M.C.I.)*, 2006 FC 1004 at paras. 27-32 (T.D.).

[209] *Quiroga v. Canada (M.C.I.)*, 2006 FC 1306 at para. 12 (T.D.).

category. While these decisions also state that a PRRA officer does not sit on appeal or in judicial review, they explicitly recognize that in the presence of new evidence, the PRRA officer may disagree with the RPD's credibility findings and may indeed reach a different conclusion.

> *The respondent submits that the only purpose of the PRRA program is to assess those risks that a person could face if they were to be removed to their native country, in light of new facts arising after the Refugee Board's decision on the refugee claim. The respondent cites a number of cases where the Court has held that the PRRA process is not intended to be an appeal of a decision of the Refugee Board and that the PRRA is designed to assess new risks[…]*
>
> *Although the PRRA process is meant to assess only evidence of new risks, this does not mean that new evidence relating to old risks need not be considered.*[210]

This liberal school of thought prevailed in *Raza*, where the Federal Court of Appeal acknowledged that a PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. However, the Court added that "*it may* [nevertheless] *require consideration of some or all of the same factual and legal issues as a claim for refugee protection. In such cases there is an obvious risk of wasteful and potentially abusive relitigation. The IRPA mitigates that risk by limiting the evidence that may be presented to the PRRA officer.*" [211]

The Court of Appeal ended its analysis by enumerating questions that need to be examined before determining whether a specific piece of evidence needs to be considered. These questions are the following:

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[210] *De Silva v. Canada (M.C.I.)*, 2007 FC 841 at para. 16 (T.D.).

[211] *Raza v. Canada (M.C.I.)*, 2007 FC 385 at para. 12 (T.D.) [*Raza*].

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:

(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) 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).[212]

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[212] *Ibid*. at para. 13.

Raza was an important decision as it clarified the inconsistency created by various judges of the Trial Division. However, we believe this decision is a setback in at least one aspect. In *Raza* the Federal Court of Appeal confirmed that a PRRA application may require an examination of the same facts that were raised by the claimant before the RPD. This finding is a setback because it contradicts the principle that *"it is not open to the PRRA officer to revisit the Board's credibility conclusions"* as well as the principle that *"a PRRA application is not an appeal of the RPD's credibility findings"*. Since the PRRA officer may now reach a different credibility finding with respect to the same allegations but based on evidence that was not before the RPD, he effectively reviews the RPD's decision with respect to the applicant's credibility. While a PRRA application may not be an appeal, it is definitely a second kick at the can.

Nevertheless, the *Immigration and Refugee Protection Regulations* impose an obligation upon the Applicant to explain why the evidence submitted with the PRRA application is admissible under subsection 113(a) of the IRPA. Subsection 161(2) of the *Regulations* requires that an applicant explain in his or her submissions which evidence meets the requirements of paragraph 113(a) of the *Act* and why it meets them. In *Raza*, the Federal Court of Appeal acknowledged that without these regulatory requirements, it would be easy to reargue unsuccessful asylum claims before a PRRA officer.

That said, it is important to define the three prongs of paragraph 113(a) of the IRPA in light of recent jurisprudential developments. First, with respect to "*new evidence"*, it is worthwhile pointing out that the mere fact that the evidence is dated after the refugee claim hearing does not mean that it could not have been prepared sooner or that it is new evidence. The evidence must contain new elements in the sense that they arose subsequent

to the hearing before the RPD.[213] Second, as to "evidence that was not reasonably available to the applicant at the time of the hearing before the RPD", it should be noted that the applicant bears the burden to establish that that particular evidence was not reasonably available.[214] Consequently, absent any proof from the applicant of circumstances that prevented him from obtaining this evidence sooner, it does not constitute evidence that was not reasonably available to the applicant at the time of the hearing before the RPD.[215] Similarly, if an applicant is aware of the existence of certain evidence but is unable to obtain it before the hearing into his claim for asylum because it required research, effort and the cooperation of third parties, he might not succeed in filing that evidence in support of his PRRA application under the third prong of paragraph 113(a) of the IRPA, i.e., as "evidence that the applicant could not have been expected to adduce in the circumstances of the case". A diligent applicant is expected to request a postponement of his RPD hearing in order to gather all relevant documents in support of his claim.[216] If he fails to do so, he will be unable to file such evidence at the PRRA stage.

ii) Relying on Extrinsic Evidence

Generally, the rules of procedural equity require that the administrative board or the decision-maker disclose the evidence that is adverse to the applicant in order to give him or her an adequate opportunity to respond. Obviously, this rule applies to extrinsic evidence only; therefore, the evidence need not be brought to the applicant's attention if he or she is aware of it. An applicant is deemed to know from his past experience with

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[213] *Ibid*; *Chong c. Canada (M.C.I.)*, 2007 CF 584 (T.D.).

[214] *Komahe v. Canada (M.C.I.)*, 2006 FC 1521 (T.D.); *Doumbouya v. Canada (M.C.I.)*, 2007 FC 1187 (T.D.).

[215] *Chong, supra* note 212.

[216] *Doumbouya, supra* note 213.

the refugee process what type of evidence of general country conditions the immigration officer will be relying on and where to find that evidence; consequently, fairness does not dictate that he be informed of what is available to him in documentation centers of the Immigration and Refugee Board.[217] Procedural equity requires an immigration officer who intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centers, to inform the applicant of novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.[218]

In other words, an immigration officer will violate a rule of procedural fairness if he relies on extrinsic evidence without providing the applicant an opportunity to respond and if the evidence relied on contains novel and significant information which evidences a change in the general country conditions. It is logical because an officer may rely on a new country report simply because the old version is no longer available. There will be no violation of procedural equity if the information contained in the new report is the same as the one found in the older version.

In *Fi*,[219] *Zamora*,[220] and *Radji*,[221] the Federal Court cautioned the PRRA officers against using documentation or sources taken from non-standard websites and that are not available at the IRB Documentation Centers. Consequently, a serious issue will be raised in a motion for a stay of removal if an applicant establishes all of the following elements: (1) the PRRA officer relied on extrinsic evidence; (2) the PRRA officer did not give

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[217] *Mancia v. Canada (M.C.I.)*, 1998 CanLII 9066 (F.C.A.), [1998] 3 F.C. 461, at para. 22 (F.C.A.) [*Mancia*].

[218] *Ibid*. at para. 23.

[219] *Fi v. Canada (M.C.I.)*, 2006 FC 1125 (T.D.).

[220] *Zamora v. Canada (M.C.I.)*, 2004 FC 1414 (T.D.).

[221] *Radji v. Canada (M.C.I.)*, 2007 FC 835 (T.D.).

him an opportunity to respond to this evidence; (3) the evidence contains novel and significant information evidencing changes in the general country conditions; (4) the evidence was not available in the IRB's documentation centres and it is not the type of evidence that the applicant can anticipate that the PRRA officer would rely on.

iii) Holding a Hearing

Paragraph 113(b) of the IRPA provides that a PRRA officer may hold a hearing if, on the basis of certain prescribed factors, the Minister is of the opinion that a hearing should be held. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the IRPA, section 167 of the *IRPA Regulations* set out the factors to be considered. These 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. If all the requirements of that section are met, then the PRRA Officer should hold a hearing.[222]

With respect to the first criterion, the immigration officer may conclude that the applicant's credibility is not in issue, but nevertheless dismiss the PRRA application on the basis of insufficiency of evidence.[223] While it is true that the lack of evidence or the probative value of evidence and credibility are two separate and distinct reasons for dismissing one's claim for asylum,[224] immigration officers should not disguise credibility

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[222] *Ferguson v. Canada (M.C.I.)*, 2008 FC 1067 at para. 8 (T.D.).

[223] *Jiang v. Canada (M.C.I.)*, 2009 FC 794 at para. 11-13 (T.D.); *C.D. v. Canada (M.C.I.)*, 2008 FC 501 at para. 39.

[224] See e.g. *Ferguson, supra* note 221; *Alexis c. Canada (M.C.I.)*, 2008 CF 273 (T.D.); *Kaba c. Canada (M.C.I.)*, 2006 CF 1113 (T.D.); *Selliah c. Canada (M.C.I.)*, 2004 CF 872 (T.D.).

findings as lack of evidence or as absence of probative value in order to justify their refusal to hold a hearing. With respect to the second and third criteria set out in section 167 of IRPR, the evidence related to the applicant's credibility must be central and decisive. It would not be central if it concerns an irrelevant fact. It would not be decisive if the claim would fail anyway on grounds unrelated to the applicant's credibility. For instance, if the PRRA officer found that the applicant could avail himself of state protection in his home country, then the applicant's credibility would no longer be decisive.

iv) Removal to Country Described in Section 230 of the Regulations

Section 230 of IRPR allows the Minister to impose a stay on removal orders with respect to a country if the circumstances in that country pose a generalized risk to the entire civilian population as a result of an armed conflict within the country or place, an environmental disaster resulting in a substantial temporary disruption of living conditions or any situation that is temporary and generalized. Removals were stayed to Burundi, Liberia, Rwanda, and the Democratic Republic of Congo because of civil wars and armed conflicts. Removals to Sri Lanka were stayed during the Tsunami. Removals to Haiti were stayed as a result of the chaotic political situation in the country and later as a result of the devastating earthquake. The Minister of Citizenship and Immigration has a list of countries for which a temporary suspension of removals has been imposed. The Minister periodically reviews this list and cancels the stay if the circumstances in the country no longer pose a generalized risk to the entire civilian population.[225]

However, this stay does not apply to a person who is inadmissible on security grounds, on grounds of violating human or international rights, on grounds of criminality, or to a person referred to in section F of Article 1 of

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[225] *Immigration and Refugee Protection Regulations*, *supra* note 6, s. 230(2).

the *Convention relating to the Refugee Status*.[226] When examining the PRRA application of a person who will be removed to a country mentioned on the Minister's list of temporary suspension of removals, but to whom this suspension does not apply because of subsection 230(3) of the IRPR, the PRRA officer has nevertheless the duty to comment on the reasons for the temporary suspension of removals to that country and distinguish the specific facts of the case being studied.[227]

In the *Isomi* and *Alexis* cases, the Federal Court explained that even when the temporary suspension of removals does not apply to an applicant, the mere existence of such a suspension of removals gives rise to a disconcerting factual situation which must be taken into consideration in studying the PRRA. The reasons for suspending removals to a particular country could be useful for the purposes of examining the risks of return of an applicant. Consequently, a PRRA officer's failure to make such an analysis raises a serious issue under the *Toth* test.

b) Serious Issue – When the Underlying Application is an H&C Decision

When the underlying proceeding to a stay motion is a judicial review application of a decision refusing a permanent residence application based on humanitarian and compassionate grounds, the questions that are most frequently raised on a stay motion relate to the procedural fairness, to the best interests of a child, to lengthy delays of processing and to the risks of return. In this section, we will not consider the issue of risks of return since we have already covered this topic in the previous section.

