Federal Court Cour fédérale

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Dockets: IMM-3700-13
IMM-5940-14

Citation: 2015 FC 892

Ottawa, Ontario, July 23, 2015

PRESENT: The Honourable Mr. Justice Boswell

Docket: IMM-3700-13

BETWEEN:

Y.Z. AND THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Docket: IMM-5940-14

AND BETWEEN:

G.S. AND C.S.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

TABLE OF CONTENTS

I. Introduction

[1] As part of the reforms enacted by the *Protecting Canada's Immigration System Act*, SC 2012, c 17, Parliament added paragraph 110(2)(d.1) to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. This new paragraph became effective on December 10, 2012, the same date as when the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] became operational under section 110 of the *IRPA*. (*Order Fixing December 15, 2012 as the Day on which Certain Sections of the Act Come into Force*, SI/2012-94, (2012) C Gaz II, 2980; *IRPA* s 275). Paragraph 110(2)(d.1) denies access to the RAD for all refugee claimants

from any country designated by the Minister of Citizenship and Immigration pursuant to section 109.1 of the *IRPA*.

[2] The present applications for judicial review challenge the constitutionality of paragraph 110(2)(d.1) and the mechanism for selecting which countries to designate. The Applicants allege that denying refugee claimants from designated countries of origin an appeal to the Refugee Appeal Division [RAD] violates sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] The primary Applicants are three refugee claimants from designated countries of origin [DCOs]. Y.Z. is a citizen of Croatia who fears persecution as a Serb and a gay man. G.S. and C.S. are a gay couple from Hungary whose fear is based on their sexual orientation; C.S. is also a national of Romania.

[4] The Refugee Protection Division [RPD] of the IRB found each of these three Applicants credible, but ultimately rejected their claims on the basis that there was adequate state protection in Croatia for Y.Z. and in Hungary for G.S. and C.S. They each obtained leave to apply for judicial review of those RPD decisions, and this Court determined that the RPD's conclusion about state protection was unreasonable in Y.Z.'s case and allowed his application for judicial review. That determination, however, does not impact Y.Z.'s status as a party to this matter. Unless and until the RPD determines him to be a refugee, there is still a live issue as to whether

he is entitled to appeal to the RAD. The decision in G.S. and C.S.'s application for judicial review remains pending.

[5] Concurrently, the Applicants tried to challenge the constitutionality of the DCO regime by appealing to the RAD. On May 2, 2013, Y.Z.'s appeal to the RAD was dismissed before he even had time to perfect it, with the RAD simply stating that it did not have jurisdiction by virtue of paragraph 110(2)(d.1) of the *IRPA*. Y.Z. eventually withdrew an application to reopen his appeal. G.S. and C.S. did perfect their appeal, but it too was dismissed by the RAD on July 11, 2014. The RAD decided that it did not have jurisdiction to assess the constitutionality of any provisions in subsection 110(2) of the *IRPA*, and that it could only determine whether the conditions listed in this subsection were factually met (citing *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at paragraphs 42 and 48, [2003] 2 SCR 504; *Kroon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 697 at paragraphs 9, 32-33 and 40, 252 FTR 257; and others).

[6] The Applicants now seek judicial review of the RAD's decisions pursuant to subsection 72(1) of the *IRPA*. The Canadian Association of Refugee Lawyers [CARL] also applied with Y.Z. as a public interest litigant. The Respondents' motion opposing CARL's standing was not filed until December 16, 2014, more than 18 months after Y.Z and CARL filed their application for leave and for judicial review; that motion was dismissed by an order of the Court dated January 15, 2015, because it had not been brought in a diligent manner. Nonetheless, the Court's order dismissing the motion was made without prejudice to the Respondents raising the same arguments at the hearing of this matter, and they did so. The Respondents also moved

to strike out many of the affidavits filed by the Applicants. That motion, which was filed on November 19, 2014, was deferred to the hearing of these consolidated applications.

II. Overview of the Designated Countries of Origin Regime

[7] Teny Dikranian, one of the Respondents' witnesses, states in her affidavit that one of the principal goals of the DCO regime "is to deter abuse of [Canada's] refugee system by people who come from countries generally considered safe and 'non-refugee producing', while preserving the right of every eligible refugee claimant to have a fair hearing before the IRB." To achieve that goal, Parliament created a separate procedure for refugee claims made by nationals of a DCO. They still have a full hearing before the RPD, but their claims are treated differently under the *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. The relevant legislative provisions are reproduced in Annex A to these reasons. They contemplate several unique consequences for claimants from DCOs. I will shortly review these consequences in more detail below; but for the moment the most significant consequences are summarized in the following chart:

	DCO Claimants	**Non-DCO Claimants**	***IRPA* and *Regulations***
Eligible for work permit under R206?	180 days after claim referred to RPD	Immediately after claim referred to RPD	A30(1.1); A32(d); R206(1); R206(2)
Time to RPD hearing?	Within 45 days (port of entry) Within 30 days (inland)	Within 60 days	A100(4.1); A111.1(1)(b); A111.1(2); R159.9(1)
Eligible for RAD appeal?	No	Yes, unless otherwise precluded by A110(2)	A110(2)(d.1)

	DCO Claimants	**Non-DCO Claimants**	***IRPA* and *Regulations***
Removal order comes into force?	15 days after receiving written RPD decision	If appealed to RAD, 15 days after notice that RAD appeal rejected Otherwise, 15 days after receiving written RPD decision	A49(2)(c); A110(2.1); R159.91(1)(a)
Automatic stay of removal until judicial review decided and any appeals exhausted?	No	Yes, if applying for judicial review of RAD decision	R231(1); R231(2)
Pre-Removal Risk Application bar?	36 months	12 months	A112(2)(b.1); A112(2)(c)

[8] The differential procedures faced by DCO claimants vis-à-vis non-DCO claimants under the *IRPA* are as follows:

1. Subsection 206(1) of the *Regulations* normally allows foreign nationals whose claims are referred to the RPD to get a work permit if they cannot support themselves without working and are subject to an unenforceable removal order. However, subsection 206(2) of the *Regulations* provides that a foreign national from a DCO cannot be issued a work permit unless 180 days have passed since his or her claim was first referred to the RPD.

2. Subsection 111.1(2) of the *IRPA* authorizes the creation of regulations that "provide for time limits [for claimants from DCOs] that are different from the time limits for other claimants" when scheduling a hearing pursuant to subsection 100(4.1) of the *IRPA*. This has been done by paragraph 159.9(1)(a) of

the *Regulations*, which provides that a hearing for a DCO claimant must be scheduled within 45 days if he or she asks for protection at a port of entry, or within 30 days if he or she asks for protection inland. For claimants from non-DCOs, hearings are expected to be scheduled within 60 days no matter where they make their claim (*Regulations*, s 159.9(1)(b)). Subject to the availability of counsel, a hearing will be scheduled on "the date closest to the last day of the applicable time limit set out in the *Regulations*, unless the claimant agrees to an earlier date" (*Refugee Protection Division Rules*, SOR/2012-256, ss 3(2), 3(3)(b), 54(5) [*RPD Rules*]). All claimants can apply to change the date of the hearing in exceptional circumstances (*RPD Rules*, s 54(1), 54(4)).

3. Subsection 161(1.1) of the *IRPA* permits the Chairperson of the IRB to differentiate between DCO and non-DCO claimants when making rules about "the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board" (*Act*, s 161(1)(c), 161(1.1)). To date, it appears that no rules which make such distinctions have yet been enacted. Claimants from any country must submit their basis of claim forms and other relevant documents as soon as their claims are referred to the RPD if their claims are made inland, or within 15 days if their claims are made at a port of entry (*IRPA*, ss 99(3.1), 100(4), 111.1(1)(a); *Regulations*, s 159.8; *RPD Rules*, s 7). All claimants can also ask for extensions of time (*Regulations*, s 159.8(3); *RPD Rules*, s 8).

4. DCO claimants cannot appeal a negative RPD decision to the RAD because of paragraph 110(2)(d.1):

110. … (2) No appeal [to the RAD] may be made in respect of any of the following:	**110.** … (2) Ne sont pas susceptibles d'appel [à la Section d'appel des réfugiés] :
…	…
(d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);	*(d.1)* la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile du ressortissant d'un pays qui faisait l'objet de la désignation visée au paragraphe 109.1(1) à la date de la décision;

The same is not true of claimants from other non-DCO countries; they will only lose access to the RAD if one of the other conditions in subsection 110(2) is met (e.g., if a decision of the RPD "states that the claim has no credible basis or is manifestly unfounded" (*Act*, s 110(2)(c))).

5. Removal orders will typically come into force sooner for claimants from DCOs. Paragraph 49(2)(c) of the *IRPA* prevents a removal order for refugee claimants from coming into force until 15 days after any appeal to the RAD is rejected, which is something DCO claimants can never benefit from since they are denied an appeal to the RAD. Instead, their departure orders will come into force 15 days after they receive the RPD's written reasons for rejecting their claims, and their departure orders will become deportation orders 30 days after that unless they leave Canada before then (*IRPA*, ss 49(2)(c), 110(2.1); *Regulations*, ss 159.91(1)(a), 224(2), 240(1)(a-c); Affidavit of Christopher Raymond (20 November 2014) at paragraphs 3-5).

6. Subsection 231(1) of the *Regulations* grants an automatic stay of removal to refugee claimants who seek judicial review of a RAD decision, but not to those who seek judicial review of a RPD decision. Thus, DCO claimants cannot benefit from that subsection. Even if they had an appeal to the RAD because their country was only designated after the RPD had rejected their claim, subsection 231(2) ensures that these claimants will not get an automatic stay of removal if they subsequently apply for judicial review. Consequently, unless they can obtain a judicial stay of removal from this Court, DCO claimants may be removed from Canada before their applications for leave and for judicial review are even considered by this Court.

7. Unless certain exemptions are granted, paragraphs 112(2)(b.1) and (c) of the *IRPA* bar all refugee claimants from seeking a pre-removal risk assessment until 12 months have passed since their claim for protection was last rejected. DCO claimants, however, have to wait 36 months in the same circumstances.

[9] Designation as a DCO also affected the level of government-funded health care that claimants from DCOs received until the *Order Respecting the Interim Federal Health Program, 2012*, SI/2012-26, (2012) C Gaz II, 1135, was invalidated by Madam Justice Anne Mactavish in *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651, 28 Imm LR (4th) 1 [*Canadian Doctors*].

[10] As for how a country is designated, this is governed by section 109.1 of the *IRPA*:

109.1 (1) The Minister may, by order, designate a country, for	**109.1** (1) Le ministre peut, par arrêté, désigner un pays pour

the purposes of subsection 110(2) and section 111.1.

(2) The Minister may only make a designation

(a) in the case where the number of claims for refugee protection made in Canada by nationals of the country in question in respect of which the Refugee Protection Division has made a final determination is equal to or greater than the number provided for by order of the Minister,

(i) if the rate, expressed as a percentage, that is obtained by dividing the total number of claims made by nationals of the country in question that, in a final determination by the Division during the period provided for in the order, are rejected or determined to be withdrawn or abandoned by the total number of claims made by nationals of the country in question in respect of which the Division has, during the same period, made a final determination is equal to or greater than the percentage provided for in the order, or

(ii) if the rate, expressed as a percentage, that is obtained by dividing the total number of claims

l'application du paragraphe 110(2) et de l'article 111.1.

