Stay motions for RPD JRs

Practical tips, pointers and pitfalls

Anthony Navaneelan J.D.

Mamann, Sandaluk and Kingwell LLP

Who may need a stay of removal pending an RPD JR?

- First question: is your client's claim a 'legacy claim' or a 'new system claim' – i.e., was your client's claim referred to the RPD **on or after** December 15, 2012?

- If your client was referred **on or after** December 15, 2012, they are a new system claim. If the client cannot appeal their RPD refusal to the RAD for any of the reasons listed under s.110(2) of IRPA, they must proceed directly to JR **and there is no stay.**

What about RPD legacy claims?

- If your client was referred to the RPD before December 15, 2012, they are a Legacy Claimant and **may or may not** be entitled to a stay…

- If your client's claim was referred to the RPD **after August 14, 2012 but before December 15, 2012**, they are ineligible to appeal to the RAD, they must proceed directly to JR and **there is no stay.**

- If your client's claim was referred to the RPD **on or before August 14, 2012**, they are ineligible to appeal to the RAD and they must proceed directly to JR. This latter group **may receive a stay** if they meet three sets of criteria:

The pre-August 15, 2012 RPD legacy claimant gets a stay if she **is not**….

- Described in s.110(2) of the IRPA – i.e., she is not a DCO or DFN; there was no NCB or MUF finding made; she did not enter Canada under an exception to the STCA; her claim was not withdrawn, abandoned or rejected for cessation or vacation.

- Subject to a removal order because she is inadmissible on grounds of serious criminality (s.36(1));

- Resides or sojourns in the U.S. 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.

Citations:

- ***Immigration and Refugee Protection Regs***, s.231
- **Order-in-Council, SOR/2012-272**, s. 2
- ***Balanced Refugee Reform Act***, s.36
- ***Protecting Canada's Immigration System Act***, s.68
- ***Economic Action Plan 2013 Act***, s.167

What to do before bringing a stay motion for a pending RPD JR:

- Stay motions will generally only be heard by the Court where a *Direction to Report* has been served. If you learn of a removal some other way, write to CBSA ASAP, explain the need for written notice to bring a stay motion, and copy DOJ. Repeat frequently and include letters in the stay motion record.

- If leave has been pending for any length of time, write to the Court explaining removal has been booked; request a direction as to whether the Court *intends* to grant leave; cite Rule 3 ("These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.").

When to bring your stay motion?

- If there is enough time, RPD stay motions can be heard on regular motions day, meaning you are file on the Wednesday before the Tuesday before removal.

- If you have a deferral pending for another non-RPD JR reason, you have a tactical choice to make. I tend to file the RPD JR early and request it not be scheduled until the deferral has been decided. This can result in DOJ pressuring CBSA to defer. Other lawyers want their RPD stays heard ASAP to give them a second chance at a deferral stay before a different justice (note: *res judicata* concerns on irreparable and BoC on 2nd stay).

Serious issue on an RPD JR stays:

- Remind new judges that as this is a stay brought pursuant to a pending JR and so the lower frivolous and vexatious test applies. Be sure you understand why the higher *Wang/Baron* test applies to deferral stays and why that reasoning is inapplicable in RPD stays.

- Remind new judges that there is no need to bring a deferral where there is a pending RPD JR; in fact, *Shpati*, 2011 FCA 286 states that requests to push back removal for pending litigation should be brought directly to the Court. Only *new* risk should go to the deferral officer. Many new judges bungle this.

Serious issue on an RPD stay (cont'd)

- If leave is granted, DOJ will often concede serious issue. The arguable issue test is more stringent than the serious issue test: *Brown*, 2006 FC 1250; *Streanga*, 2007 FC 792. Also there are comity concerns with departing from the leave decision of another Judge: *Almrei*, 2007 FC 1025.

- If leave has not been granted, hammer how low the serious issue threshold is: "Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable." *RJR Macdonald*, [1994] 1 SCR 311.

Irreparable harm on RPD JR stays:

- Irreparable harm is a separate branch of the tri-partite test and must be independently established by the Court on **admissible** evidence. The harm can be the same fears presented to the RPD and/or they can be 'new' harms advanced for the purposes of the motion.