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[226] *Ibid*, s. 230(3).

[227] *Isomi v. Canada (M.C.I.)*, 2006 FC 1394 at para. 31 (T.D.) [*Isomi*]; *Alexis, supra* note 223.

i) Procedural Fairness

An applicant bears the burden of bringing to the officer's attention any evidence relevant to humanitarian and compassionate considerations.[228] The officer is neither required to contact the applicant to obtain all information necessary to render an appropriate decision[229] nor to allow the Applicant to complete his evidence.[230] Similarly, an officer has no duty to contact the applicant and request an update even when an application has been pending for many months; in such cases, the courts have held that an applicant may constantly update his file throughout the process before the decision is rendered.[231] In *Krishnan*,[232] the Federal Court refused to certify the following question:

> *Does the duty of fairness require that the Minister's delegate either make herself aware of the conditions in the applicant's country of origin, through publicly available human rights reports and other such material, at the time of making a decision [...] or give notice to the applicant that a decision will shortly be made and invite the applicant to provide updated information on the conditions in the country of origin, where a significant period has passed since the applicant's case was perfected for consideration without a decision having been made?*

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[228] *Owusu v. Canada (M.C.I.)*, 2003 FCT 94, [2003] F.C.J. No. 139, aff'd 2004 FCA 38, [2004] F.C.J. No. 158 (F.C.A.).

[229] *Nguyen v. Canada (M.C.I.)*, 2005 FC 236, [2005] F.C.J. No. 281 (T.D.); *Aoutlev v. Canada (M.C.I.)*, 2007 FC 111 (T.D.) [*Aoutlev*]; *Irias v. Canada (M.C.I.)*, 2003 FC 1321, [2003] F.C.J. No. 1717 (T.D.); *Patel v. Canada (M.C.I.*), [1997] F.C.J. No. 54 (T.D.).

[230] *Samsonov v. Canada (M.C.I.)*, 2006 FC 1158, [2006] F.C.J. No. 1457 (T.D.).

[231] *Melchor v. Canada (M.C.I.)*, 2004 FC 1327, [2004] F.C.J. No. 1600 at paras. 14-15 (T.D.); *Arumugam v. Canada (M.C.I.)*, [2001] F.C.J. No.1360 (T.D.) at para. 17 (T.D.); *Souici v. Canada (M.C.I.)*, 2007 FC 66 at paras. 50-51 (T.D.).

[232] *Krishnan v. Canada (M.C.I.)*, 2007 FC 846 (T.D.).

In refusing to certify this question, the Court followed previous decisions where it was held that an applicant has the responsibility to put before the decision-maker all the material that he or she wishes to have considered and he or she can submit further evidence until the final decision is rendered. The only difficulty with this reasoning is that an applicant cannot know when the decision is about to be rendered. Therefore, he is expected to constantly verify the documentary evidence and send updates to the immigration officer. Such a burden seems to be excessive compared with the little effort it would require an officer to inform the applicant by a standard letter that a decision is about to be rendered and to invite him to submit updated information.

An interview is not a general requirement in the case of decisions regarding applications based on humanitarian and compassionate considerations, and offering applicants a chance to make their submissions in writing satisfies the requirements of procedural fairness.[233] However, the officer has a duty to take into account all of the relevant information submitted by an applicant, including any new information relating to risks of return which was not analyzed by a PRRA officer.[234] In addition, an officer must provide adequate reasons for the decision. When assessing the adequacy of reasons, those reasons must not be held to a standard of perfection or read microscopically:

> *[…] a reviewing court should be realistic in determining if a tribunal's reasons meet the legal standard of adequacy. Reasons should be read in their entirety, not parsed closely, clause-by-clause, for possible errors or*

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[233] *Baker*, *supra* note 99, at 843; *Étienne v. Canada (M.C.I.)*, 2003 FC 1314, [2003] F.C.J. No. 1659 (T.D.); *Duplessis c. Canada (M.C.I.)*, 2006 CF 1190 at para. 37 (T.D.); *Bouaraoudj v. Canada (M.C.I.)*, 2006 FC 1530, [2006] F.C.J. No. 1918 at para. 17-21 (T.D.); *Aoutlev, supra* note 228 at para. 10.

[234] *Arunachalam v. Canada (M.C.I.)*, 150 F.T.R. 289, 1998 CanLII 8220 (T.D.).

> *omissions; they should be read with a view to understanding, not puzzling over every possible inconsistency, ambiguity or infelicity of expression.*[235]

Rather, in assessing the adequacy of the reasons provided, a reviewing Court must examine the overall reasoning process contained in a decision.[236] A related consideration is whether or not relevant evidence was ignored in the officer's assessment. Although the officer, as is the case with any other administrative board, is presumed to have considered all documentary evidence that was before it,[237] and although the officer's failure to mention some of the documentary evidence is not fatal to the decision,[238] an erroneous finding of fact can be inferred from the officer's failure to mention in his reasons some evidence before him that was relevant to the finding, and that pointed to a different conclusion from that reached by him.[239]

ii) Best Interests of a Child

The best interests of the child is an important factor that must be given substantial weight when assessing a permanent resident application based on humanitarian and compassionate grounds.[240] The immigration

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[235] *Ragupathy v Canada (M.C.I.)*, 2006 FCA 151, [2006] F.C.J. No. 654 at para. 15 (F.C.A.); See also *Andryanov v. Canada (M.C.I.)*, 2007 FC 186, [2007] F.C.J. No. 272 at para. 21 (T.D.); *Liang v Canada (M.C.I.)*, 2003 FC 1501, [2003] F.C.J. No. 1904 at para. 42 (T.D.).

[236] *Malveda v. Canada (M.C.I.)*, 2008 FC 447 at para. 41 (T.D.).

[237] *Florea v. Canada (M.E.I.)*, [1993] F.C.J. No. 598 at para. 1 (F.C.A.).

[238] *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (F.C.A.)

[239] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (T.D.).

[240] *Baker*, *supra* note 99; *Legault v. Canada (M.C.I.)*, 2002 FCA 125, [2002] 4 F.C. 358 (C.A.) [*Legault*], leave to appeal to S.C.C. refused, 21 November 2002, SCC 29221.

officer must be "alert, alive and sensitive" to these interests.[241] In *Kolosovs*, the Federal Court defined these three terms as follows:

> *The word alert implies awareness. When an H&C application indicates that a child who will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated. […] Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably determined. […]It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief.*[242]

In our view, in *Kolosovs*, by defining the terms "alert, alive and sensitive", the Court added formal requirements and complicated an immigration officer's task. The Trial Division did precisely what the Federal Court of Appeal cautioned against doing:

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[241] *Baker*, *ibid*. at para. 75.

[242] *Kolosovs v. Canada (M.C.I.)*, 2008 FC 165, 323 F.T.R. 181 (T.D.).

> *The administrative burden facing officers in humanitarian and compassionate assessments--as is illustrated by section 8.5 of Chapter IP 5 of the Immigration Manual: Inland Processing (IP) reproduced at paragraph 30 of my colleague's reasons-- is demanding enough without adding to it formal requirements as to the words to be used or the approach to be followed in their description and analysis of the relevant facts and factors.*[243]

Although the best interests of a child are an important factor, they are not more important than other factors:

> *Baker does not create a prima facie presumption that the children's best interests should prevail, subject only to the gravest countervailing grounds. In his question, Justice Nadon refers to the "children's best interests". This expression is oftentimes encountered in Baker, but to the extent that it could be understood to mean that the interests of the children are superior to other interests, it can cause the agent to believe that this factor is, before all others, more important, which in light of Suresh and in the absence of clear legislative or regulatory limitations stating otherwise, cannot be the case. It would be better to use the expression "children's interests".*[244]

The children's interests are especially not decisive of the issue of removal.[245] The presence of children in Canada does not constitute in itself an impediment to the removal of a parent illegally residing in Canada.[246] The officer's assessment of the best interests of the child does not consist of determining whether the child's best interests favour non-removal because such a determination would inevitably lead to the conclusion that removal is

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[243] *Hawthorne v. Canada (M.C.I.)*, 2002 FCA 475, [2003] 2 F.C. 555, 222 D.L.R. (4th) 265; 235 F.T.R. 158, at para. 7 (F.C.A.).

[244] *Legault, supra* note 239 at para. 13.

[245] *Hawthorne*, *supra* note 242.

[246] *Langner v. Canada (M.E.I.)* (1995), 29 C.R.R. (2d) 184 (F.C.A.), leave to appeal to S.C.C. refused, [1995] 3 S.C.R. vii.

prohibited in all but a very few unusual cases.[247] "*The officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations that militate in favor of or against the removal of the parent.*"[248] The officer is not required to assess whether the damage to the child's interests is disproportionate to the public benefit produced by the decision.[249]

The officer must clearly identify and define the best interests of a child.[250] However, the officer is not required to specifically identify the obvious disadvantages faced by children as such a requirement "*would elevate form over substance*".[251] Also, the obligation to consider the best interests of a child only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies in whole, or at least in part, on this factor.[252] In other words, the officer's analysis of the best interests of the child should be proportionate to the applicant's submissions on this point.[253] If an applicant provides insufficient evidence to support the claim, the officer may conclude that it is baseless.