(2) Il ne peut procéder à la désignation que dans les cas suivants :

a) s'agissant d'un pays dont les ressortissants ont présenté des demandes d'asile au Canada sur lesquelles la Section de la protection des réfugiés a statué en dernier ressort en nombre égal ou supérieur au nombre prévu par arrêté, si l'une ou l'autre des conditions ci-après est remplie :

(i) le taux, exprimé en pourcentage, obtenu par la division du nombre total des demandes présentées par des ressortissants du pays en cause qui ont été rejetées par la Section de la protection des réfugiés en dernier ressort et de celles dont elle a prononcé le désistement ou le retrait en dernier ressort — durant la période prévue par arrêté — par le nombre total des demandes d'asile présentées par des ressortissants du pays en cause et sur lesquelles la Section a statué en dernier ressort durant la même période est égal ou supérieur au pourcentage prévu par arrêté,

(ii) le taux, exprimé en pourcentage, obtenu par la division du nombre total des demandes présentées

made by nationals of the country in question that, in a final determination by the Division, during the period provided for in the order, are determined to be withdrawn or abandoned by the total number of claims made by nationals of the country in question in respect of which the Division has, during the same period, made a final determination is equal to or greater than the percentage provided for in the order; or

par des ressortissants du pays en cause dont la Section de la protection des réfugiés a prononcé le désistement ou le retrait en dernier ressort — durant la période prévue par arrêté — par le nombre total des demandes d'asile présentées par des ressortissants du pays en cause et sur lesquelles la Section a statué en dernier ressort durant la même période est égal ou supérieur au pourcentage prévu par arrêté;

(b) in the case where the number of claims for refugee protection made in Canada by nationals of the country in question in respect of which the Refugee Protection Division has made a final determination is less than the number provided for by order of the Minister, if the Minister is of the opinion that in the country in question

b) s'agissant d'un pays dont les ressortissants ont présenté des demandes d'asile au Canada sur lesquelles la Section de la protection des réfugiés a statué en dernier ressort en nombre inférieur au nombre prévu par arrêté, si le ministre est d'avis que le pays en question répond aux critères suivants :

(i) there is an independent judicial system,

(i) il y existe des institutions judiciaires indépendantes,

(ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and

(ii) les droits et libertés démocratiques fondamentales y sont reconnus et il y est possible de recourir à des mécanismes de réparation pour leur violation,

(iii) civil society organizations exist.

(iii) il y existe des organisations de la société civile.

(3) The Minister may, by order, provide for the number, period or percentages referred to in subsection (2).	(3) Le ministre peut, par arrêté, prévoir le nombre, la période et les pourcentages visés au paragraphe (2).
(4) An order made under subsection (1) or (3) is not a statutory instrument for the purposes of the *Statutory Instruments Act*. However, it must be published in the *Canada Gazette*.	(4) Les arrêtés ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*, mais sont publiés dans la *Gazette du Canada*.

[11] Pursuant to subsection 109.1(3), the Minister of Citizenship and Immigration [MCI] has issued an *Order Establishing Quantitative Thresholds for the Designation of Countries of Origin*, (2012) C Gaz I, 3378 [*Thresholds Order*], which prescribes the numbers used in subsection 109.1(2) as follows:

2. For the purposes of paragraphs 109.1(2)*(a)* and *(b)* of the Act, the number provided is 30 during any period of 12 consecutive months in the three years preceding the date of the designation.	**2.** Pour l'application des alinéas 109.1(2)*a)* et *b)* de la Loi, le nombre est de trente durant toute période de douze mois consécutifs au cours des trois années antérieures à la date de la désignation.
3. For the purposes of subparagraph 109.1(2)*(a)*(i) of the Act, the period provided is the same 12 months used in section 2, and the percentage is 75%.	**3.** Pour l'application du sous-alinéa 109.1(2)*a)*(i) de la Loi, la période est la même période de douze mois retenue aux termes de l'article 2 et le pourcentage est de 75 %.
4. For the purposes of subparagraph 109.1(2)*(a)*(ii) of the Act, the period provided is the same 12 months used in section 2, and the percentage is 60%.	**4.** Pour l'application du sous-alinéa 109.1(2)*a)*(ii) de la Loi, la période est la même période de douze mois retenue aux termes de l'article 2 et le pourcentage est de 60 %.

[12] One of the Respondents' witnesses, Eva Lazar, testifies that when a country meets the quantitative criteria set out in paragraph 109.1(2)(a) or the qualitative criteria set out in paragraph 109.1(2)(b), the Monitoring, Analysis and Country Assessment Division [MACAD] of the Refugee Affairs Branch at Citizenship and Immigration Canada [CIC] will conduct an in-depth review of the conditions in that country. This process requires a careful examination of publicly available and objective evidence from a range of credible sources such as the United States Department of State, the United Nations Human Rights Committee, Amnesty International, and local non-governmental organizations. The MACAD then prepares a report assessing nine human rights and state protection factors: (1) democratic governance; (2) protection of right to liberty and security of the person; (3) freedom of opinion and expression; (4) freedom of religion and association; (5) freedom from discrimination and protection of rights for groups at risk; (6) protection from non-state actors; (7) access to impartial investigations; (8) access to an independent judiciary system; and (9) access to redress [collectively, the Designation Factors]. This report is finalized through consultation with the Directors General Interdepartmental Committee on DCO, which includes representatives from: CIC; the Canada Border Services Agency [CBSA]; the Department of Foreign Affairs, Trade, and Development; Public Safety; the Department of Justice; the Canadian Security Intelligence Service; and the Royal Canadian Mounted Police. If designation is recommended, then that recommendation and the final DCO country review are sent to the MCI, who will then decide whether to designate the country.

[13] When this matter was heard, 42 countries had been designated by the MCI as DCOs. Croatia, Hungary and Romania have been designated on a quantitative basis under

paragraph 109.1(2)(a). Other countries such as Andorra, Estonia and Slovenia have been designated on a qualitative basis under paragraph 109.1(2)(b). Of the 42 DCOs, country reviews were triggered on a quantitative basis under paragraph 109.1(2)(a) for 19 countries, and on a qualitative basis under paragraph 109.1(2)(b) for 23 countries.

[14] There is no express authority set out in the *IRPA* for removing a country's designation, but Ms. Lazar testifies that the MCI approved a process for doing so on or about October 14, 2014. This process requires that all DCOs are regularly monitored for significant changes in country conditions and also reassessed annually against the Designation Factors. A review may be recommended if conditions appear to be deteriorating significantly in any five of the nine Designation Factors, or in any one of the three key criteria: democratic governance; protection of the rights to liberty and security of the person; and an independent judiciary. If there is a review, then a full country report will again be prepared and the MCI will decide whether the country should remain designated. At the time of the hearing of this matter, no DCO has been removed from the list of DCOs.

III. Is section 109.1 directly in issue?

[15] The Applicants frame the issues arising from these applications more broadly than the Respondents. They say that the primary question to resolve is whether the combined effect of section 109.1, paragraph 110(2)(d.1) of the *IRPA* and the *Thresholds Order* violate section 7 or subsection 15(1) of the *Charter*. At the hearing of this matter, the Applicants challenged the entire DCO regime insofar as they argued that the designation process itself is not *Charter*-compliant.

[16] In contrast, the Respondents contend that the Applicants are seeking remedies which are not properly part of these applications, noting in particular that their applications for judicial review do not ask that the *Thresholds Order* be declared void and of no force and effect. According to the Respondents, if the declaratory relief sought with respect to paragraph 110(2)(d.1) is granted, declaring section 109.1 of the *IRPA* and the associated *Thresholds Order* to be void and of no force and effect would be superfluous because the individual Applicants would obtain the remedy they seek; that is, an appeal to the RAD.

[17] I agree with the Respondents that the relief sought by the Applicants has evolved over time. The application in Court file IMM-3700-13, dated May 27, 2013, requests only that the RAD's decision in Y.Z.'s case be set aside and that paragraph 110(2)(d.1) of the *IRPA* be declared to have no force and effect pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. The application in Court file IMM-5940-14, dated August 5, 2014, requests that the RAD's decision in the case of G.S. and C.S. be set aside and that both section 109.1 and paragraph 110(2)(d.1) of the *IRPA* be declared to have no force and effect pursuant to section 52 of the *Constitution Act, 1982*. Most recently, the Notice of Constitutional Question, dated February 11, 2015, states the Applicants' intention to question the constitutional validity of "the effect of" section 109.1, paragraph 110(2)(d.1), and the *Thresholds Order*.

[18] I further agree with the Respondents that it would be inappropriate to assess whether the DCO regime as a whole, or any aspect of the regime other than paragraph 110(2)(d.1), is not

compliant with the *Charter*. It is not appropriate in this case to directly assess the constitutionality of section 109.1 and the associated *Thresholds Order* for several reasons.

[19] First, a finding that paragraph 110(2)(d.1) is unconstitutional would be sufficient to grant the individual Applicants the substantive relief they seek in these applications; that is, an appeal to the RAD in respect of their claims which were rejected by the RPD. To go beyond this constitutional issue and also assess the constitutionality of other aspects of the DCO regime would be an unwarranted exercise because unnecessary constitutional pronouncements should generally be avoided (*Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paragraphs 6-11, 124 DLR (4th) 129; *Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156 at paragraph 66, 381 DLR (4th) 541).

[20] Second, there is insufficient evidence in the record to fully assess all of the consequences of a country being designated under section 109.1. As the Supreme Court stated in *Mackay v Manitoba*, [1989] 2 SCR 357 at 361-362, 61 DLR (4th) 385:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. … *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

For instance, there is not enough evidence to assess the potential disadvantages for DCO-claimants who are ineligible for a work permit until 180 days after their claim is referred to the RPD. G.S. states in his affidavit that he is upset that he cannot get a work permit and that, since social assistance is insufficient, he and C.S. needed to take unsafe jobs and work harder than

their Canadian colleagues for the same amount of pay. However, this evidence alone is not sufficient to prove that either section 7 or subsection 15(1) of the *Charter* is violated by subsection 206(2) of the *Regulations*. Furthermore, G.S.'s affidavit was only filed on October 21, 2014, and this was the first indication that subsection 206(1) of the *Regulations* could be in peril. The Respondents were required to serve their own further affidavits one month later on November 21, 2014, and they did not have a reasonable opportunity to mount a section 1 *Charter* defence to this potential challenge prior to the hearing of this matter.

