

DEFERRAL REQUESTS

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As soon as (legally) possible

IRPA s. 48 (2):

“If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced **as soon as possible**”

“this must mean as soon as legally possible”

Etienne v Canada (MPSEP), 2015 FC 415 (quoting from earlier stay decision)

Discretion to defer

- Factors related to the timing of removal, such as
 - Medical issues / fitness to fly
 - Pending births and deaths
 - Children's school year
 - Short-term best interest of the child
 - Compelling personal circumstances
- Pending some other process
 - H&C
 - Family court proceedings
 - Risk assessment

Or, risk of death, extreme sanction or inhumane treatment

- *Baron*, 2009 FCA 81, citing *Wang*, [2001] 3 F.C. 682, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

Peter 2014 FC 1073

- Constitutional challenge to the PRRA bar - s. 112(2)(b.1) of *IRPA* (On appeal to the FCA)
- Annis, J found the PRRA bar constitutional
 - Refugee determination process includes removals and PRRAs within 12 months makes it difficult to effect removal
 - Low success rate of PRRAs shows that most are an unnecessary waste of resources, delaying removal
 - Deferral requests screen for clear and persuasive evidence of new risk circumstances
 - Federal Court acts as oversight

Peter cont'd

- Annis, J also found the removals scheme constitutional
 - applies “risk of death, extreme sanction or inhumane treatment” threshold
 - Similar to s. 97 threshold
 - Definition of persecution, for the most part, is included in s. 97 risks
 - Anyone removed who is found to face a lower risk of persecution can be readmitted to Canada to pursue a PRRA

Etienne, 2015 FC 415

- [42] Nevertheless, I agree with the Minister that there is no need for the court on this application to engage in an analysis of the constitutionality of paragraph 112(2)(b.1) of the Act because it was not that provision that was the direct cause of the Etienne family not having their risk assessed prior to removal; rather, it was the decision of the enforcement officer not to defer their removal. Notwithstanding that the timing of the removal and refusal to defer may suggest that the respondent was anxious to remove the Etienne family before they became eligible for a PRRA, there is no evidence on which such a conclusion can be reached. Accordingly, the decision under review had nothing to do with the PRRA bar.

Etienne cont'd

- Enforcement officers must
 - consider whether a failure to defer will expose applicant to a “risk of death, extreme sanction or inhumane treatment”
 - turn their mind to the evidence presented, consider and assess it, and if it shows the applicant might be at risk, defer removal for a risk assessment
- Doesn't have to be a “new risk”
- Also must consider risks that have never been assessed by a competent body. (ex – IFA or identity determinative)

Deferral based on risk

- Keep in mind new evidence test - *Raza* 2007 FCA 385 at para 13
 - Credibility
 - Relevance
 - Newness
 - Materiality
 - Express statutory conditions
 - Reasonably available (if pre-dates RPD decision)
 - Evidence of new event or circumstance, must be considered

Risk deferrals - tips

- Deferral request letter / submissions should give detailed explanation of how the risk evidence is either new or wasn't previously assessed.
- Argue that the evidence shows the applicant faces risk
- Request a deferral of removal until risk is assessed
- Include detailed affidavit of applicant
- Personal supporting documents
- Country conditions research
- Submissions detailing how the applicant meets the definition of refugee or protected person (for the eventual decision-maker)

H&C – Deferral

- When to request deferral for pending H&C
- Timeliness of H&C
- Are you going to seek a stay?
- Will you convince the Court on Irreparable Harm?
- In other words – it better be pretty compelling – ie:
 - Medical issues impacting physical or psychological integrity
 - Issues affecting children

H&C deferrals - tips

- Cover letter should be clear and concise, and point to the some of the most compelling evidence
- Attach the entire H&C application
- Do an update if you can – send it to the H&C office and attach it to the deferral request

Medical issues

- Support the deferral request with clear medical evidence
- Include doctor's credentials
- CBSA will get a separate medical opinion

Best Interests of the Child

- Can relate to *any* child affected by the removal (whether or not the child is being removed)
- Factors which may be considered include:
 - School year
 - Child custody issues
 - Family separation (outside the normal consequences of deportation)
 - Child-care issues (e.g. when remaining parent is unfit to care for the child alone)
 - Risk to a child who is being returned
- Cases:

Bonil Acevedo v. Canada 2007 FC 401, *Munar v. Canada* 2006 FC 761,
Mauricette v. Canada 2008 FC 420

Family Court proceedings

- Get Court's orders / endorsements
- Often, and particularly for CAS matters, enforcement officers will defer pending genuine Family Court matters