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[247] *Ibid*.

[248] *Ibid*. at para. 6.

[249] *Ibid.* at para. 8.

[250] *Legault, supra* note 239.

[251] *Barrak v. Canada (M.C.I.)*, 2008 FC 962, 333 F.T.R. 109 (T.D.); *Sant'anna v. Canada (M.C.I.)*, 2006 FC 1454, 153 A.C.W.S. (3d) 1220 at para 39.

[252] *Owusu, supra* note 227 at paras. 36-39.

[253] *Pillai v. Canada (M.C.I.)*, 2008 FC 1312 at para. 62 (T.D.).

In certain decisions, the Court has extended the application of the notion "best interests of a child" to adult children.[254] We strongly disagree with these decisions.

An officer was held not to be alert, alive and sensitive to the child's best interests when he summarily dismissed the child's concerns and ignored the financial implications for the child of her mother's removal.[255] Similarly, an officer was held not to be alert, alive and sensitive to the child's best interests when his analysis "*lacked substance and any real basis for the Officer's disagreement with the advice and conclusions contained in the psychological reports*".[256] Also, an officer is not alert, alive and sensitive to the best interests of a child when he simply lists these best interests without conducting a meaningful analysis, particularly when he has before him evidence "that the children's educational aspirations would be significantly damaged if forced to leave Canada".[257] In *Yoo*,[258] the Federal Court granted the judicial review application challenging an H&C where the officer failed to assess the potential impact of the interruption in the adult child's education.

iii) Undue Delay

Processing an application for permanent residence based on H&C grounds may take several years. Applicants whose H&C application has been pending for several months or years may seek from the Federal Court an order of *mandamus* pursuant to subparagraph 18(1)(3)(a) of the *Federal*

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[254] *Naredo v. Canada (M.C.I.)*, [2000] F.C.J. No. 1250 (T.D.); *Yoo v. Canada (M.C.I.)*, 2009 FC 343 (T.D.).

[255] *Hawthorne*, *supra* note 242.

[256] *Mughrabi v. Canada (M.C.I.)*, 2008 FC 898 (T.D.).

[257] *Guadeloupe v. Canada (M.C.I.)*, 2008 FC 1190 (T.D.).

[258] *Yoo, supra* note 253.

Courts Act.[259] A mandamus application may result in an order forcing the Minister of Citizenship and Immigration to render a decision on the H&C application that it failed or refused to render or has unreasonably delayed.

In *Apotex*,[260] the Federal Court of Appeal conducted an extensive analysis of the jurisprudence and concluded that to issue a writ of *mandamus*, the following conditions need to be satisfied:

(a) there must be a public legal duty to act;

(b) the duty must be owed to the applicant;

(c) there is a clear right to performance of that duty:

  (i) there was a prior demand for performance of the duty;

  (ii) there was a reasonable time to comply with the demand unless refused outright;

  (iii) there was a subsequent refusal to perform the duty which can be either expressed or implied, e.g. unreasonable delay.

(d) Where the duty sought to be enforced is discretionary, the following rules apply:

  (i) in exercising his or her discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

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[259] *Supra* note 7.

[260] *Apotex Inc. v. Canada (A.G.)*, [1994] 1 F.C. 742, 51 C.P.R. (3d) 339, 18 Admin. L.R. (2d) 122, 69 F.T.R. 152 (F.C.A.) [*Apotex*], aff'd 1994 SCC 47, [1994] 3 S.C.R. 1100, 59 C.P.R. (3d) 82, 29 Admin. L.R. (2d) 1 (S.C.C.).

(ii) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

(iii) in the exercise of "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(iv) *mandamus* is unavailable to compel the exercise of "fettered discretion" in a particular way;

(v) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

(e) No other adequate remedy is available to the applicant;

(f) The order sought will be of some practical value or effect;

(g) The Court in the exercise of its discretion finds no equitable bar to the relief sought;

(h) On a "balance of convenience", an order in the nature of mandamus should (or should not) be issued.

In the vast majority of immigration cases where a *mandamus* order is sought, the decisive issue concerns the third factor – clear right to the performance of the duty – and in particular, the reasonableness of the delay.[261] While each application for *mandamus* must turn on its own factual context,[262] the jurisprudence provides some guidance in terms of what may

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[261] *Abdolkhaleghi v. Canada (M.C.I.)*, 2005 FC 729, at para. 13 (T.D.); see also *Conille v. Canada (M.C.I.)*, [1999] 2 F.C. 33 (T.D.); *Platonov v. Canada (M.C.I.)* (2000), 192 F.T.R. 260 (T.D.); *Kalachnikov v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 777, (2003), 236 F.T.R. 142 (T.D.).

[262] *Bhatnager v. Canada (M.E.I.),* [1985] 2 F.C. 315 (T.D.); *Mohamed v. Canada (M.C.I.)* (2000), 195 F.T.R. 137 (T.D.).

constitute unreasonable delay in processing an H&C application. A delay of 24 months is usually considered a normal timeframe for processing an H&C decision whereas a delay of 36 months without a reasonable explanation has been held to be excessive.[263]

c) Serious Issue – When the Underlying Application is a Refusal to Defer a Removal

As mentioned previously, the *Act* contains no reference to removals officers, enforcement officers or expulsion officers. Yet, the Federal Court found in the wording of section 48 of the former *Immigration Act*, which is the equivalent of subsection 48(2) of the *IRPA*, the power enabling removals officers to defer a foreign national's removal from Canada. The first case to recognize such power was *Poyanipur*.[264] Since then, several important decisions were rendered by the Federal Court where the scope of a removals officer's discretion was thoroughly examined. The Courts have attempted to define in these decisions the scope of a removals officer's discretion to defer a removal.

The case law is unanimous – an enforcement officer's discretion to defer removal is limited.[265] In *Wang*,[266] the Federal Court circumscribed the boundaries of an enforcement officer's discretion to defer a person's removal. It was held that an officer may take into account a range of factors in determining the timing of the removal. These factors are mainly related to making effective travel arrangements. Consequently, any circumstance or

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[263] *Mann v. Canada (M.P.S.E.P.)*, 2008 FC 612 (T.D.); *Bakhsh v. Canada (M.C.I.)*, 2004 FC 1060, 256 F.T.R. 194 (T.D.).

[264] *Poyanipur*, *supra* note 75; see also *Pavalaki*, *supra* note 75; *Lewis*, *supra* note 75; *Saini*, *supra* note 75.

[265] *Baron v. Canada (M.P.S.E.P.)*, 2009 FCA 81, 387 N.R. 278, 79 Imm. L.R. (3d) 157 (F.C.A.).

[266] *Wang, supra* note 76.

factor that may affect these arrangements, such as children's school years, pending births or deaths or poor medical condition of the person to be removed, may influence the officer's decision as to the timing of the person's removal.

In addition to these factors, the most recent jurisprudence of the Federal Court also instructs that in the exercise of his discretion a removal officer may consider the best interests of a child[267] and the existence of a pending H&C application that was filed in a timely manner.[268] An applicant has the onus to provide the evidence justifying a deferral and an officer is not required to investigate matters to see whether or not deferral is warranted.[269]

i) Duty to Render a Decision

The Federal Court considers the removals officer's exercise of discretion as a decision-rendering process.[270] Therefore, a removals officer must render a decision on a request to defer a removal. However, a removals officer must be afforded a reasonable time period to deal with the request.[271] In most cases, a delay of four days does not constitute a reasonable period of time.[272] Conversely, if a removal officer does not respond to a deferral request within a reasonable period of time, this failure in itself may, and in our view should, raise a serious issue.

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[267] *Munar*, *supra* note 78; *Simoës*, *supra* note 77; *Boniowski, supra* note 77; *Poyanipur, supra* note 75; *Melo*, *supra* note 78; *Paterson*, *supra* note 78; *John*, *supra* note 78.

[268] *Simoës*, *supra* note 77; *Antablioghli*, *supra* note 79.

[269] *Singh v. Canada (M.C.I.)*, 2004 FC 405, 250 F.T.R. 19 (T.D.).

[270] *Adviento*, *supra* note 84, at para. 19; *Huseine*, *supra* note 84.

[271] *Samra, supra* note 137.

[272] *Ibid*.

ii) Inadequate Reasons

In the absence of a legislative provision specifying the form decisions must take, there is no required format for decisions.[273] A decision can be oral or written.[274] Thus, theoretically, a removals officer has no duty to provide a written decision. In practice, however, officers send a standardized letter wherein they inform the applicant that they considered his or her request to defer, but did not think that it was justified in the circumstances. These types of letters were held to be sufficient in many recent decisions of the Federal Court.[275]

Applicants should always strive to make their request to defer removal in writing. It may be difficult to prove that an oral request was made and it will be especially difficult to establish the contents of such a request. Moreover, a written request is more likely to culminate in a written response. By the same token, communicating a decision orally, especially through the telephone, may be problematic. In *Hinson*,[276] the Court refused to recognize a simple telephone call as a decision, in response to a written inquiry, from a departmental official in which the immigration officer advised the applicant that his request for admission to Canada on humanitarian and compassionate grounds had been granted. Following this telephone call, Hinson received a letter denying his H&C application. The Court explained that given the repercussions of such a decision on an applicant, a simple telephone call could not be a final determination of an application and consequently was not a reviewable decision. A removals officer's decision also has important

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[273] Macaulay and Sprague, *supra* note 81 at 22-53.

[274] *Shooters Sports Inc. v. Nova Scotia (Liquor License Board)* (1996), 45, Admin. L.R. (2d) 112 (N.S.S.C.).

[275] *Wright*, *supra* note 88; *Boniowski*, supra note 77; *Charles*, *supra* note 55; *Mann*, *supra* note 88.