[21] Third, I am not convinced that this is a suitable case to decide whether the abbreviated timelines for DCO claimants are necessarily invalid or unconstitutional. Despite the Applicants' arguments to the contrary, the abbreviated timelines do not appear to be insurmountable. The difference between the hearing dates for DCO claimants and non-DCO claimants is not inordinate, and the RPD decisions in respect of the individual Applicants in this case show that they, as DCO claimants, were able to meet the deadlines. C.S. mentioned during his re-examination that he would have liked more time so that some evidence from Hungary could arrive, but that never formed a basis for his application. The individual Applicants did not ask to adjourn their hearings before the RPD; they were able to file substantial documentation (including medical reports); they presented their cases fully; and they did not allege in their applications for leave and for judicial review in this Court that they had insufficient time to prepare for the hearings before the RPD. The Applicants have presented evidence that some types of claimants may have a harder time than others meeting short deadlines; yet, a speedier process could also be considered a benefit to those claimants who are ultimately successful, since it could be stressful for genuine refugees to wait for years before their status is finally settled.

These issues would be better decided in a case where the abbreviated timelines have actually made a difference to the applicants and the mechanisms for extending deadlines and re-opening cases have actually been tested.

[22] Fourth, none of the individual Applicants are yet affected by the 36-month ban on making a pre-removal risk assessment [PRRA] application under paragraphs 112(2)(b.1) and 112(2)(c) of the *IRPA*. The constitutionality of that ban should be decided in a factual matrix where the issue is directly and squarely raised. This is not the case here. The Court's decision in *Peter v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1073, 13 Imm LR (4th) 169 [*Peter*], did not directly assess that ban; the decision in *Peter* was concerned with only the 12 month PRRA ban vis-à-vis section 7 of the *Charter*. Furthermore, the constitutionality of the ban against bringing a PRRA application until 36 months have passed, at least *vis-à-vis* section 7 of the *Charter*, will be considered by the Court of Appeal on the appeal of *Al Atawnah v Minister of Citizenship and Immigration*, 2015 FC 774.

[23] In short, therefore, it is not appropriate in this case to assess the constitutionality of the DCO regime as a whole or, in particular, section 109.1, since any declaration that it is invalid would have effects that exceed the scope of the present applications and the evidentiary record.

IV. Issues

[24] Since section 109.1 of the *IRPA* is not directly in issue on these applications, the issues to be addressed are as follows:

1. Does CARL have standing as a public interest litigant?

2. Should the impugned affidavits be struck out?

3. Does paragraph 110(2)(d.1) of the *IRPA* infringe subsection 15(1) of the *Charter*?

4. Does paragraph 110(2)(d.1) of the *IRPA* infringe section 7 of the *Charter*?

5. If *Charter* rights are infringed, is paragraph 110(2)(d.1) of the *IRPA* justified by section 1 of the *Charter*?

6. If paragraph 110(2)(d.1) of the *IRPA* is unconstitutional, what is an appropriate remedy?

7. What questions, if any, should be certified?

V. Does CARL have standing as a public interest litigant?

[25] The parties acknowledge that the Court must consider three factors when deciding whether to grant public interest standing: "(1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts" (*Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paragraph 37, [2012] 2 SCR 524 [*Downtown*]).

A. *CARL's Arguments*

[26] CARL argues that all of the principles of public interest standing are in its favour: there is no risk to scarce judicial resources because its application has already been consolidated with that of Y.Z., G.S. and C.S.; its involvement in the case has sharpened the arguments and ensured that they would be thoroughly presented; and it would be beneficial for the rule of law for it to be granted standing since constitutional cases are complex and CARL could carry on with the case if for any reason the individual Applicants cannot.

[27] In addition, CARL says that all of the factors set out in *Downtown* support a grant of public interest standing. The Respondents concede that there is a serious justiciable issue, and CARL contends that it has a real stake in the litigation. Relying on the affidavit of Mitchell Goldberg, CARL submits that it is an association of lawyers and academics with an interest in legal issues relating to refugees, asylum seekers, and the rights of immigrants, and one of its key mandates is to ensure that the human rights of refugees and vulnerable migrants are protected. Indeed, they raised their concerns about the DCO regime with Parliament while it was debating Bill C-31, which became the *Protecting Canada's Immigration System Act*, SC 2012, c 17 [*PCISA*]. These interests are broader than those held by the individual Applicants, and by having standing CARL says it has been able to raise the prejudicial consequences of the DCO regime that go beyond those that have affected the individual Applicants. Furthermore, it has participated in the matter from the outset, thus demonstrating its concern, and its standing has not altered the timelines in any way.

[28] CARL contends that granting it standing alongside three individual Applicants is a reasonable and effective means of bringing the issues in this case before the Court. CARL says the Court has already recognized that these issues are better litigated in one robust proceeding by consolidating Court File Nos. IMM-3700-13 and IMM-5940-14. Giving CARL standing promotes the continuity and viability of the present litigation while allowing it to present the full spectrum of issues raised by the DCO regime. Indeed, CARL points out that there is no guarantee that any of the individual Applicants would be able or willing to pursue an appeal if their applications are not successful. The matter could very well become moot if their applications for judicial review of their respective RPD decisions succeed. Furthermore, the stays

of removal the individual Applicants have obtained only apply until the end of the present proceeding, and there is no guarantee that the Federal Court of Appeal would continue them.

[29] Applying the considerations set out in *Downtown* at paragraph 51, CARL submits that it clearly has the resources and expertise to bring this matter forward, and its members have already volunteered hundreds of hours to this litigation. It will not cost any additional judicial resources by affording CARL standing and it would forestall duplicative litigation and minimize the risk of inconsistent results. Furthermore, the DCO provisions affect significant numbers of refugee claimants; many of them lack the resources to challenge the legislation themselves and their interests could not be adequately advanced by the individual Applicants alone.

[30] CARL disputes the Respondents' argument that many other applicants, including G.S. and C.S., came forward without CARL's assistance. G.S. and C.S. relied wholly on the record prepared by CARL and Y.Z, so it is misleading to say that they brought their application "without CARL." As for other potential litigants, the Applicants note the Respondents have been promptly deporting them and challenging their arguments on technical grounds, trying to impose a complex and onerous procedure for bringing the issues to this Court that would exhaust the resources of many litigants and expose them to a greater risk of deportation. There is also no conflict between CARL's interests and those of the individual Applicants, so CARL submits it should be granted standing.

B. *Respondents' Arguments*

[31] The Respondents argue that CARL has no direct interest in this matter and should be denied public interest standing. Although the Respondents concede that there is a serious justiciable issue, they say CARL can offer no useful or distinct perspective on that issue because its arguments are identical to those put forward by the individual Applicants and it seeks the same relief. The Respondents say CARL's assertion that it raises distinct issues is nothing but a smokescreen to justify its participation.

[32] Indeed, the Respondents argue that litigation by individual litigants is an entirely effective means of raising the issues proposed by CARL. Even CARL acknowledges that there are potentially hundreds of such litigants, and there are already three of them in this matter alone, all of whom have received stays of removal ensuring that their applications will not become moot. In the Respondents' view, adding another useless party to the matter only increases cost and inconvenience. Although CARL says it helped prepare the record, the Respondents argue that it did not need party status to do that and there is no evidence about the degree to which it helped. The Respondents submit that, all other things being equal, the parties with standing as of right should be preferred to CARL.

[33] Furthermore, the Respondents submit there is no evidence that other applicants do not have the resources to bring their own challenges, nor does CARL's participation preclude those who would from making parallel applications which could create conflicting jurisprudence. The Respondents also contend that CARL has mischaracterized the Respondents' position in other

cases. The Respondents did not argue that applicants must pursue a futile appeal to the RAD but, instead, disputed only an attempt to challenge the absence of an appeal right through a judicial review of a RPD decision. Had those applicants commenced a separate application raising the constitutional issues alone, the Respondents would have had no objection.

[34] The Respondents also point out that CARL has participated in most of its cases only as an intervener. Although CARL did have party status in *Canadian Doctors*, the Respondents say that case is distinguishable since: (1) the impugned provisions only refer to nationals of DCO countries, and there is no other affected category of persons who are not before the Court; (2) there is no evidence that CARL made concerted efforts to recruit other litigants; (3) persons affected by the impugned provisions have already had their claims denied, so they need not fear vindictiveness from the government if they challenge the constitutionality of the DCO regime; and (4) the evidentiary record compiled in *Canadian Doctors* exceeded what an individual refugee claimant could be expected to assemble, but in this case G.S. and C.S. were able to compile a virtually identical record without CARL's help.

[35] The Respondents also complain that it was improper for CARL to file its notice of application along with Y.Z. because the onus was on CARL to prove that it should get standing. The Respondents ask the Court to discourage this conduct since it unfairly put the burden upon the Respondents to bring a motion to deny public interest standing. Although that motion was ultimately dismissed for delay, the Respondents were nonetheless permitted to raise the same arguments at the hearing. They submit that it would be unfair to have their motion deferred to the application judge only to have it dismissed for mootness, and ask for a ruling on the merits.

C. *Analysis*

[36] The Respondents argue that CARL circumvented the Federal Court's procedural rules by including itself as a named party when Y.Z. brought his application. This argument has no merit. Subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], permits an application for judicial review by "anyone directly affected by the matter in respect of which relief is sought," and the Court of Appeal has said that this wording "is broad enough to encompass applicants who are not directly affected when they meet the test for public interest standing" (*Canada (Royal Canadian Mounted Police) v Canada (AG)*, 2005 FCA 213 at paragraph 56, [2006] 1 FCR 53). Standing is asserted whenever a party applies for judicial review, and the *Federal Courts Rules*, SOR/98-106, do not require any party to prove its standing by a preliminary motion.

[37] There is also no reason why they should be required to do so. CARL bears the onus to show that it has standing, but this is true of all litigants whether they assert private or public interests (*Downtown* at paragraph 18). That does not mean they must also prove that they have standing on a preliminary basis. Such a rule would be contrary to the guidance in *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 616-617, 33 DLR (4th) 321 [*Finlay*], where the Supreme Court opined that there may be occasions where standing cannot be determined without a full hearing; it "depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted" (*Finlay* at 617). Those issues are even more pronounced for judicial review applications in this

Court; such applications are meant to be summary procedures that focus "on moving the application along to the hearing stage as quickly as possible" (*David Bull Laboratories (Canada) Inc v Pharmacia Inc* (1994), [1994] FCJ No 1629 (QL) at paragraphs 10-11, [1995] 1 FCR 588 (CA); *IRPA*, s 74(c); *Federal Courts Act*, s 18.4(1)). Preliminary determinations are generally discouraged, not only on questions of standing but also on any other question (*Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at paragraph 13, 370 NR 336; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paragraphs 47-48, [2014] 2 FCR 557).

[38] There is therefore nothing improper about the way that CARL has asserted standing, nor is it unfair to recognize that granting CARL standing at this stage would not cause any prejudice to the Respondents. All the issues presently before the Court would need to be considered even if Y.Z., G.S., and C.S. were the only applicants. In similar circumstances in *Canada (AG) v Bedford*, 2012 ONCA 186 at paragraph 50, 109 OR (3d) 1, var'd on other grounds 2013 SCC 72, the Ontario Court of Appeal declined to even address standing since it was irrelevant.

[39] The Respondents have requested a ruling on the merits of their motion though, and I have concluded that public interest standing should be afforded to CARL in this case since this will permit reasonable and effective litigation of the issues raised by these applications.