- Many judges of the Court (Crampton C.J., Hughes, Annis, Bell JJ.) have expressed concern that counsel don't understand the rules of evidence in establishing irreparable harm. Remember, this isn't the RPD – strictly speaking, evidentiary rules concerning hearsay and expert evidence and the 'best evidence rule' apply.

Irreparable harm flowing from the serious issue:

- It is often cited in PRRA JR stays that where an Applicant raises a serious issue, irreparable harm will flow: *Cruz Ugalde*, 2010 FC 775; *Koca*, 2009 FC 473; *Streanga*, 2007 FC 792; *Figuardo*, 2005 FC 347.

- But this approach can make some judges very nervous. Also, you will see jurisprudence stating that facts that were found not credible by the RPD cannot form the basis of irreparable harm. (But if the Court has found a serious issue with the RPD's credibility, perhaps at least the Court should decide the facts at first instance?)

Cardoza Quinteros, 2008 FC 643:

[14] Where the decision that underlies the stay application is a negative PRRA decision which the applicant claims exposes him to persecution or subjects him to a danger of torture or a risk to life or cruel or unusual treatment or punishment, it may be that **once the serious issue test has been satisfied the remaining two tests will, in most instances, also be met**: *Figurado v. The Solicitor General of Canada*, 2005 FC 347 at paragraph 45.

[15] That being so, it seems to me that the Court must exercise vigilance in cases involving a negative PRRA decision to satisfy itself that the issues raised by an applicant are truly serious issues and not issues that merely have the appearance of seriousness.

Even where irreparable harm flows, evidence of it must still be admissible:

- In a JR affidavit, the affiant is attaching the PIF/BoC not to establish the events set out in it but to establish that it was before the RPD. So the PIF/BoC are not admissible evidence for proof of their content on a stay motion. If you are relying on the fears presented to the RPD, it is best to have the client swear an affidavit indicating that they are still fearful for the reasons set out in the PIF/BoC and they adopt the PIF/BoC in full.

New or supplemented harms on the irreparable harm test:

- Consider whether your client can obtain new evidence of old risk, such as more proof of their sexual orientation; documents that the RPD specifically cited were lacking; etc. Section 113(a) does not apply.

- Have country conditions worsened since the RPD decision? *Ragupathy,* 2006 FC 1370: “As is often the case in refugee producing countries, circumstances can change significantly over a short period of time.”

Mootness as irreparable harm:

- *Shpati*, 2011 FCA 286: "[M]ootness does not **in itself** amount to irreparable har. […] Potential mootness is a consideration that the Federal Court is better placed to take into account when weighing all the factors relevant under the tripartite test for determining a motion for a judicial stay."]

- If your client's claim depends on s.97 of IRPA, removal will likely render it moot: *Rosa*, 2014 FC 1234. (97. A person in need of protection is a person **in Canada** whose removal…).

Mootness as irreparable harm (cont'd):

- But if your client's claim depends on s.96, removal will not render it moot if they are outside their country of nationality when JR is heard: *Rosa*, 2014 FC 1234. So consider including affidavit evidence why your client cannot travel to a third-country.

- Court is now divided on whether a client's claim that depends on s.96 is moot if they are inside their country of nationality when JR is heard: *Molnar*, 2015 FC 345 (question certified); *Dogar*, IMM-5719-13.

Balance of convenience: The usual DOJ arguments and some responses…

- Parliament intended removals to take place as soon as possible. But where there is a serious issue and irreparable harm arising from a flawed RPD decision, removal is simply not possible.
- What is "possible" under s.48 must be understood in light of s.3(3) of the IRPA: "(3) This Act is to be construed and applied in a manner that […]
(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter* [… and]
(*f*) complies with international human rights instruments to which Canada is signatory."

28th Session of the Executive Committee of the UN High Commissioner for Refugees (UNHCR), *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) – 1977. United Nations General Assembly Document No. 12A (A/32/12/Add.1).

(e) Recommended that procedures for the determination of refugee status should satisfy the following basic requirements: […]

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. **He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.**

Balance of convenience: The usual DOJ arguments and some responses…

- The fact Parliament removed the automatic statutory stay for refused RPD claimants does **not** mean it intended all refused RPD claimants to leave right away.
- Parliament left the discretionary common-law stay completely untouched which has become an integral part of the removal process.
- More accurate statement is Parliament intended refused RPD claimants whose claims did not demonstrably give rise to a serious issue or irreparable harm to leave.