[276] *Hinson*, *supra* note 87.

repercussions on an applicant. If a removals officer decides to inform the applicant of his decision by telephone, the applicant may find himself in a difficult situation in case he decides to seek a judicial review of that decision because the Courts may follow the *Hinson* case and not view a telephone call as a reviewable decision.

In our view, a refusal to defer removal communicated orally will raise a serious issue as soon as the applicant alleges that the removals officer ignored certain allegations, misconstrued or misunderstood the evidence, and so on. Therefore, we cannot insist enough on the importance of providing adequate reasons in support of a refusal to defer removal.

In many cases, the Federal Court has ruled that no formal decision is mandated in the legislation or regulations to defer removal,[277] and that before refusing the request, an officer must at least acknowledge that he has some discretion to defer removal.[278] This however does not mean that the complete absence of reasons is looked on with a favourable eye. As mentioned previously, to the extent that it is practical to do so, an agency must always strive to provide reasons for its decision.[279] The Supreme Court of Canada outlined a number of purposes that reasons may serve.[280] The courts constantly urge removal officers to take notes.[281] In *Boniowski*, the Court explained that the recording of written notes which set out the reasons for an administrative decision fosters better decision-making, and provides a basis of explanation if such decision is challenged on judicial review. The officer is not required to draft well-written, formal reasons. His hand-written notes

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[277] *Boniowski, supra* note 77.

[278] *Boniowski, supra* note 77.

[279] Macaulay and Sprague, *supra* note 81 at 22-55.

[280] *Baker*, *supra* note 99.

[281] See e.g. *Boniowski, supra* note 77 at para. 12.

may constitute reasons for the decision.[282] As stated by the Court in *Adomako*:

> *Removal officers have limited discretion and accordingly, the reasons for decision are often sparse and not as well written as one might wish. They have to be read in their totality; rather than focusing on a single sentence and reading it too literally. In this case, after looking at the entire decision, it becomes clear that the removal officer was aware of the total situation and took all of the relevant factors into account.*[283]

Furthermore, an officer is not required to communicate his notes to the applicant unless a specific request is made. If the applicant fails to request the officer's reasons or her notes to file, he will be barred from raising this issue in a motion for a stay of removal before the Federal Court.[284]

A serious issue was found in the *Thomas* and *Guizar* cases where the officer either refused to communicate his notes or imposed upon the applicant additional steps in order to obtain these notes.[285] In *Thomas* the applicant requested reasons for the removals officer's decision refusing to defer removal. The removals officer denied the request indicating that such a request for reasons "*must be made through the privacy coordinator*." The Court held that this reply raised a serious issue and granted the stay.

The vast majority of cases state that even the complete absence of written reasons from a removal officer is not, in and of itself, a reason for the

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[282] *Osei, supra* note 101.

[283] *Adomako v. Canada (M.P.S.E.P.)*, 2006 FC 1100 (T.D.).

[284] *Chavez*, *supra* note 106 at para. 17.

[285] *Thomas*, *supra* note 104; *Guizar, supra* note 104.

reviewing Court to intervene.[286] There is however a number of judges who disagree with this reasoning. For instance, in *Man*, the Court stated in an *obiter* that a complete absence of reasons raises a serious issue:

> *Notwithstanding the decision of the Court in Hailu v. Canada (Solicitor General), 2005 FC 229 (where no question was certified), with great respect, I would likely have concluded that a serious issue arose from the absence of any explanation anywhere for the decision not to defer removal (i.e. whether contained in the officer's notes, in the decision letter or by affidavit). This Court has held that a refusal of deferral may carry profound implications for the person concerned. (See, for example, Thomas v. Canada (M.C.I.) 2003 F.C. 1477). Accordingly, I wish to underscore the Court's comments in Boniowski v. Canada (M.C.I.), 2004 FC 1161 that the respondent minister should "encourage" as a regular practice the keeping of notes by removals officers with respect to the exercise of their discretion whether to defer removal. Such notes fulfill any reasons requirement and would allow the Court to consider allegations of bias, fettering of discretion, breach of principles of fairness and the like. The absence of any note, affidavit or meaningful statement in a decision letter as to why deferral was refused should not, in my view, be allowed to immunize from effective judicial review the exercise of an, albeit limited, discretion.*[287]

iii) Medical Impediments to Travel

Some individuals with medical conditions who are facing removal may claim that adequate medical facilities and/or treatment are not available or accessible in their destination country. A removal officer has to consider these medical factors when determining the timing of the removal. Removal officers often rely on the expertise of the medical officers employed by the

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[286] *Boniowski, supra* note 77; *Mann*, *supra* note 88; *Charles*, *supra* note 55; *Hailu*, *supra* note 93.

[287] *Man*, *supra* note 103 at para 13; *Cf. Jones-1*, *supra* note 103 at para. 14.

Health Management Branch of Citizenship and Immigration Canada.[288] The Health Management Branch is a centralized unit that, upon request, will provide a medical opinion on the medical facilities, treatment and services available in the destination country.[289]

When medical reasons are raised in support of a request for a deferral, the officer should refer these reasons to the Health Management Branch and solicit an opinion on these allegations from a medical officer. The failure to consult a medical officer or an attempt to interpret a medical report may raise a serious issue since a removal officer has no medical expertise.[290] Needless to say, an officer is not required to obtain an additional medical opinion if the file already contains conclusions from medical officers which contradict the medical certificate filed by the applicant.

In any event, a medical opinion being extrinsic evidence must be communicated to the applicant.

> *I interpret the term "extrinsic evidence not brought forward by the applicant" as evidence of which the applicant is unaware because it comes from an outside source. This would be evidence of which the applicant has no knowledge and on which the immigration officer intends to rely in making a decision affecting the applicant.*[291]

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[288] See e.g. *Keppel v. Canada (M.C.I)*, 2003 FC 1208 (T.D.); *Kaplan v. Canada (M.C.I.)*, 2003 FC 1521 (T.D.); *Berki v. Canada (Solicitor General)*, 2005 FC 1084 (T.D.).

[289] Department of Citizenship and Immigration, Operation Manual ENF-10, "Removals" 26 May 2009 at para. 24.1 [*Manual ENF-10*].

[290] *Charlton v. Canada (M.P.S.E.P.)*, 2008 FC 1355 (T.D.); *Delisle v. Canada (M.P.S.E.P.)*, 2009 FC 28 (T.D.).

[291] *Dasent v. Canada (M.C.I.),* (1994), 87 F.T.R. 282 (T.D.).

Therefore, the Courts held in certain cases that the removals officer should provide the applicant with an opportunity to respond to this opinion.[292] However, in *Holubova*,[293] the Court warned that "*the deferral request and the stay* [motion] *is not the forum for dueling medical opinions, rebuttal, reply, sur-rebuttal and sur-reply*."

The removal officer's reliance on a medical opinion from the Health Management Branch does not shelter his decision from judicial scrutiny because it may be apparent from the medical opinion obtained that the medical officer disregarded an essential element such as costs of treatment[294] or accessibility of certain medical services[295] in the country of destination.

iv) A Second PRRA Application

A person who receives a negative PRRA decision and who remains in Canada may make another application. Pursuant to section 165 of IRPR, a subsequent PRRA application does not result in a statutory stay of removal. Thus, removal arrangements can proceed. In exceptional circumstances, a stay of removal may be warranted.[296] A lengthy period of time since the first PRRA application would, in our opinion, constitute exceptional circumstances and would justify a deferral or an administrative stay. If such a stay is denied, then the courts should grant a judicial stay to an applicant.

Should the immigration authorities grant a stay to an applicant who alleges to have discovered evidence that would be crucial to his subsequent application? The answer to this question depends, in our view, on the nature

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[292] *Level v. Canada (M.P.S.E.P.)*, 2008 FC 227, 324 F.T.R. 71 (T.D.).

[293] *Holubova*, *supra* note 196.

[294] *Mazakian v. Canada (M.P.S.E.P.)*, 2008 FC 1248 (T.D.).

[295] *Caruth v. Canada (M.C.I.)*, 2009 FC 891 (T.D.); *Perez de Leon c. Canada (M.S.P.P.C.)*, Imm-2091-08, J. de Montigny, May 12, 2008 (T.D.).

[296] Manual ENF-10, *supra* note 284; *Cf. Haghighi*, *supra* note 80, at para. 24.

of this allegation and on the trustworthiness of an applicant based on his overall credibility before various immigration boards and decision-makers. If the applicant has been found not credible by the Immigration and Refugee Board as well as by the PRRA officer who dismissed his first application, and he or she now attempts to adduce new evidence relating to the same allegations which were found not to be credible, then the applicant is most probably trying to buy more time in Canada and does not deserve a stay of removal. Conversely, if the applicant has never claimed asylum in Canada and his PRRA application was dismissed on grounds of insufficiency of evidence, then the removal officer should seriously consider the applicant's request for a deferral of his removal.

v) Pending H&C Application

Generally, a pending H&C application does not constitute grounds for deferring a removal that has become enforceable.[297] However, the Federal Court held on numerous occasions that an enforcement officer has a duty to take into account a pending H&C application that has been filed in a timely fashion.[298] A pending H&C will be considered as filed in a timely fashion if it meets the following two criteria.

First, a timely application is not an application that was filed for the sole purpose of obtaining a deferral or a stay of removal. Generally, an H&C application that is filed after the applicant's removal becomes enforceable should not be considered as timely. For instance, an H&C application filed after a negative PRRA decision was rendered should not be considered an application filed in a timely manner:

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[297] *Wang*, *supra* note 76.

[298] *Simoës*, *supra* note 77; *Boniowski, supra* note 77.