[40] The Respondents concede that there is a serious justiciable issue, and I agree. The constitutionality of paragraph 110(2)(d.1) of the *IRPA* is certainly "a 'substantial constitutional issue' and an 'important one' that is 'far from frivolous' " (*Downtown* at paragraph 54).

[41] As to whether CARL has a real stake or a genuine interest in this matter, "this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody… [and] is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise" (*Downtown* at paragraph 43). CARL is not a mere busybody. CARL is an organization which includes many experienced immigration and refugee lawyers, and one of its mandates is to "advocate with respect to legal issues related to refugees, asylum seekers, and immigrants" (Affidavit of Mitchell Goldberg (15 September 2014) at paragraph 4 [Goldberg Affidavit]). CARL raised concerns about the DCO regime before Parliament when the *PCISA* was being debated. Moreover, CARL has fully participated in this matter from the outset, thus demonstrating its interest.

[42] Granting public interest standing to CARL is also a reasonable and effective way by which the constitutional concerns about paragraph 110(2)(d.1) of the *IRPA* can be brought before the Court. CARL's resources and expertise are such that the constitutional issues have been presented in a concrete factual setting. Although the existence of other potential DCO claimants is a relevant consideration, CARL has joined its application with three private litigants and thus ensured that judicial resources will not be wasted (*Downtown* at paragraph 50). Also, the practical prospects of other claimants bringing the matter to Court at all or by equally reasonable and effective means needs to be considered in light of the fact that many potential claimants could be deported before they even try to challenge the legislation (see *IRPA*, s 48(2); Affidavit of James Gildiner (30 September 2014)). Most refugee claimants arrive with little money and lack the financial means to litigate complex constitutional issues; whereas CARL has secured test case funding from Legal Aid Ontario (Goldberg Affidavit at paragraphs 15 and 20; Affidavit

of Dolores De Rico (23 June 2013) at paragraph 3). CARL will be in a good position to continue this litigation in the event that Y.Z., G.S., or C.S. should be unable or unwilling to do so.

[43] In addition, CARL and two other organizations were granted public interest standing by this Court in *Canadian Doctors*, where my colleague Madam Justice Anne Mactavish remarked as follows with respect to CARL as one of the three organizations which sought standing in that case:

> [347] The three applicant organizations seeking public interest standing in this case are credible organizations with demonstrated expertise in the issues raised by these applications. They are represented by experienced counsel, and have the capacity, resources, and ability to present these issues concretely in a well-developed factual setting: *Downtown Eastside*, above at para. 51. This suggests that this litigation constitutes an effective means of bringing the issues raised by the application to court in a context suitable for adversarial determination.
>
> [348] CARL's membership has extensive experience in refugee law, and the organization is an active advocate for refugees. Although a relatively new organization, it has already been granted intervener status in at least three cases before the Supreme Court of Canada: *Downtown Eastside, Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] S.C.J. No. 36 and *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] S.C.J. No. 40.

VI. The Affidavit Evidence

[44] The parties have filed more than two dozen affidavits which contain written testimony and many exhibits. The Respondents seek to strike out some of the affidavits, or portions thereof, filed by the Applicants.

[45] Before addressing the merits of the Respondents' motion, it is useful to summarize some of the evidence presented by the parties.

A. *The Applicants' Affidavit Evidence*

[46] Y.Z. is one of the Applicants in IMM-3700-13. He testifies that he fears persecution in Croatia because he is a Serb and because he is gay. His refugee claim was rejected by the RPD, but he maintains that he may be attacked or killed if he lived openly as a gay man in Croatia and that he would either kill himself or die a "slow death" if he has to hide his orientation. He has started having relationships in Canada and is fearful and anxious whenever he thinks he might be sent back to Croatia. He presents some recent evidence about conditions in Croatia by way of an exhibit.

[47] G.S. is one of the Applicants in Court File No. IMM-5940-14. He is a gay man from Hungary whose refugee claim was refused by the RPD on the basis that the Hungarian state could protect him and his partner, C.S. He testified in his original affidavit, dated September 3, 2014, that his family has since discovered he is gay and his brothers-in-law say they will kill him for shaming them. In his further affidavit, dated October 21, 2014, G.S. states he is upset that he has less procedural rights than other refugee claimants just because he is from Hungary. Although the removal order against G.S. and C.S. was eventually stayed by this Court, G.S. says it was the worst thing to happen to them since coming to Canada. He was acutely afraid of being returned to Hungary, and he and his partner could not sleep for days. The refugee process overall has been very frustrating for them, and G.S. states the CBSA officials "smirked" when they learned that he and his partner were from Hungary. G.S. also claims that two of his friends who

lived in the same building as him in Hungary had the same counsel and obtained refugee protection on essentially the same evidence. In addition, G.S. is upset that he cannot get a work permit, since social assistance is insufficient. He and his partner both had comfortable careers in Hungary, but without work permits they have been forced to take unsafe jobs and work up to three times harder than their Canadian colleagues for the same amount of pay. G.S. also says that he and C.S. want the opportunity to contribute to Canadian society. Living in Canada has brought him and his partner a sense of dignity he never thought possible, and he says having that taken away would be torture.

[48] C.S. is the other Applicant in Court File No. IMM-5940-14. He is a gay man who is originally from Romania; he is also a citizen of Hungary. He testifies that he could not live openly with G.S. in either Romania or Hungary because they would both be in danger of violent persecution. Being able to live together as a family in Canada has been an incredibly positive experience for them. He says that he is frustrated and dismayed with the refugee process in Canada, and enduring the CBSA's attempts to deport him was one of the most stressful experiences of his life.

[49] Mitchell Goldberg is the vice-president of CARL. He says CARL's membership is composed of many experienced refugee lawyers and academics, and it has been granted status as a party or an intervener in many cases. He notes that Canada's immigration and refugee system has been undergoing significant reforms, and CARL made submissions to the standing committee on immigration as Parliament debated what would become the *PCISA*. DCOs have always been a central concern, creating a regime which CARL fears has created a real risk to the

lives, liberty and security of its membership's clients. He also testifies that it is difficult for claimants themselves to challenge the constitutionality of this legislation, since they lack sufficient resources and face deportation as soon as their claims are denied. Indeed, only Y.Z. had been willing to challenge the legislation at the time the application was initiated. While Y.Z. may be able to raise the ground of discrimination based on sexual orientation or ethnicity, Mr. Goldberg says that only CARL can represent some of the other interests at stake, such as those of women fleeing gender-based persecution. CARL is also well-positioned to lead evidence and could pursue an appeal if the case becomes moot for Y.Z.

[50] Dolores De Rico is the co-director and co-founder of the FCJ Refugee Centre, which provides shelter and assistance to refugee women and their children. She is also the president of the Canadian Council for Refugees, and has worked a lot with refugees. She testifies that refugees often arrive with very little money and cannot hire lawyers without the assistance of legal aid.

[51] Christopher Anderson is an assistant professor in the Department of Political Science at Wilfrid Laurier University, and he says that he has spent a lot of time researching Canadian immigration and refugee policy. His affidavit, dated June 17, 2013, focuses on identifying historical trends animating Canada's immigration and refugee policy. In his view, Canada's desire to attract some immigrants has always been accompanied by a determination to exclude others, and negative stereotypes often inform which groups are excluded (including refugees and asylum-seekers). At times, this was based on explicit racial discrimination, such as the head tax on Chinese immigrants. Canada has discriminated against other groups as well, such as Japanese

and East Indian immigrants. This was not always done through legislation, and Professor Anderson says that the trend has been to assign extensive regulatory powers to the executive, thus making immigration law less subject to parliamentary and public scrutiny. This, he says, is exemplified by the restrictive measures used by Canada to exclude Armenians fleeing genocide around the time of World War I, and to exclude Jewish people in the years leading up to World War II.

[52] After the Holocaust, it became harder for Canada to defend explicitly racist policies, but Professor Anderson states that Canada simply masked the debate over race within discourse that rarely mentioned which groups would be restricted yet ensured some would be. Canada kept discriminating by vesting wide discretions in officials to establish geographical tiers of preferred immigrants. Mr. Anderson says the last vestiges of formal discrimination were only removed in 1967 and Canada eventually made a formal commitment to equality when it enacted the *Immigration Act, 1976*, SC 1976-77, c 52, s 3(f). As explicit racial discrimination diminished though, Professor Anderson claims that security and abuse concerns arising from the Cold War created barriers for refugees fleeing political oppression. Indeed, he opines that part of the reason Canada did not initially sign the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6 [*Convention*] was because it did not want to create rights which undesirable non-citizens like communists could claim against the state to avoid deportation. Refugee claims were dealt with informally, but a formal process was eventually established because there were fears the system could otherwise be abused. Fear of abuse is also the reason claimants were not entitled to an oral hearing until the Supreme Court intervened in *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR (4th)

422. Professor Anderson says that the security/abuse dynamic continues to inform refugee policy today, from the imposition of visa requirements to the way that the government handles irregular arrivals.

[53] Cathryn Costello is a law professor at the University of Oxford who has worked in the area of refugee law since the 1990s. She purports to be an expert in international and European refugee law, and her affidavit assesses the DCO regime in light of her knowledge about the safe country of origin [SCO] provisions in European Union [EU] asylum law. While the original EU directive on SCOs seemed procedurally weak, Professor Costello says that it cannot be read literally because: EU directives require national implementation; parts of the directive and implementing domestic legislation have been struck down; and the consequences of designating a country as safe can never be such that they deprive an applicant of domestically-required fair procedures and an effective judicial remedy. In 2013, Professor Costello notes that the EU adopted a recast directive on SCOs which now reflects the basic entitlement to an appeal with suspensive effect, and the exceptions are accompanied by important safeguards such as a right to request suspensive effect. The recast directive also ensures that the SCO concept is primarily a basis only for accelerated procedures, and cannot be used to consider an application unfounded without an individual assessment. In determining whether a country is a SCO, reference must be had to a range of sources, and the application of the SCO concept remains rebuttable in the circumstances of an individual case. Nonetheless, she says that the SCO mechanism is flawed and likely to lead to poor decisions and *refoulement*.

[54] Professor Costello also assesses the DCO regime, and concludes that it is even worse than the SCO regime in the EU. She says that the quantitative criteria for designating a country are dubious, especially insofar as they include abandoned and withdrawn claims within their calculations; and it is problematic that they are based on past refugee determinations and not on present or anticipated country conditions. As for the qualitative criteria, Professor Costello states that they are general and do not focus enough on whether a country is likely to produce refugees. The procedure for designating a country is problematically secret, and Professor Costello opines that it should be open to challenge in a court of law and reviewable in light of changing country conditions. She also says that the procedural consequences are too adverse, especially insofar as claimants are deprived of an appeal with suspensive effect; that, Professor Costello says, is a basic requirement of a fair asylum procedure. She concludes that the DCO regime will have a significant deleterious effect on the assessment of asylum claims.