> *The existence of a pending H&C application has often been held not to constitute irreparable harm, especially when, as here, the application was not made in timely fashion after unsuccessful applications for refugee status and a PRRA. Counsel says that it was justifiable for them to wait five years before making their H&C application so that they could demonstrate establishment in Canada. This was a tactical decision and the appellants must live with the consequences.*[299]

Second, a timely H&C application also requires that it be pending for a sufficiently long period of time. More specifically, in determining whether an application was filed in a timely manner, the enforcement officer should consider whether the reason there was no decision was a backlog in the system.[300]

As a rule of thumb, an application that has been pending for more than 12 months will be considered as timely. In more recent cases,[301] the Federal Court held that there was no duty on the enforcement officer to defer removal pending determination of the H&C application filed approximately 10 months before. Inversely, in several other decisions, the Federal Court held that a serious issue is raised by an enforcement officer's failure to consider an outstanding H&C application that has been pending for more than 13 months.[302]

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[299] *Palka*, *supra* note 199 at para. 14; see also *Bonil Acevedo v. Canada (M.P.S.E.P.)*, 2007 FC 401, 311 F.T.R. 221 (T.D.).

[300] *Simmons v. Canada (M.P.S.E.P.)*, 2006 FC 1123 (T.D.).

[301] *Peters v. Canada (M.C.I.)*, 2006 FC 518 (T.D.); *Jackson v. Canada (M.C.I.)*, 2007 FC 201 (T.D.).

[302] *Harry v. Canada (M.C.I.)*, [2000] F.C.J. 1727 (T.D.); see also *Simmons, supra* note 299; *Diaz Arroyo v. Canada (M.P.S.E.P.)*, 2006 FC 260 (T.D.) (where the H&C application was pending for 15 months); *Contra Barrera v. Canada (M.C.I.)*, 2003 FCT 779 (T.D.).

Even though in some decisions the Federal Court found that a serious issue was raised by the enforcement officer's failure to consider an H&C application that had been pending for only four[303] or eight months,[304] we believe that this approach is unrealistic.

vi) Best Interests of a Child

It is now settled law that the removals officer has a duty to consider the best interests of a child. It is essential for the removals officer to make it clear either in his notes or, in their absence, in the decision itself, that he took into consideration the best interests of the children. Ideally, the officer would go one step further and briefly explain why the interests of the child were insufficient to warrant a deferral. In *Munar*, the Federal Court described the scope and the extent of the removal officer's obligation to take into account the best interests of a child. In doing so, the Court compared this obligation to that of an H&C officer:

> *[39]When assessing an H&C application, the immigration officer must weigh the long term best interests of the child. […] Factors related to the emotional, social, cultural and physical well-being of the child are to be taken into consideration. Examples of factors that can be taken into account include the age of the child, the level of dependency between the child and the H&C applicant, the degree of the child's establishment in Canada, the child's links to the country in relation to which the H&C decision is being considered, the medical issues or special needs the child may have, the impact to the child's education, and matters related to the child's gender. […]*
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> *[40]This is obviously not the kind of assessment that the removal officer is expected to undertake when deciding whether the enforcement of the removal order is "reasonably practicable." What he should be considering,*

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[303] *Paterson*, *supra* note 78.

[304] *Rettegi v. Canada (M.C.I.)*, 2002 FCT 153 (T.D.).

> *however, are the short-term best interests of the child. For example, it is certainly within the removal officer's discretion to defer removal until a child has terminated his or her school year, if he or she is going with his or her parent. Similarly, I cannot bring myself to the conclusion that the removal officer should not satisfy himself that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. This is clearly within his mandate, if section 48 of the IRPA is to be read consistently with the Convention on the Rights of the Child. To make enquiries as to whether a child will be adequately looked after does not amount to a fulsome H&C assessment and in no way duplicates the role of the immigration officer who will eventually deal with such an application (see Boniowski v. Canada (Minister of Citizenship and Immigration) (2004), 44 Imm. L.R. (3d) 31 (F.C.)).*[305]

Since the Federal Court's decision in *Munar*, it is now clear that although a removal officer need not conduct a mini H&C assessment, he has an obligation to consider the short-term interests of a child affected by a removal. Thus, a failure to consider this factor will raise a serious issue.

vii) Spouse in Canada Public Policy

The Minister of Citizenship and Immigration has determined that it is in the public interest to assess all foreign nationals in spousal or common-law relationships with Canadian citizens or permanent residents, regardless of status of their immigration status, under the provisions of the *Spouse or Common-law Partner in Canada* class, if they meet the following conditions: (1) they have made an application for permanent residence either on H&C grounds or via the *Spouse or Common-law Partner in Canada* class; (2) they

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[305] *Munar*, *supra* note 78. This reasoning was adopted when the application for judicial review was heard: *Munar v. Canada (M.C.I.)*, 2006 FC 761 (T.D.).

are the subjects of a sponsorship undertaking that is made by their spouse or common-law partner.[306]

Accordingly, this policy exempts the foreign national from the requirement of having legal status in Canada for the purposes of applying for a permanent resident status in the spouse or common-law partner category.[307] This policy would have very little practical effect if the foreign national could be removed by the Canada Border Services Agency of the Department of Public Safety while his application for permanent residence is being processed. Consequently, the Canada Border Services Agency has agreed to grant a temporary administrative deferral of removal to applicants who qualify under this public policy. However, to benefit from this deferral, the foreign national should not be inadmissible for security, human or international rights violations, serious or organized criminality and criminality or be excluded under Article 1F of the *Geneva Convention relating to Refugee Status* by the Refugee Protection Division of the Immigration and Refugee Board.[308] In addition, the foreign national will not benefit from this deferral if he has an outstanding warrant for removal, or if he has previously hindered removal.[309]

Applicants who apply under this public policy after they are deemed removal ready by the Canada Border Services Agency will not benefit from the administrative deferral of removal. For the purposes of this public policy, by the time an applicant attends a pre-removal interview, the foreign national is generally removal ready. This means that a person who has been called to a pre-removal interview by any means (letter, call, etc.) and who has not

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[306] Department of Citizenship and Immigration, Operation Manual IP-8, "Spouse or Common-law partner in Canada class" 16 October 2006.

[307] *Ibid*.

[308] *Ibid*.

[309] *Ibid*.

already applied as a spousal H&C applicant or a *Spouse or Common-law Partner in Canada* class applicant, cannot, from the point they are called to the interview onwards, benefit from an administrative deferral of removal as outlined in this public policy.[310] This exception was introduced in order to avoid abuse or deferrals based on fraudulent applications.

d) Serious Issue – When Underlying Application is an Order to Release a Detained Person

Subsection 55(2) of IRPA provides that an officer may, without a warrant, arrest and detain a foreign national, other than a protected person, who the officer has reasonable grounds to believe is a danger to the public or is unlikely to appear for an examination, admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order. This provision also allows the officer to detain a person if he is not satisfied of the person's identity.

Immediately after taking a person into detention, an officer must give notice to the Immigration Division.[311] Within 48 hours after a person is taken into detention, the Immigration Division must review the reasons for the continued detention.[312] Further detention reviews take place within seven days following the first detention review, and once during each 30-day period following each previous review.[313]

Pursuant to section 58 of IRPA, the Immigration Division shall order continued detention when satisfied that the person detained is a danger to the public, is unlikely to appear or his identity has not been established. The

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[310] *Ibid*.; *Lubisa Jovic v. (Canada) M.P.S.E.P.* 2007 FC 748 (T.D.); *Wraich v. Canada (M.P.S.E.P)*, 30 November 2006, Imm-6194-06, de Montigny J. (T.D.).

[311] IRPA, *supra* note 5, s. 55(4).

[312] *Ibid*. s. 57(1).

[313] *Ibid*. s. 57(2).

Minister bears the initial burden of establishing that the continued detention is warranted.[314] The evidentiary burden shifts to the detainee once the Minister has established a *prima facie* case.[315]

The factors to be taken into consideration when assessing the detention or the release of a person who is either unlikely to appear for an examination, admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order, is set out in section 245 of IRPR. The factors to be taken into consideration when assessing the detention or the release of a person who is a danger to the public, or whose identity has not been established, are set out in sections 246 and 247 of IRPR.

When the Board decides to order the person's release, the Minister of Public Safety might challenge this decision before the Federal Court by way of judicial review. However, the release order is effective immediately;[316] therefore, by the time the judicial review application is disposed of, the points in issue will become moot. To prevent the foreign national's release from detention before the disposition of the judicial review, the Crown (the Minister of Public Safety) will seek an order from the Federal Court requesting that the individual's release be stayed pending the final disposition of the judicial review application.

To obtain a stay of the Immigration Division's order to release a detained person, the Minister must meet the tri-partite test applicable to all stay motions. The threshold of a serious issue is low: it is sufficient to prove that the issue raised by the Minister is not frivolous or vexatious.[317] In

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[314] *Canada (M.P.S.E.P.) v. Welch*, 2006 FC 924 at para. 25 (T.D.).

[315] *Thanabalasingham*, *supra* note 138.

[316] *Immigration Division Rules*, SOR/2002-229, r. 11(3).

[317] See e.g. *Canada (M.P.S.E.P.) v. Liew*, 2008 FC 1114 (T.D.); *Iamkhong*, *supra* note 9.

Thanabalasingham,[318] the Federal Court of Appeal considered the nature of the Immigration Division's detention reviews under sections 57 and 58 of the *Act*. It noted that the *Act* does not draw any distinction between the first and subsequent detention reviews. Therefore, the same factors may be considered during the first as well as all subsequent detention reviews. Also, the Federal Court of Appeal observed that the *Act* does not impose a requirement to adduce any new evidence at a subsequent detention review hearing on the Minister. Hence, the Member must decide afresh whether continued detention is warranted.

In that case, the Federal Court of Appeal made an interesting determination with respect to the weight the Immigration Division must give to previous detention review decisions in subsequent reviews.

> *Credibility of the individual concerned and of witnesses is often an issue. Where a prior decision maker had the opportunity to hear from witnesses, observe their demeanor and assess their credibility, the subsequent decision maker must give a clear explanation of why the prior decision maker's assessment of the evidence does not justify continued detention. For example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.*
>
> *The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.*
>
> *However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be*

[318] *Thanabalasingham*, *supra* note 138.

> *unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.*[319]

This precedent stands for the proposition that, before departing from a decision reached at a previous detention review hearing, the Immigration Division must clearly explain the reasons for doing so. Furthermore, the Board errs when it releases a person despite reaching the conclusion that he is a flight risk or a danger for Canadians. This error raises a serious issue on a motion for a stay of removal.[320] The Board also errs when it orders a person's release on the basis of the best interests of a child because this factor alone cannot override all other factors enumerated in the *Regulations*.[321] Similarly, the Board's failure to sufficiently examine the character of the bondspersons, or the relationship of the bondspersons to the person detained, raises a serious issue and constitutes an error.[322] However, the Immigration Division is not required to allow for cross-examination of a bondsperson in all cases,[323] in particular, in cases where the Minister's representative requests an opportunity to cross-examine the bondspersons after the adjudicator renders his decision.[324]

2. ESTABLISHING IRREPARABLE HARM

In this part, we will consider the second prong of the tri-partite test that the applicant must satisfy in order to obtain a stay. In *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, the House of Lords decided

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[319] *Thanabalasingham*, *supra* note 138.

[320] *Ambrose*, *supra* note 9; *Canada (M.C.I.) v. Singh*, 2001 FCT 954 (T.D.).

[321] *Canada (M.C.I.) v. Shote*, 2004 FC 115, 245 F.T.R. 32 (T.D.).

[322] *Canada (M.C.I.) v. Zhang*, 2001 FCT 522, 205 F.T.R. 91, [2001] 4 F.C. 173 (T.D.) [*Zhang*]; *Iamkhong*, *supra* note 9.

[323] *Canada (M.C.I.) v. Ke*, 188 F.T.R. 91, 2000 CanLII 15184 at para. 7 (T.D.).

[324] *Zhang*, *supra* note 321.

that irreparable harm should not be harm that can be compensated monetarily. The Supreme Court of Canada followed this reasoning in the *Metropolitan Stores*[325] and *RJR Macdonald*[326] cases. In an immigration context, this fast rule is not easily transposable. As the Federal Court explained in *Suresh*, the House of Lords (or the Supreme Court) did not give any consideration to its applicability in the context of human rights. It is only in a commercial context that any court would characterize irreparable harm in terms of that which cannot be compensated monetarily. The Federal Court of Appeal rightly pointed out that no transgression of a basic human right can be accurately measured or compensated by money. This is particularly true in immigration cases often involving deportation of individuals to a country of alleged persecution.[327] In *RJR MacDonald*, the Supreme Court also acknowledged that "*the assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases*."[328]

What constitutes irreparable harm in the context of stays of removal? In *Kerrutt*,[329] the Federal Court concluded that, for the purposes of a stay motion, irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. It added that it "*is a very strict test and [...] it must be very grave and more than the unfortunate hardship associated with the*

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[325] *Metropolitan Stores*, *supra* note 3.

[326] *RJR-MacDonald*, *supra* note 192.

[327] *Suresh v. M.C.I*, [1999] 4 F.C. 206, [1999] F.C.J. No. 1180 (F.C.A.), rev'd 2002 SCC 1, [2002] 1 S.C.R. 3 (S.C.C.).

[328] *RJR-MacDonald*, supra note 192.

[329] *Kerrutt v. M.E.I.* (1992), 53 F.T.R. 93 (T.D.).

breakup or relocation of a family." In a more recent decision, *Melo*,[330] the Federal Court adopted this reasoning and defined "irreparable harm" as "*prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar places and people. It is accompanied by enforced separation and heartbreak*". In addition, a determination of irreparable harm cannot result from the same allegations of risk that were found not credible by the Immigration and Refugee Board or by the PRRA officer. Were that the case, a stay motion would become a proceeding where one can collaterally challenge adverse credibility findings reached by the IRB and the PRRA officer. Such is not the role of a stay motion; thus, the Federal Court rightly refuses to consider allegations of risk that were found not credible as irreparable harm:

> *[…] the Court notes that the risk to the applicants upon their return to Turkey has been assessed twice - once by the Refugee Division, and a second time by the PRRA officer. Both administrative tribunals made findings of fact that the applicants would not be at risk. In the case at bar, the Refugee Division clearly called into question the applicants' credibility as it found, based on the applicants' behavior over a prolonged period, that they lacked the subjective fear of persecution that was the very basis of their claim. This Court has held that where an applicant's account was found not to be credible by the Refugee Division, this account cannot serve as a basis for an argument supporting irreparable harm in a stay application.*[331]

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[330] *Melo*, *supra* note 78.

[331] *Akyol v. Canada (M.C.I.)*, 2003 FC 931 (T.D.) [*Akyol*]; *Majerbi v. Canada (Solicitor General)*, 2008 FC 958 (T.D.); *Petrovych v. Canada (M.P.S.E.P.)*, 2009 FC 110 (T.D.); *Pao v. Canada (M.C.I.)*, 2005 FC 941 (T.D.).

Furthermore, irreparable harm cannot be speculative nor can it be based on a series of possibilities.[332]

a) Harm to the Applicant Personally

In several decisions, the Federal Court concluded that irreparable harm must be assessed in connection with the person to be removed from Canada and not a third party, including a spouse or parents.[333] In our view, such a restrictive interpretation of the phrase irreparable harm is simply illogical. The Courts expect the removals officer to take into account the short-term interests of a child before refusing to defer a parent's removal. In doing so, the Courts recognize that a parent's removal may adversely affect a child. Why then would the Federal Court expect a removals officer to consider the best interests of a child in determining the timing of the parent's removal if the harm suffered by the child cannot qualify as irreparable harm in a motion for a stay of the parent's removal?

This said, we also disagree with the contrary position which states that irreparable harm may be suffered by anyone. Harm suffered by the extended family, friends and colleagues cannot constitute irreparable harm. This was the position adopted in the Federal Court's decision in *Jesudhasmanohararaj,*[334] where it was held that irreparable harm can arise where the children [and spouse] of the applicant will be directly and severely affected. However, the Court did not agree that it could extend to third parties such as extended family members.

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[332] *Jaballah v. Canada (M.C.I.)*, 2006 FCA 179 at para. 4 (F.C.A.); *Akyol*, *ibid*. at para. 7.

[333] *Bayemi v. Canada (M.C.I.)*, 23 March 2004, IMM-2348-04, Pinard J. (T.D.); *Simpson v. Canada (M.E.I.)*, [1993] F.C.J. No. 380 (T.D.); *Kante v. Canada (M.P.S.E.P.)*, 2007 FC 109 (T.D.) [*Kante*]; *Tajram v. Canada (M.C.I.)*, 2006 FC 760, [2006] F.C.J. No. 949 (T.D.).

[334] *Jesudhasmanohararaj v. Canada (Solicitor General)*, 2004 FC 596; see also *Melo*, *supra* note 78, at para. 19.

In many cases, irreparable harm was found to exist when the person affected was not the applicant himself;[335] therefore, in our opinion, it can no longer be argued that the harm must be suffered by the applicant himself.

b) Purely Economic Harm or Loss of Employment

A loss of a business in Canada caused by the applicant's removal does not constitute irreparable harm[336] unless this loss will adversely affect his family and employees.[337] Similarly, a loss of a property[338] and employment[339] caused by the applicant's removal does not constitute irreparable harm.

c) Family Separation

In two cases decided in 2004, the Federal Court of Appeal held that the loss of job and separation from one's family constitute the usual consequences of deportation and are not an irreparable harm "*of the type contemplated by the three-stage test for granting a stay*" either individually or combined.[340] However, in 2005, the Federal Court of Appeal conceded that irreparable harm may include family separation, and is not limited to a threat

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[335] See e.g.: *Natoo v. Canada (M.P.S.E.P.)*, 2007 FC 402, 311 F.T.R. 234 (T.D.) [*Natoo*]; *Phillip v. Canada (M.C.I.)*, 2004 FC 906 (T.D.) [*Phillip*]; *Martinez v. Canada (M.C.I.)*, 2003 FC 1341, [2003] F.C.J. No. 1695 (T.D.) [*Martinez*]; *Samuels v. Canada (M. C.I.)*, 2003 FC 1349 (T.D.) [*Samuels*]; *Kahn v. Canada (M.P.S.E.P.)*, [2005] F.C.J. No. 1365 (T.D.) [*Kahn*].

[336] *Startchev v. Canada (M.C.I.)*, 2002 FCT 690 (T.D.); *Akyol, supra* note 330.

[337] *Toth*, *supra* note 4; *Natoo, supra* note 334.

[338] *Benedict v. Canada (Solicitor General)*, 2004 FC 555 (T.D.); *Camara v. Canada (M.P.S.E.P.)*, 2008 FC 1089 (T.D.); *Kante, supra* note 332 at para. 57.

[339] *Soosaipillai v. Canada (Solicitor General)*, 2004 FC 684 (T.D.); *Hamid v. Canada (M.P.S.E.P.)*, 2006 FC 233 at para. 4 (T.D.); *David v. Canada (M.C.I)*, 2006 FC 1486, 154 A.C.W.S. (3d) 437 (T.D.); *Camara, ibid.*; *Kante supra* note 332 at para. 57.

[340] *Atwal v. Canada (M.C.I.)* (2004), 330 N.R. 300 (F.C.A.) [*Atwal*]; *Selliah v. Canada (M.C.I.)*, 2004 FCA 261 (F.C.A.) [*Selliah*].

to the deportee's life and limb.[341] The Court of Appeal also acknowledged that decisions on the grant of stays tend to be very fact-specific; therefore, the difficulty is to delineate the circumstances in which family separation, or the disruption of personal and other important relationships, constitutes irreparable harm. Thus, in deciding whether family disruption constitutes irreparable harm, the Court must determine whether the hardship of removal is a usual consequence of deportation or whether the hardship will exceed the usual consequences of deportation.[342] For instance, a removal which results in financial hardship for a family in Canada would generally exceed the normal consequences of deportation. In my view, the financial hardship the family will likely experience as a result of the applicant's deportation may constitute irreparable harm. Yet, in many decisions the Federal Court decided the exact opposite: the economic hardship the applicant's family might experience as a result of his removal does not constitute irreparable harm.[343] I do not argue that any financial hardship would meet the irreparable harm threshold; in my opinion, the financial hardship must be significant.

d) Disruption of Medical Treatment

An irreparable harm will be established in cases where the applicant's deportation would disrupt the medical treatment he receives in Canada.[344] For instance, a diabetic who takes expensive prescription drugs to control her diabetes would suffer irreparable harm if deported to a country where she wouldn't be able to afford them.[345] Similarly, an applicant would suffer an

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[341] *Tesoro v. Canada (M.C.I.)*, 2005 FCA 148 (F.C.A.) [*Tesoro*].