[55] Sean Rehaag is an associate professor at Osgoode Hall Law School who specializes in immigration and refugee law and its intersection with gender and sexuality. In an affidavit dated June 12, 2013, he attacks the use of the quantitative trigger permitting designation of a country. He says that statistics on outcomes in refugee determinations from a given country can vary substantially over time, due to changing country condition evidence and random factors. He points out that some countries which meet the quantitative criteria for designating a country in one year can have high recognition rates in subsequent years. North Korea, for instance, met the quantitative criteria in 2008, despite the fact that in most years the vast majority of claims from that country which were decided on their merits were allowed. He says these problems are further compounded by including abandoned and withdrawn claims when calculating the

rejection rate; this can give the impression that claimants from a country are often being rejected when it may just be that the IRB has not scheduled many claims to be heard on their merits. Another problem is that a country may be safe for many claimants but unsafe for particular subsets of claimants. He specifically points to claims based on gender and sexual orientation; those claims, he says, are generally more likely to succeed than other types of claims from the same country of origin, and such claimants can often come from countries which typically do not produce many refugees. Lastly, Professor Rehaag says that the IRB data used to make the calculations cannot be counted on to reliably record demographic information because that is not its purpose. He says it may not properly account for claimants who are nationals of multiple countries, or who are determined by the RPD to be from countries other than the one they claimed.

[56] Professor Rehaag swore another affidavit on May 20, 2014, which took into account the IRB's Country Report for all decisions rendered in 2013. He opined that it did not affect his analysis. He swore a supplementary affidavit on December 8, 2014, to disclose that he is a member of CARL and is on its litigation committee. When he was cross-examined though, he clarified that he was not involved in CARL's decision to join the present applications.

[57] Julianna Beaudoin has a PhD in anthropology and completed her dissertation on Roma in Canada and the various issues they face. In her first affidavit, dated June 13, 2013, she says that Roma people are often portrayed and treated negatively, and that Canadians lack accurate information about people with this ethnicity. Because there is so little exposure to Roma, she opines that it is problematic when government officials say Roma people make "bogus" claims

or are undeserving of refugee protection. She also opines that the DCO regime should not count abandoned and withdrawn claims as failures, since this ignores the rate at which claims are accepted by RPD members. In particular, she says there may be many reasons why a claim might be withdrawn or abandoned which are unrelated to whether a person would face persecution in their country of origin. She points out that some Roma are illiterate even in their native language and it can be hard to correct misinformation that spreads through their communities. She says she interviewed many Romani immigrants for her dissertation, and some of the reasons claims have been abandoned include: their representatives either defrauded them or were incompetent; some claimants did not understand that they cannot return home for any reason or mistakenly believe they can restart their claim later; some claimants need to change addresses frequently and do not realize how important it is to inform the IRB, causing them to miss deadlines; some claimants suffer from mental disabilities that make it difficult; and some grew discouraged when they heard a former MCI say that their claims were "bogus." She also says not all unfounded claims are fraudulent. She concludes by saying that even if some Roma attempt to commit immigration fraud, it is racist to attribute the actions of those individuals to all Roma claimants.

[58] In her further affidavit, dated September 18, 2014, Ms. Beaudoin explains her methodology. She said that she conducted well over a hundred interviews, though not with the aim of collecting a statistically significant sample. She also conducted quantitative and archival research as part of her fieldwork. Finally, she says that she has engaged in "applied anthropology," since it would be unethical to study a marginalized population without also advocating for their better treatment.

[59] Nicole LaViolette is a law professor at the University of Ottawa who has worked in the area of refugee law since the early 1990s. She presents herself as an expert in refugee claims based on sexual orientation and gender identity. In an affidavit dated September 16, 2014, she opines that shortened timelines and the inability to present new evidence after a refugee claim is rejected particularly impede the fair adjudication of claims based on sexual orientation and gender identity. She says that accelerated timelines affect such claimants more than normal for two main reasons: first, psycho-social issues common among Lesbian, Gay, Bisexual, Trans-identified, and Queer [LGBTQ] claimants - including internalized sexual stigma, mental health conditions, and social isolation – can prevent timely and full disclosure of the facts of their case and their narrative of self-identity; and second, special evidentiary challenges arise because: they may need more time to build trust before they can fully disclose their stories; it is harder to collect corroborating evidence since they are often estranged from the people who knew them in their country of origin, and the persecution they are fleeing sometimes happens in private; they may require reports from mental health experts; and they need to be more resourceful when proving that country conditions are bad for them since available country documentation is often deficient or non-existent when it comes to persecution of sexual minorities.

[60] Brian Brenie is the Coordinator of Refugee Programs at the Metropolitan Community Church of Toronto. He has been working with LGBTQ claimants for over seven years. In his affidavit dated June 14, 2013, he says that the new timelines are too short for many LGBTQ claimants. They have often lived their entire lives in secret, and Mr. Brenie says they need time to adapt to Canada and find support before they can fully share their stories; and it is not possible

for them to do so within 30 or 60 days. He also believes there are many countries which do not normally produce refugees but nevertheless persecute LGBTQ people.

[61] Woo Jin Edward Lee is involved with Action LGBTQ with Immigrants and Refugees [AGIR], and his affidavit supplies statistics regarding AGIR's involvement with LGBTQ claimants. He too says that 30 or 45 days is not enough time for LGBTQ claimants to access necessary support and service organizations like AGIR, in part because other pressing needs like securing shelter and food take priority. He thus says that the timeline is too short and will prevent fair and complete adjudication of their claims; their inability to access any forum where they can supply new evidence is a problem. He also says that Mexico, despite being a designated country, is not safe for all of its LGBTQ citizens, and notes that if the DCO regime were in place in 2009, only two of the eight accepted refugee claimants that AGIR had helped would have contacted AGIR prior to their hearing.

[62] Michael Battista has been a lawyer in Ontario since 1992, and has represented thousands of refugee claimants during that time, about 80% of whom were LGBTQ. He testifies that a number of factors combine to make such claims more challenging than most, and that the truncated procedure for claimants from DCOs will exacerbate these challenges. Specifically, he identifies the following problems: (1) safe countries for most people are not safe for the LGBTQ community; (2) the best evidence of sexual orientation is a relationship with the LGBTQ community, but such a community may have been driven underground in the country of origin and the claimants need time to establish themselves in the LGBTQ community in Canada; (3) LGBTQ claimants often require the assistance of mental health professionals, assistance

which they may not have had time to secure under the restricted timelines; (4) claimants may lack an awareness of their ability to claim refugee protection on the basis of sexual orientation since it is not expressly mentioned in the *Convention*, and it is difficult for them to learn about this possibility because their ethnic community may harbour prejudices against LGBTQ individuals; and (5) there is a dearth of country documents reporting the risks to the LGBTQ community.

[63] Sharalyn Jordan is an assistant professor of Counselling Psychology at Simon Fraser University. Since 2004, she has been a volunteer with the Rainbow Refugee Committee, which is a community group that supports and advocates for LGBTQ refugee claimants. In that position, she has helped over 300 LGBTQ refugees. In her experience, many claimants did not trust the state and feared that seeking protection would make them targets. It can also be challenging to prove a claim, especially for countries which otherwise appear safe, since persecution for LGBTQ refugee claimants is often hidden and highly stigmatized. She states that many claimants fleeing from persecution on grounds of sexual orientation or gender identity have hidden these aspects of themselves for years, and this makes it difficult to gather evidence. She also says it usually takes a lot of time before LGBTQ claimants will trust their lawyers enough to disclose important information and to mentally prepare to testify; such claimants also often have histories of complex trauma which may affect their memories.

[64] Patricia Durish has been a clinical social worker for over 15 years and has conducted more than 250 trauma assessments, a majority of which have been in support of refugee claimants. In her affidavit dated June 25, 2013, she addresses three limitations with the DCO

process in how it deals with claims by trauma survivors: (1) designation of democratic countries does not guarantee a culture that acknowledges and responds to gender-based violence or violence based on racial and sexual identity, and she gives examples of many traumatized clients she has had from DCOs for whom there was no protection in their countries of origin; (2) the short time frames do not allow for the way which trauma is processed and it is unrealistic to assume that trauma survivors can consciously recount traumatic experiences and symptoms in a consistent and spontaneous narrative; and (3) the acceptance rate of previous claims is unreliably skewed because the system emphasizes cognition and autonomy and thereby militates against the acceptance of individuals who have experienced traumatic stress.

[65] Amanda Dale has been the executive director of the Barbra Schlifer Commemorative Clinic since May, 2010. For 25 years, the Clinic has been opposing violence against women and being a front-line service provider for women who have experienced violence; it also provides legal representation and advocacy services in many areas, including refugee and immigration law. In her affidavit, dated July 4, 2014, she testifies that women are often vulnerable to violence and cannot escape it without overcoming a number of barriers. Some common situations in the refugee context include women fleeing from abuse, women arriving in Canada with an abusive partner who maintains carriage over the refugee claim, and women leaving an abusive partner during the sponsorship process, thus resulting in a breakdown of the sponsorship. Ms. Dale says that the recent changes to refugee law disproportionately affect such women. She testifies that many women often experience systemic discrimination and violence even in seemingly "safe" countries, and that the DCO regime fails to recognize this. She also says the reduced timelines for claimants from designated countries means that they will not be able to properly substantiate

their claims, since domestic violence occurs in secret and the women may not trust their lawyer in time to disclose it. Also, if a woman arrived with a controlling, abusive partner who was the principal applicant in a claim, the RPD may never hear the true basis of her claim as she may be deported before she can apply to reopen her application or even while she is waiting for a decision on such an application. Since the DCO regime was adopted, Ms. Dale states that other shelters have reported that women from DCOs were being deported despite histories of violence, and that they were suffering heightened levels of fear and demoralization.

[66] Aisling Bondy is an Ontario lawyer who practices immigration and refugee law and has represented about 25 claimants who have experienced some form of domestic or gender-based violence. She testifies that in some of those cases, most commonly when an abused woman originally filed her claim jointly with her partner, the allegations only arose several months or years after the process had been started. Under the DCO regime, Ms. Bondy says that the accelerated timelines make it unlikely that an abused woman will disclose her fear before the RPD hearing, and it is hard to raise a claim afterwards for various reasons. For example: there is no appeal to the RAD; it can be difficult to reopen an RPD hearing after a claim is refused; a PRRA is not available for 36 months; and even if a woman falls into one of the narrow exceptions allowing her to make an application under section 25(1) of the *Act* [H&C application] without having to wait 12 months, there is no statutory stay of removal and she will likely be deported before a decision is made. There are also unique evidentiary burdens since domestic abuse happens in private. Ms. Bondy has also represented about 10 claimants with serious mental health issues, and she says they too are prejudiced by the DCO regime. She says these claimants are often reluctant to tell counsel about their impairment, and the accelerated timelines make it

more likely that mental disorders will be undetected and thus negatively affect their claims if they present as being not credible because of memory problems or other defects.