[342] Ibid.; *Atwal, supra* note 339; *Selliah, supra* note 339.

[343] *Phillip, supra* note 334; *Natoo, supra* note 334; *Martinez, supra* note 334; *Samuels, supra* note 334; *Kahn*, *supra* note 334.

[344] *Adao v. Canada (M.C.I.)*, 2003 FC 1396 (T.D.); *Caruth, supra* note 294.

[345] *Gallardo v. Canada (M.C.I.)*, 2006 FC 1331, 302 F.T.R. 252, 58 Imm. L.R. (3d) 238, 152, 2006 CarswellNat 3607 (T.D.).

irreparable harm if his removal would put an end to physiotherapy prescribed for a physical injury.[346] Or perhaps it could be found that an applicant would suffer an irreparable harm if he is removed from Canada despite evidence that a follow up is necessary in order to determine whether further surgeries will be needed.[347] Irreparable harm may also be established where a Canadian psychiatrist confirms that further investigation into the applicant's mental health is required.[348] An applicant who suffers from chronic renal failure and continues to receive dialysis treatment for her condition three times a week for three and a half hours each visit will no doubt suffer an irreparable harm if removed to her country of origin.[349] An applicant who will be deprived of his treatment for hepatitis "C" will also meet the irreparable harm criterion.[350] An irreparable harm is likely to exist in cases where a child's medical treatment will be jeopardized by the removal.[351]

However, if the medical treatment is available and accessible in the country of destination, there will be no irreparable harm found,[352] unless the

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[346] *Ebonka v. Canada (M.C.I.)*, 2008 FC 879, [2008] F.C.J. No. 1098, 74 Imm. L.R. (3d) 40, 2008 CarswellNat 2500 (T.D.).

[347] *Charlton v. Canada (M.P.S.E.P.)*, 2008 FC 1355, [2008] F.C.J. No. 1724, 78 Imm. L.R. (3d) 114, 2008 CarswellNat 4641 (T.D.).

[348] *Mazakian v. Canada (M.C.I.)*, 2008 FC 1248, [2008] F.C.J. No. 1567, 76 Imm. L.R. (3d) 151, 2008 CarswellNat 4110 (T.D.).

[349] *Caruth, supra* note 294.

[350] *Yusufzai, v. Canada (Solicitor General)*, 2005 FC 113, [2005] F.C.J. No. 144, 137 A.C.W.S. (3d) 159.

[351] *Samokhvalov v. Canada (M.C.I.)* (1994), 76 F.T.R. 56, 46 A.C.W.S. (3d) 1117 (T.D.); G*lasgow v. Canada (M.P.S.E.P.)*, 2009 FC 611, [2009] F.C.J. No. 1386 (T.D.); *Adao v. Canada (M.C.I.)*, 2003 FC 1396, [2003] F.C.J. No. 1916, 127 A.C.W.S. (3d) 1212 (T.D.); *Odumosu v. Canada (M.C.I.)*, 2001 FCT 1174, 2001 CFPI 1174, [2001] F.C.J. No. 1636, 109 A.C.W.S. (3d) 628 (T.D.).

[352] *Atwal, supra* note 339; *Solis Perez v. Canada (M.C.I.)*, 25 October 2007, IMM-4023-07, Blanchard J. (T.D.); *Dia v. Canada (M.P.S.E.P.)*, 2007 FC 859 (T.D.).

applicant can prove that she would not be able to afford this treatment.[353] There will be no irreparable harm if the applicant completed his medical treatment and is only currently being monitored in Canada.[354]

e) Application for Judicial Review in Process

The Federal Court and the Federal Court of Appeal often dismiss stays where there are outstanding applications for leave and for judicial review or appeals, including appeals of negative PRRA applications.[355] However, in *Solis Perez*, the Federal Court of Appeal recently ruled that a judicial review application challenging a PRRA decision becomes moot as soon as the person leaves the country. In reaction to this case, two schools of thought seemed to emerge. According to the first school, irreparable harm exists if there is a risk that the removal of a person will render moot his judicial review application challenging a PRRA decision.[356] According to the second school of thought, even if the removal does render nugatory the application for judicial review challenging the PRRA decision, this does not necessarily constitute irreparable harm.[357] We agree with the second school of thought because not every application for leave and for judicial review has merit. The applicant should not be allowed to benefit from a futile judicial review application. However, the Court hearing the stay motion should minimally conduct a cursory analysis of the PRRA decision in order to ascertain that it is not filled with legal and factual errors. In other words,

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[353] *Singh v. Canada (M.C.I.)*, 2005 FC 909 (T.D.); *Ebonka v. Canada (M.C.I.)*, 2008 FC 879 (T.D.).

[354] *David v. Canada (M.C.I.)*, 2006 FC 1486 (T.D.).

[355] *Selliah, supra* note 339; *El Ouardi, supra* note 185*; Sivagnanansuntharam v. Canada (M.C.I*), 2004 FCA 70, [2004] F.C.J. No. 325 (F.C.A.); *Tesoro , supra* note 340.

[356] *Ghahremani v. Canada (M.C.I.)*, 2009 FC 722 (T.D.); *Koca v. Canada (M.P.S.E.P.)*, 2009 FC 473 (T.D.).

[357] *Palka*, *supra* note 199 at para. 20.

Solis Perez implicitly requires the Court examining a stay motion to pay closer attention to the serious issue when the underlying decision is a judicial review of a PRRA decision.

f) School Year

As a rule, removing a child from Canada in the middle of the school year does not constitute irreparable harm:

> *[…] leaving school before the completion of the school year will no doubt be highly inconvenient and will most likely necessitate the redoing of their school year. However, this does not constitute irreparable harm.*[358]

However, in certain circumstances, it may establish irreparable harm:

> *As for the effect of removal on MacKenzie, his situation must be viewed in the context of the facts of this case. Loss of a school year may in some circumstance establish irreparable harm. That is not the case here where MacKenzie started junior kindergarten in September, and the only evidence is that he loves his school, his teachers, and the other students and is doing well.*[359]

The circumstances which will determine whether the harm is irreparable are the timing of the removal, the age of the child and the type of studies. For instance, if the removal takes place one month before the end of the school year, the child will have to redo the year in the country of

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[358] *Mahadeo c. Canada (M.C.I.)* 166 F.T.R. 315, [1999] F.C.J. No. 294, 86 A.C.W.S. (3d) 773 at para. 6 (T.D.); see also *Strachan v. Canada (M.C.I.)* (1998), 157 F.T.R. 267, 84 A.C.W.S. (3d) 545 at para. 24 (T.D.); *Nedelkovski v. Canada (M.C.I.)*, 2001 FCT 33 (T.D.); *Kakonyi v. Canada (M.C.I.)*, 2008 FC 1410 (T.D.); *Diallo v. Canada (M.C.I.)*, 2009 FC 84 (T.D.).

[359] *Ryan v. Canada (M.C.I.)*, 2001 FCT 1413 (T.D.).

destination.[360] Consequently, removing him one month before the end of the school year is likely to constitute irreparable harm:

> *I am satisfied that should the applicant be removed to Grenada on May 24, 2001, irreparable harm will be suffered by her elder child who, while she is not subject to removal by the Minister, will accompany the applicant if the latter is now removed. With more than one month remaining in the current school year, the child's schooling will be disrupted. Whether she will lose credit for the school year not yet completed is uncertain, but there is no uncertainty that her schooling will be affected adversely. In the circumstances, where that risk is unnecessary, it would constitute irreparable harm, in my opinion. If the elder child is permitted to finish her school year by staying removal of the applicant until after June 30, 2001, any irreparable harm from disruption of the child's schooling would disappear.*[361]

Similarly, the removal will be less harmful for a young child who just began school as opposed to a teenager who is on the verge of graduating and obtaining a diploma.[362]

3. BALANCE OF INCONVENIENCES

The third and last criterion of the tri-partite test is the balance of inconveniences. This prong of the test is the least important and will in most cases not be decisive in immigration matters. When assessing the inconveniences, the Court must determine which party will experience greater inconveniences if the motion is granted or dismissed. The individual's

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[360] See e.g. *John v. Canada (M.C.I.)*, 1 June 1999, Imm-2259-99, Richard J., 1999 CanLII 8246 (T.D.).

[361] *Commissiong v. Canada (M.C.I.)*, 2001 FCT 539 (T.D.); *Ivanov v. Canada (M.C.I.)*, 2002 FCT 188 (T.D.); *Liu v. Canada (M.C.I.)*, 2001 FCT 415 (T.D.); *Gallardo v. Canada (M.C.I.)*, 2002 FCT 604 (T.D.); *Vasquez v. Canada (M.C.I.)*, 2004 FC 402 (T.D.).

[362] See for instance *Firsova v. Canada (M.C.I.)*, 2003 FCT 156 (T.D.).

inconveniences will have likely been mentioned under the irreparable harm factor. However, the sources of the Crown's inconveniences are not as palpable. They are the public interest, the security of Canadians, the integrity of the system and the Crown's obligation to execute the removal orders as soon as reasonably practicable.