[67] Catherine Bruce is an Ontario lawyer who specializes in immigration and refugee law and has represented over 1,000 refugee claimants from around the world over the past 15 years. She says that she has represented about 80 South Korean women and their children who have been victims of intimate partner violence and child abuse. They are among the most traumatized of any clients she has ever had and face the greatest risk. In her experience, such claimants often have difficulty articulating their claims, but are nevertheless recognized as refugees far more often than other claimants from South Korea. She states in her affidavit that 70% of the South Korean women and children she represented from 2009-2012 were recognized as refugees even though the average acceptance rate for all claims from South Korea was only 13.5% over the same period (though she adjusted her success rate to 60% at her cross-examination in order to match the way that the 13.5% figure was calculated). She also says these types of cases can be very complex. South Korea is a patriarchal culture in which women are socialized to accept abuse without complaint. As for children, physical punishment is widely accepted in South Korea, and this presents procedural problems since children often do not speak for themselves at RPD hearings. Nevertheless, South Korea is a DCO, with no distinction made for historically marginalized communities like women facing domestic violence. Ms. Bruce says the DCO regime exacerbates the risks that these historically marginalized groups will be denied the protection they need. She says that the timelines are too short to build the necessary trust between these types of clients and their lawyers. Ms. Bruce also says that, to rebut the presumption of state protection in similar cases, she has had to collect many affidavits from

similarly-situated persons. The accelerated timelines would make the collection of such evidence much more difficult. Judicial review is also inferior to a RAD appeal since, even if it is successful, the case will need to be re-litigated which may lead to further trauma.

[68] The other affidavits filed by the Applicants do not need to be summarized in any detail. Geraldine MacDonald, James Gildiner, and Tibor Tiboz all testified about specific cases in which the CBSA sought to remove DCO claimants from Canada before the Federal Court could hear their applications for judicial review. The remainder of the affidavits introduced documentary evidence or reported on the status of various access to information requests.

B. *The Respondents' Affidavit Evidence*

[69] Kay Hailbronner is proposed as an expert in the study and practice of German, European and international immigration and refugee law, and of related public international law governing migration and refugee protection. He has provided two affidavits, each dated November 19, 2014. His first affidavit explains how the basic SCO concept arose and describes how it operates within the EU legal framework. Each EU member state generates its own list of safe countries. Claimants from a SCO cannot secure asylum unless they rebut the presumption of safety and there are typically procedural consequences as well, such as accelerated timelines. Under the newest directive, article 39 ensures that asylum claimants must have reasonable access to an effective remedy if their claim is refused, but EU member states have considerable discretion when deciding whether claimants are allowed to stay in the country pending its outcome. Typically, accelerated timelines have been accepted, so long as claimants practically have enough time to prepare and bring an effective action to court. He also discusses the Aznar

Protocol which, essentially, provides that EU countries are safe vis-à-vis each other with some exceptions. He then describes in detail the national regimes in Germany, the United Kingdom, France, Belgium, and Austria, and he also makes a few comments about other nations. He concludes that, in general, the SCO regimes in the EU reflect the central concept of a rebuttable presumption of safety. There is generally a tendency among EU countries to shorten time limits, but a right to appeal is typically recognized. Whether that appeal has suspensive effect, however, has often been restricted or refused and can be withheld so long as a claimant has an opportunity to ask for suspensive effect.

[70] Professor Hailbronner's second affidavit responds to the evidence of Professor Costello. He says that her description of the SCO concept is largely correct, but he does not find her comparison with the Canadian DCO regime to be convincing. He does not agree that either the EU model or the Canadian model infringes international refugee law, and he says the emergence of some basic principles of fairness in accelerated asylum procedures do not constitute a firm and unalterable canon of procedural rules. Although Professor Costello criticizes the absence of defined qualitative criteria for designating a country as safe, Professor Hailbronner says this ignores the fact that the criteria eventually assessed are very similar. He also points out that, unlike the European regime, the Canadian DCO designation does not create a presumption of safety and is not more likely to produce false negative decisions for that reason. He sees no problem with quantitative criteria triggering a qualitative review process in these circumstances, although he admits it is unusual from a European perspective. He acknowledges that the right to effective judicial protection is a recognized principle of EU law, and that a stay of execution in administrative practice likely would not pass muster under article 13 of the *Convention for the*

Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Eur TS 5. However, he says that is not the yardstick for measuring Canada's compliance with international human treaties or the *Charter*. In his view, the relevant question is whether the DCO regime ensures effective protection of the human rights of asylum seekers and a fair asylum procedure, and he concludes that it does. He says that he "cannot identify a greater likelihood of false negative IRB determinations and a higher risk of irreparable harm for serious human rights violations in the Canadian law and practice than in the European law and practice on SCO asylum procedures." He adds that the established removal procedures and a right to ask for a judicial stay of removal are adequate precautions against irreparable harm in asylum applications originating from DCOs.

[71] Teny Dikranian is employed by CIC, and from May 2009 until July 2013, she was the Manager of Asylum Policy in the Asylum Policy and Programs Division of the Refugee Affairs Branch. She helped reform the refugee determination system and provides four reasons for why the system was changed: (1) it was too slow and it could take 20 months to get a hearing at the RPD, which was unfair to genuine claimants and made the system vulnerable to abuse; (2) the IRB's resources were strained and it had a backlog of some 61,000 cases by the time the *Balanced Refugee Reform Act*, SC 2010, c 8 [*BRRA*] was introduced; (3) there were too many layers of recourse and no limits on the number of H&C applications or PRRAs, so failed refugee claimants could often say they were waiting on any number of decisions; and (4) it would take an average of 4.5 years from the time a claim was made to remove a failed refugee claimant, during which time those claimants were drawing on most of the same social services which refugee claimants who were awaiting an RPD decision could access. She also testifies that the DCO

regime was one of the most significant changes introduced to respond to those needs, and it was modeled on similar systems in the United Kingdom, Ireland, France, Germany, the Netherlands, Norway, Switzerland, and Finland. Simply put, she says that some countries do not normally produce refugees, but significant resources were being spent assessing the unfounded claims from nationals of such countries. She explains that one of the principal reasons the DCO regime was introduced was to "deter abuse of our refugee system by people who come from countries generally considered safe and 'non-refugee producing', while preserving the right of every eligible refugee claimant to have a fair hearing before the IRB." She then goes on to explain the consequences of designation that have been summarized above.

[72] Jennifer Irish was the Director of Asylum Policy and Program at CIC from August 2008 to August 2012. She describes many of the same problems noted by Ms. Dikranian, specifically with respect to the backlog at the IRB and the fact that it would take an average of 4.5 years to remove failed refugee claimants. CIC thus needed to create a speedier process, and she says the base assumption was that all asylum seekers would continue to receive a full and fair determination of their claims by the IRB. They explored the SCO concept from Europe, and they knew that the United Nations High Commission for Refugees [UNHCR] had confirmed that procedural consequences from this type of designation complied with the *Convention*. Many of those countries relied on volume alone to trigger a designation assessment, but Ms. Irish says that CIC decided the Canadian model should take into account objective rates of rejection, abandonment and withdrawal, and so created the quantitative triggers. The intent of allowing the MCI to prescribe the numbers used, Ms. Irish says, was to provide the MCI with a flexible tool to respond quickly to spikes in refugee claims from countries which had a high degree of

rejected, abandoned or withdrawn claims. As for the qualitative triggers, they were designed to align with sections 96 and 97 of the *IRPA* as well as relevant international instruments. Those rates were just intended to trigger a review of the country conditions though, and the Designation Factors to then be considered were also defined in relation to many international human rights instruments. Instead of assigning the process to an independent panel, it was determined that it would be better to have a new division within CIC assess the country conditions as this would be more flexible and could accommodate classified material about human rights reporting from Canadian missions abroad. She concludes by saying that all claimants still get a full hearing, and there are safeguards against *refoulement*, such as the provision that allows access to a PRRA where the country circumstances change in such a way as to put all of its residents at risk. Also, while it would be expected to be rare, the MCI could intervene on his own initiative to grant someone access to a PRRA.

[73] Eva Lazar is the Director of the MACAD of CIC. In her first affidavit, dated July 25, 2013, she describes the process summarized above for designating a country. She also states that the Applicants use misleading statistics. In particular, she criticizes them for not counting abandoned and withdrawn claims in the divisor when calculating acceptance rates and then comparing them side-by-side to rejection rates which include them. According to Ms. Lazar, one also cannot compare the number of claims referred to the IRB in a year to the number of claims finalized by the IRB in the same year, as substantial delays may mean that many or most of the claims referred were not finalized in the same year. She also criticizes the Applicants for using data from the IRB to suggest that designation of a country as a DCO has a disproportionate

impact on people who make certain types of claims. The IRB does not keep exhaustive statistical records of claims by type and such data cannot be accurately relied upon for statistical analysis.

[74] Ms. Lazar updated her evidence in an affidavit dated November 20, 2014, where she testifies that the Designation Factors align with sections 96 and 97 of the *IRPA* as well as various international human rights instruments. In developing the methodology for assessing country conditions, CIC had regard to the practice of other countries and general country of origin research approaches. As of November 20, 2014, she says that the MCI has designated 42 countries. Ms. Lazar also describes how CIC collects data about pre-*PCISA* and post-*PCISA* asylum claimants. She notes that overall intake of asylum claims from the 37 DCOs designated before September, 2014, has decreased by 83%. Intake from Hungary has decreased by 94% and intake from Croatia has decreased by 78%. The statistics also show that acceptance rates for claims from Hungary increased from 9% pre-*PCISA* to 44% post-*PCISA*, while withdrawal rates dropped from 44% to 15%. She also provides data on Croatia. These statistics, she says, are better than those provided by Professor Rehaag since his data from 2013 includes legacy cases which predate the *PCISA* and does not properly distinguish between pre-reform and post-reform data. Ms. Lazar says that PRRA acceptance rates remain low. She also testifies that the average number of days from the latest negative RPD decision to removal has been reduced by 100 days since implementing the *PCISA*, yet it is substantially the same for both DCO and non-DCO claimants.

[75] In her supplementary affidavit, dated December 15, 2014, Ms. Lazar adds some data on the so-called legacy cases from Croatia and Hungary – those cases which are governed by the old

system since they were referred to the RPD before December 15, 2012, but which were only finalized afterwards. In particular, she notes that the acceptance rate for those claims from Hungary was 22%.

[76] Christopher Raymond is a Senior Program Advisor for the CBSA in the Removals Program. His affidavit, dated November 20, 2014, focuses on the procedure for removing someone from Canada. Most refugee claimants are issued a conditional departure order which only comes into force 15 days after their refugee claim has failed. They then have an additional 30 days to voluntarily leave Canada, after which their departure order becomes a deportation order which the CBSA will enforce. If they leave before the departure order becomes a deportation order, they will not need to seek CBSA authorization to return to Canada in the future. If they stay though, the CBSA will call them in for a pre-removal interview and deal with any outstanding issues such as scheduling a removal date. At this time, they can request a deferral of removal and an inland enforcement officer can postpone the removal. If it is determined that there is new evidence of a risk of death, extreme sanction, or inhumane treatment, the officer can refer the matter to CIC for a determination under section 25.1 of the *IRPA*. If the deferral is denied, the individual can then seek judicial review and possibly obtain a judicial stay of removal. He says that this process is sufficient to constitutionally justify the PRRA bar. Mr. Raymond also describes the assisted voluntary returns and re-integration program, in which 3,721 failed refugee claimants participated from June 29, 2012, to September 30, 2014. Of those who participated, 1,738 were from Hungary and 217 were from Croatia. He also says that the CBSA is responsible for temporary suspensions of removals when circumstances in a country pose a generalized risk to the entire civilian population and for

administrative deferrals of removals when immediate action is necessary to temporarily stay removals in situations of humanitarian crisis. Finally, Mr. Raymond testifies that from January 2013 to June 2014, 213 failed refugee claimants sought stays of removal from this Court; 21 of them were from DCOs. He says that the Federal Court granted stays to seven of the claimants from DCOs and to 58 of the claimants who were not from DCOs.

C. *Should the impugned affidavits be struck out?*

1. Respondents' Arguments

[77] The Respondents contend that many of the affidavits filed by the Applicants should be struck, and they submit that the Court must properly exercise its gatekeeper role. They point out that in *R v Mohan*, [1994] 2 SCR 9 at 20, 114 DLR (4th) 419 [*Mohan*], the Supreme Court set out four criteria for expert witnesses: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert. The Respondents say that these criteria are not met by four of the expert witnesses proposed by the Applicants: namely, Christopher Anderson; Sean Rehaag; Nicole LaViolette; and Patricia Durish.

[78] The Respondents argue that Professor Anderson's affidavit is a selective summary of notorious immigration policies from Canada's past, and it provides no historical context relevant to the Applicants' claims. Even if it did, the Respondents say its probative value is vastly outweighed by its prejudicial effect, in that it broadens the scope of the litigation to attack every Canadian immigration policy since Confederation. Requiring the Respondents to refute this affidavit would be a waste of time and money. The Respondents also say it is unnecessary

because the policies about which Professor Anderson testifies are widely known and could just as easily be described with reference to a textbook in the Applicants' submissions.

[79] As for Professor Rehaag's affidavits, the Respondents say that paragraphs 7 through 18 and Exhibit B of his further affidavit should be struck. It is not disputed that some refugee claims from DCOs are accepted, and the Respondents argue that breaking the data down by which RPD members decided those claims is irrelevant. Furthermore, they argue that Professor Rehaag is partial; he has been an advocate against the DCO regime and, specifically, against the lack of an appeal right for DCO claimants to the RAD, telling Parliament's Standing Committee on Citizenship and Immigration that it was unconstitutional. That is the very issue in contention, and the Respondents submit his affidavits should be granted little weight.

[80] The Respondents argue that Professor LaViolette's affidavit is irrelevant. She testified about the effect of accelerated timelines on LGBTQ claimants, but the effect of those timelines are not in issue and they never prejudiced any of the individual Applicants in this case.

[81] Similarly, they also argue that Ms. Durish's affidavit simply criticizes how the entire refugee determination system deals with trauma victims, both pre-reform and post-reform. She gives no examples, and the Respondents say her broad attack is well outside the scope of this litigation, which is just about the inability of DCO claimants to access the RAD. The Respondents further argue that her opinion is not necessary since it requires no expertise to acknowledge that some refugee claimants suffer from trauma. Thus, the Respondents submit that both her affidavits should be struck.

[82] The expert affidavits are not the only ones which the Respondents argue should be struck. They contend that the affidavits from Amanda Dale, Aisling Bondy, and Catherine Bruce are irrelevant because they discuss female victims of domestic abuse, give no examples of any such victims who have been affected by the DCO regime, and do not limit themselves to facts within their personal knowledge. The Respondents argue those affiants and many others give inadmissible opinion evidence and are veiled attempts to add expert witnesses without seeking leave. Many affiants even attached their curriculum vitae. Specifically, the Respondents argue that the following affidavits should be struck because the listed paragraphs include qualifications and opinion evidence:

Affidavit	**Paragraphs**	**Exhibit**
Amanda Dale (4 July 2014)	5-10, 35-48	A, B
Sharalyn Jordan (10 October 2014)	3-9, 11-21	-
Julianna Beaudoin (13 June 2013)	2-4, 5, 6, 9-33	A
Julianna Beaudoin (18 September 2014)	All	-
Michael Battista (9 October 2014)	3-41, 46-49	-
Aisling Bondy (15 October 2014)	3-4, 6-25, 30-73	-
Audrey Macklin (21 June 2013)	1	A
Catherine Bruce (20 June 2013)	1-15, 17-81	-

[83] The Respondents also say that the listed portions of the following affidavits should be ignored for the same reason, but do not ask that the rest of the affidavits also be struck:

Affidavit	**Paragraphs**
Woo Jin Edward Lee (17 October 2014)	18-28
Edson Emilio Alvarez Garcia (20 June 2013)	10-14, 19-22
Brian Brenie (14 June 2013)	2-7

2. Applicants' Arguments

[84] The Applicants no longer rely on the affidavits of Audrey Macklin or Edson Emilio Alvarez Garcia. They also do not rely on paragraphs 20 and 21 of Professor Jordan's affidavit.

[85] They do, however, submit that constitutional litigation requires a full record and argue that the other affidavits should remain intact. The Applicants argue that the Respondents have relied on an unduly narrow vision of the scope of this litigation. In their view, these applications are not just about paragraph 110(2)(d.1) but, rather, are also about whether the system for designating DCOs is itself unconstitutional. All the effects that flow from designation are therefore in issue.

[86] With respect to the expert evidence, the Applicants submit that the Court's gatekeeper role is most important for trials (*R v Abbey*, 2009 ONCA 624 at paragraphs 77-95, 97 OR (3d) 330 [*Abbey*]), and is significantly attenuated for applications for judicial review where there is neither *viva voce* evidence nor a jury. There is no cost to admitting the evidence in this case because it causes no prejudice and wastes no time.

[87] The Applicants advance the following reasons for why their experts' affidavits should be admitted: (1) Professor Anderson's affidavit is relevant and necessary since it shows that immigrants and refugees are an historically disadvantaged group, which is an element of their section 15 *Charter* claim; (2) the impugned paragraphs of Professor Rehaag's further affidavit show the actual numbers of DCO claimants whose claims are accepted and demonstrate a broad

consensus among RPD members that these countries do produce refugees; (3) Professor Rehaag did not appear before the Standing Committee on Citizenship and Immigration as an advocate but, instead, as an expert whose opinion was that there is an unavoidable risk of false negatives at the RPD which requires a right of appeal; (4) Professor LaViolette specifically testifies about the effect of the DCO regime on LGBTQ claimants, which is relevant to section 15 and the Applicants' arguments about overbreadth; and (5) Patricia Durish's affidavits explain that reduced timelines worsen the refugee system for victims of trauma, and her opinion that the former system was also not attuned to the needs of such victims does not negate her view of the DCO regime. Thus, the Applicants say that none of their experts' affidavits should be struck.

[88] With respect to the affidavits of Amanda Dale, Aisling Bondy, and Catherine Bruce, the Applicants argue that, when assessing *Charter* violations, anecdotal evidence and "reasonable hypotheticals" can and should be considered (citing e.g. *R v Goltz*, [1991] 3 SCR 485 at 515-516, 131 NR 1; *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paragraphs 154 and 155, [2013] 3 SCR 1101 [*Bedford*]). In their view, it is therefore irrelevant that the examples these witnesses provide pre-date the DCO regime.

[89] As for the rest of the impugned evidence, the Applicants say it is improper for the Respondents to seek to strike entire affidavits on the basis that a few paragraphs might contain opinion evidence (citing e.g. *Armstrong v Canada (AG)*, 2005 FC 1013 at paragraphs 40-42 [*Armstrong*]). Thus, while they acknowledge that the following witnesses did stray into opinion evidence at times, the Applicants say that is no reason to strike their affidavits:

Affidavit	**Paragraphs**
Julianna Beaudoin (13 June 2013)	10, 12-18, 24-25, 32-33
Michael Battista (9 October 2014)	13, 26, 38, 48-49
Catherine Bruce (20 June 2013)	unspecified
Brian Brenie (14 June 2013)	unspecified

[90] Otherwise, the Applicants say that the witnesses testify to information within their personal knowledge or give background to their experiences. If they supplied their curriculum vitae, it was because they obtained that knowledge or experience through their professional activities. They may have made a few common sense inferences from that personal knowledge, but the Applicants argue the weight of those inferences should be assessed with the merits.

3. Analysis

[91] It is well established that motions to strike all or part of an affidavit should not be routinely made (*Gravel v Telus Communications Inc*, 2011 FCA 14 at paragraph 5), especially where the question is one of relevancy. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irrelevant will such motions be justified (*Mayne Pharma (Canada) Inc v Aventis Pharma Inc.*, 2005 FCA 50 at paragraph 13, 331 NR 337; *Armstrong* at paragraph 40).

[92] These applications for judicial review were case managed. Prothonotary Milczynski was familiar with the file and could have heard the motion if she thought it was clearly warranted (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraphs 11-12, 428 NR 297). She did not. If the

Respondents were concerned that the complexity of this application warranted more procedural safeguards, they could have tried to convert it into an action pursuant to subsection 18.4(2) of the *Federal Courts Act* (*Meggeson v Canada (AG)*, 2012 FCA 175 at paragraphs 31-32, 349 DLR (4th) 416; *Canada (Citizenship and Immigration) v Hinton*, 2008 FCA 215 at paragraph 44, [2009] 1 FCR 476), but they did not do so. This being the case, the motion must be addressed as it stands, and I find no prejudice to the Respondents at this point by denying their motion.

[93] The Respondents cross-examined almost all of the affiants whose affidavits they impugn, and the transcripts of these examinations are part of the record before the Court. I am not convinced the Respondents have suffered any material prejudice by virtue of the admittedly voluminous record compiled by the Applicants.

[94] Furthermore, the affidavits or portions thereof which the Respondents challenge are not so clearly irrelevant to the constitutional issues raised by these applications that they should be struck from the record. This is not a case where striking the impugned affidavits or portions thereof would improve the orderly hearing of these applications for judicial review. It is unnecessary to go through each affidavit line-by-line and state which portions are relevant and which are irrelevant. In this regard, I agree with the Applicants that my role as a gatekeeper is reduced when there is no prejudice to either party.

[95] Nevertheless, the Respondents do object to some of the Applicants' expert witnesses on other grounds and these should be considered. The Supreme Court of Canada recently restated the test for expert opinion evidence in *White Burgess Langille Inman v Abbott and Haliburton*

Co, 2015 SCC 23, 383 DLR (4th) 429 [*White*], and it essentially corresponds to the parties' submissions about *Mohan* and *Abbey* (*White* at paragraphs 19-24).

[96] The Respondents say that the affidavit of Professor Anderson is not necessary. This criterion of the test asks "whether the expert will provide information which is likely to be outside the ordinary experience and knowledge of the trier of fact" (*R v DD*, 2000 SCC 43 at paragraph 21, [2000] 2 SCR 275; *White* at paragraph 21). Some of the particular instances of discrimination described in Professor Anderson's affidavit are notorious, but the overall history of immigration he describes is more detailed than that which would be within the "ordinary experience and knowledge" of the reasonably informed Canadian. I am not convinced that I could take judicial notice of everything he states or of his opinion about historical trends. This affidavit will not be struck.