There is no longer any doubt that the public interest must be taken into consideration when evaluating the balance of inconveniences.[363] For instance, the balance of inconveniences will favour the Crown in cases where the applicant has been determined to be a danger to the public:[364]

> *In considering the balance of convenience, the Court must consider that the Applicant is a danger to the public in Canada. If a person is a danger to the public in Canada or has committed crimes against humanity, the public interest and the balance of convenience favours not staying removal from Canada. (Choubaev v. Canada (M.C.I.), 2002 FCT 816; Grant v. Canada (M.C.I.), 2002 FCT 141.)*[365]

Or, where the applicant has a long and steady history of disregarding Canadian laws:[366]

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[363] *RJR-MacDonald, supra* note 192*; Blum v. Canada (M.C.I.)* (1994), 90 F.T.R. 54 (T.D.); *Jama v. Canada (M.C.I.)*, 2008 FC 374 (T.D.) [*Jama*].

[364] *Kennedy v. Canada (M.C.I.)* (2000), 184 F.T.R. 279, [2000] F.C.J. No. 1081, 2000 CanLII 15804 (T.D.) [*Kennedy*]; *Singh v. Canada (M.C.I.)*, [1998] 3 F.C. 616 (T.D.); *Chilcott v. Canada (M.C.I.)*, [1998] F.C.J. No. 556, 1998 CanLII 7692 (T.D.); *Osman v. Canada (M.C.I.)*, [1998] F.C.J. No. 611, 1998 CanLII 7843; *Sinnarajah v. Canada (M.P.S.E.P.)*, 2007 FC 895 (where the applicants had a danger opinion or security certificates issued against them).

[365] *Jama, spra* note 362.

[366] *Louis v. Canada (M.C.I.)*, [1999] F.C.J. No. 1101, 94 A.C.W.S. (3d) 541, 45 W.C.B. (2d) 215, 1999 CanLII 8343 (T.D.); *Omar v. Canada (M.C.I.)*, 2009 FC 94, 340 F.T.R. 97, [2009] F.C.J. No. 129; *Kennedy*, supra note 363; *Townsend v. Canada (M.C.I.)*, 2004 FCA 247, 327 N.R. 229; [2004] F.C.J. 1137, 132 A.C.W.S. (3d) 339; 2004 CarswellNat 2035, 2004 CarswellNat 2872, 25 June 2004, A-167-04 Rothstein J. (F.C.A.); *Somian v. Canada (M.P.S.E.P.)*, 2008 FC 435 (T.D.).

> *In Townsend, Justice Marshall Rothstein, found that the balance favoured the Minister given the "appellant's long criminal record and current costly incarceration outweigh the appellant's lengthy residence in Canada". (Tesoro v. Canada (M.C.I.), 2005 FCA 148; Thanabalasingham v. Canada (M.P.S.E.P.), 2006 FC 486).*[367]

Is the opposite also true; does the balance of inconveniences favour an applicant who neither represents a danger for Canadians nor has a criminal record? Some decisions stand for that proposition. Indeed, in a few decisions, the Federal Court held that the balance of inconveniences favours the applicant if he is not a security threat, a danger to the public and has no criminal record.[368] However, the Federal Court of Appeal specifically dealt with this argument in *Selliah*:

> *Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the status quo until their appeal is decided.*
>
> *I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.*[369]

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[367] *Jama, supra* note 362.

[368] *Paez v. Canada (M.C.I.)*, 2005 FC 112, [2005] F.C.J. No. 143, 137 A.C.W.S. (3d) 157 (T.D.); *Selliah v. Canada (M.C.I.)*, 2003 FCT 190 (T.D.); *Hailu v. Canada (Solicitor General)*, 2004 FC 790 (T.D.).

[369] *Selliah, supra* note 339 at para. 21.

In our view, the applicant's good character should play a positive role in evaluating the balance of inconveniences prong of the test, but should not be decisive because, as we mentioned earlier, the Crown has a statutory obligation to execute removal orders as soon as reasonably practicable irrespective of the applicant's good character. The balance of inconveniences should generally favour an applicant who has significantly contributed to Canadian society and economy and whose presence in Canada for an additional period of time does not otherwise negatively affect the image of the system and the public interest in general. The extent to which an applicant exhausted the administrative and judicial resources available should also play a role in determining on whose side the balance should weigh. More specifically, an applicant who has had the opportunity to claim asylum, to file permanent residence applications based on humanitarian and compassionate grounds, has benefited from a Pre-Removal Risk Assessment and has challenged most or all of these administrative decisions before the Federal Court has indeed exhausted all of the recourses available. Therefore, the integrity of the system requires that he leave the country in order to allow the system to process efficiently and adequately claims made by genuine refugees in need of protection.

CONCLUSION

Statutory, administrative and judicial stays of removal play an extremely important role in the immigration process; in most cases, it is the last opportunity a foreign national has to stop or delay his removal. Consequently such an important concept must be governed by consistency and foreseeability. However many factors and circumstances make this concept highly uncertain and at times purely random. For instance, the urgency and the limited time that both the parties and the Court dispose of when dealing with stays make it practically impossible to ensure that the law of stays is coherent and foreseeable. Another important factor which makes

the law of stays inconsistent is the subjective approach adopted by judges hearing stay motions. Normally, courts strive to attain consistency in the case law because the doctrines of *stare decisis* and judicial comity require them to do so. Considering the impact a deportation may have on an individual and considering the fact-driven nature of the immigration files, judges often bring their subjective and personal dimension to the decision-making process. Consequently, the outcome depends on the sensitivity and the values of the judge hearing the motion. This may be one of the reasons why the name of the presiding judge on motions is not disclosed until the day of the hearing whereas the identity of the judge hearing judicial review applications can be known two weeks prior to the hearing date.

By introducing a few legislative amendments it would be possible to attenuate or mitigate some of the factors which make the law of stays somewhat unforeseeable. First, the legislator should acknowledge that a stay motion in immigration matters has particularities that do not exist in other areas of law falling under the jurisdiction of the Federal Courts. Needless to say, the most important distinction is the impact a stay motion in immigration matters has on a person's life. In immigration files, the Federal Courts' judges often hesitate to dismiss stay motions only because the applicant's motion record has gaps and deficiencies. In any other area of law, when a party fails to put his best foot forward, the Courts do not hesitate to dismiss the motion. Many judges tolerate deficiencies because they realize that parties have little time to prepare their records and gather all of the relevant evidence. Yet, the question that comes to mind is what can be done to rectify this problem. Our recommendation is to create a separate regime for stay motions in immigration matters by adding several provisions to the *Immigration and Refugee Protection Act*[370] and to the *Federal Courts*

[370] *Supra* note 5.

Immigration and Refugee Protection Rules.[371] A new provision is required in the *Immigration and Refugee Protection Act* obliging the immigration authorities to give at least four-week's notice to deportees who are not detained.[372] At the same time, the *Federal Courts Immigration and Refugee Protection Rules* should also be amended so that stay motions in immigration matters are governed entirely by these rules rather than by the *Federal Courts Rules*, which cannot fully and adequately govern stays in the context of immigration law because the *Federal Courts Rules* do not take into account two important realities of the immigration law: the impact of stay motions in a person's life; and the application for leave that is required only in immigration cases.

Our recommendation is to add in the *Federal Courts Immigration and Refugee Protection Rules* provisions requiring that the Applicant file his Motion Record two weeks before the hearing date and that the Respondent file his Record one week before the hearing date. This would allow both parties to prepare adequately, to gather and file all relevant evidence. Similarly, this would allow the Court sufficient time to carefully review the evidence, to conduct research and to adjudicate. With these amendments, applicants would no longer have an excuse to file late or last-minute motions. Also, the Courts would no longer feel obliged to be lenient with applicants who choose not to put their best foot forward and whose motion record contains deficiencies that would otherwise be detrimental to their case.

In addition, while creating a separate regime for immigration-related stay motions under the *Federal Courts Immigration and Refugee Protection Rules*, the legislator can seize the opportunity and specify whether cross-

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[371] SOR/93-22.

[372] Those who are detained should also be entitled to a notice of at least one week.

examinations on affidavit are allowed when a stay motion is filed before leave is granted.

Another important problem relating to stay motions needs to be addressed by the legislator. When the Minister is the moving party, he is often required to prepare a Motion Record within a few hours because the Immigration Division's Order to release a foreign national from detention becomes effective immediately. The author of this paper was faced with a situation where he was required to prepare a Record within 45 minutes in order to avoid the release of a person who was, in the Minister's opinion, a danger for Canadians and a flight risk. It is difficult to describe how quickly one needs to think, draft and delegate in order to produce a Motion Record within 45 minutes.

The legislator should amend rule 11(3) of the *Immigration Division Rules*[373] which states that the Immigration Division's release order is effective immediately. The release order should become effective 24 hours after it is rendered so that counsel for the Minister can prepare the Motion Record within a relatively reasonable amount of time. Under the current legislation, counsel for the respondent must file an interim stay motion or send a letter requesting that the Court order a stay of the person's release until the Minister can file his record and plead his case. Theoretically, neither of these two ways of proceeding is fully legitimate because the Minister asks the Court to stay a person's release for a short period of time without any evidence. However, counsel for the Minister can proceed in no other way to prevent the release of the foreign national while preparing the Motion Record.

Despite our ambitions, we were unable to cover all aspects of stay applications. We did not touch on appeals against decisions of the Federal

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[373] *Supra* note 13.

Courts' Trial Division on a stay motion. For instance, what constitutes an excess of jurisdiction and a refusal to exercise jurisdiction?

Also, we did not discuss the interrelation that exists between statutory and judicial stays. More specifically, when immigration authorities fail to apply a statutory stay, does the applicant need to establish irreparable harm when he challenges this decision and files a motion for a (judicial) stay of removal? Statutory stays do not require that irreparable harm exist; thus, if an applicant raises a serious issue with respect to the application of a statutory stay, one can argue that he no longer needs to establish the irreparable harm criterion.

Similarly, when an applicant challenges several administrative decisions and files several stay motions at different times, does it amount to an abuse of process?

Because of its importance on human rights, this subject deserves further research and we hope this paper will incite the interest of the legal and academic community.

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