[97] The Respondents also argue that Patricia Durish's testimony was unnecessary. Her criticisms of the refugee determination system extend beyond the DCO regime, but that provides context to her more specific concerns. Her affidavits will not be struck.

[98] As for the Respondents' objection to Professor Rehaag's impartiality, they limited those concerns to weight. To address admissibility briefly though, I agree with the Applicants' arguments. I am not convinced that Professor Rehaag "is unable or unwilling to provide the court with fair, objective and non-partisan evidence" (White at paragraph 49).

[99] The Respondents also submit that some of the Applicants' other witnesses give opinions they are not qualified to give. As the Respondents correctly point out, a party needs leave of the Court to produce more than five expert witnesses (*Federal Courts Rules*, s 52.4(1); *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 4(1)). Generally, lay witnesses can only give opinions in the circumstances set out in *Graat v The Queen*, [1982] 2 SCR 819 at 837, 144 DLR (3d) 267 [*Graat*], citing *Cross on Evidence*, 5th ed (London: Butterworths, 1979) at 451:

> When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury.

[100] I agree that some of the affidavits presented by the Applicants contain opinions that would not satisfy the criteria in *Graat*. However, this does not mean that whole affidavits should be struck, and many of those opinions are accompanied by properly admissible factual observations. Suffice it to say that I am cognizant of the Respondents' objections and have neither assigned any weight to the opinions of the Applicants' lay witnesses nor deferred to any inferences drawn by them.

[101] Accordingly, the Respondents' motion to strike the affidavits, or portions thereof, as stated in their written submissions filed November 19, 2014, is denied.

VII. Does paragraph 110(2)(d.1) of the Act infringe subsection 15(1)of the *Charter*?

[102] Section 15 of the *Charter* provides as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

A. *Applicants' Arguments*

[103] The Applicants argue that subsection 15(1) should be interpreted in a manner that gives effect to Canada's international human rights obligations (citing e.g. *R v Hape*, 2007 SCC 26 at paragraphs 53-56, [2007] 2 SCR 292 [*Hape*]). They point out that the *Convention* does not recognize the concept of a SCO, and article 3 says that "Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of

origin." Although the UNHCR has said the concept of a SCO can be used as a tool to accelerate procedures to determine refugee claims, the Applicants note that it has condemned Canada's DCO regime for falling short of the UNHCR's standards.

[104] In *Withler v Canada (AG)*, 2011 SCC 12 at paragraph 61, [2011] 1 SCR 396 [*Withler*], the Supreme Court set out a two-part test for establishing a violation of subsection 15(1) of the *Charter*: "(1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" The Applicants contend that both conditions are satisfied in this case.

[105] With respect to the first part of the test, the Applicants point out that national origin is an enumerated ground in subsection 15(1) of the *Charter*, and they argue the purpose of section 109.1 is to subject some claimants to an inferior refugee determination process based on that ground. At the hearing, the Applicants disputed the Respondents' proposition that nationality was just a proxy for safety. The legislation does not mention safety, and nothing about designation of a country guarantees that a country is safe for persons who are actually asking for protection. According to the Applicants, DCO claimants are just trapped in an inferior process from which nothing about their personal circumstances can free them.

[106] As for the second component of the test, the Applicants argue that discrimination is "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to

opportunities, benefits, and advantages available to other members of society" (*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 174, 56 DLR (4th) 1, McIntyre J, dissenting but in the majority on this point [*Andrews*]). They say expressly imposing disadvantages on the basis of national origin alone constitutes discrimination, since the distinction perpetuates the historical disadvantage of non-citizens and refugee claimants. They further say that branding their claims as "bogus" by the government and the use of statistics to trigger designation exposes them to the stereotype that their fears are less worthy of attention because they are undesirable (citing *Canadian Doctors* at paragraphs 835 and 837-838).

[107] The Applicants also argue that the DCO regime has adverse effects on LGBTQ claimants, ethnic minority claimants, women seeking protection from gender-based persecution, and claimants with particular cognitive impairments. Such claimants, they say, are often traumatized and more vulnerable than other refugee claimants, and may find it harder to fully and immediately disclose the basis of their claims. The Applicants say that exposing persons who have been discriminated against in their own countries to further differential treatment exacerbates those issues and makes the DCO regime disproportionately severe for such claimants.

B. *Respondents' Arguments*

[108] The Respondents accept that the test for a violation of subsection 15(1) is set out in *Withler*, but contend that the DCO regime does not draw distinctions among refugee claimants based on their national origin. Rather, according to the Respondents, claimants are subject to the DCO regime only because they come from parts of the world that are generally safe. Nationality

is simply a proxy for the relative safety of the countries they are from (citing *Pawar v Canada* (1999), 247 NR 271 at paragraphs 3-4, 67 CRR (2d) 284 [*Pawar*]). As the list of DCOs changes over time, the Respondents say that membership in a DCO is not an immutable characteristic.

[109] Alternatively, the Respondents argue that it is not a discriminatory distinction, and they say four factors are relevant to this analysis: (1) pre-existing disadvantage, if any, of the claimant group; (2) the degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (citing *Quebec (AG) v A*, 2013 SCC 5 at paragraphs 325-330 and 417-418, [2013] 1 SCR 61).

[110] In the Respondents' view, the DCO regime is not based on stereotypes; it is based on informed statistical generalizations followed by thorough reviews of the country conditions. Expedited processing based on the relative safety of a country is legitimate and conforms to Canada's international obligations. Furthermore, nationals of safe countries do not suffer from any historical disadvantage the DCO regime could perpetuate. The Respondents say the Applicants mischaracterize the effect of designation when they allege that the DCO regime creates some kind of presumption that refugee claims from DCOs are unfounded, as it does not.

[111] The Respondents further argue that the DCO regime corresponds to the needs of those affected by it. It limits access to an appeal to the RAD on the basis of a thorough and accurate assessment of the country conditions, while maintaining an individualized assessment before the RPD for every refugee claimant from DCO countries. As for the Applicants' argument that it

negatively affects refugees as a vulnerable group, the Respondents reply that this argument incorrectly assumes all refugee claimants are genuine refugees.

[112] The Respondents also say none of the interests affected by the DCO regime suggest discrimination for the following reasons: (1) there is no *Charter* right to an appeal from a quasi-judicial tribunal such as the RAD; (2) the Applicants have not established that the accelerated timelines adversely affect any group of DCO refugee claimants more than any other, and their arguments ignore the fact that there are already procedures in place to alleviate strict deadlines when necessary and to address the needs of groups like LGBTQ persons, claimants making gender-based claims, and those with mental issues; and (3) a time-limited statutory bar to a PRRA has already been found to be constitutional, and the MCI always has discretion to exempt a person from the bar when circumstances warrant.

[113] The Respondents contend that the Applicants have supplied no reliable evidence that the DCO regime has an adverse impact on particular minority subgroups of DCO claimants. Rather, the Respondents argue: (1) minority subgroups faced challenges before the DCO regime was introduced; (2) other claimants face similar challenges; (3) the Applicants did not give any examples of DCO claimants adversely affected by the DCO regime; (4) the individual Applicants in this case have not been negatively affected; (5) no studies or statistical analysis support the allegations of adverse impact, and the Applicants have supplied instead only speculative assertions by non-expert witnesses with vested interests; and (6) RPD data is unreliable, so nothing supports the allegation that issues involving gender or sexual orientation may be more likely to arise for claimants from DCO countries.

[114] Furthermore, the Respondents assert that the broader legal context shows there is no discrimination. There are many ways in which the refugee system could be reformed with no guarantees as to which would be most effective, and the Respondents say legislatures are better situated than courts to make difficult policy judgments like this (citing e.g. *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 at paragraphs 116-119, 121 OR (3d) 733). In the Respondents' view, no reasonable person would conclude that the DCO regime is an affront to human dignity (citing *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paragraphs 60-61, 170 DLR (4th) 1).

C. *Analysis*

[115] The parties agree that the test for a violation of section 15(1) of the *Charter* is set out in *Withler*, where the Supreme Court of Canada stated as follows:

> [61] The substantive equality analysis under s. 15(1)…proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?… Comparison plays a role throughout the analysis.
>
> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> …
>
> [65] The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to

> determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances. … [citations omitted]
>
> [66] The particular contextual factors relevant to the substantive equality inquiry at the second step will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other … Factors such as … pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected — may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory …At the end of the day, all factors that are relevant to the analysis should be considered. As Wilson J. said in *Turpin*,
>
> > In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]

[116] More recently, in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, the Supreme Court summarized its jurisprudence on section 15 of the *Charter* as follows:

> [16] The approach to s. 15 …set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47…requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*": para. 331 (emphasis added).
>
> [17] This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 2; *R v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. ...

> [18] The focus of s. 15 is therefore on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: *Andrews*, at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.
>
> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336….
>
> [20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage…
>
> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.
>
> [Emphasis in original]

[117] In view of the foregoing, I turn now to consider whether the Applicants have established that paragraph 110(2)(d.1) of the *IRPA* violates subsection 15(1) of the *Charter*.

[118] The first question is whether the denial of an appeal to the RAD by DCO claimants creates a distinction based on an enumerated or analogous ground of discrimination. The Supreme Court has stated that "inherent in the word 'distinction' is the idea that the claimant is treated differently than others" (*Withler* at paragraph 62).

[119] In this case, the Applicants argue that the distinction is based on national origin, and I agree with the interpretation of the words "national origin" adopted by this Court in *Canadian Doctors*. Madam Justice Mactavish stated (at paragraph 768) that the reference to "national origin" in subsection 15(1) encompasses "a prohibition on discrimination between classes of non-citizens based upon their country of origin … consistent with the provisions of the *Refugee Convention*, article 3 of which prohibits discrimination against refugees based upon their country of origin" (see also *Hape* at paragraphs 55-56).

[120] The differential treatment in paragraph 110(2)(d.1) of the *IRPA* is clearly a distinction on the basis of the national origin of a refugee claimant (*Canadian Doctors* at paragraphs 751-773). If the claimant comes from one of the countries designated under subsection 109.1(1) of the *IRPA*, his or her claim will be assessed without the potential benefit of or access to an appeal to the RAD, unlike claimants from non-DCO countries.

[121] The Respondents' reliance on *Pawar* is misguided. Justice Mactavish distinguished that case in *Canadian Doctors* (at paragraphs 753-755), and her reasons are persuasive. Whatever qualities the MCI might conclude that any particular country has, the reason a DCO claimant is treated differently is because of the country from which such claimant originates. This distinction

is made without regard to claimants' personal characteristics or whether that country is actually safe for them. Moreover, the fact that a country could conceivably be removed from the list of designated countries in the future does not make a claimant's national origin mutable. All it means is that the MCI could stop drawing distinctions on the basis of their national origin in the future and claimants have no control over when that might be. That is no comfort to claimants affected by that distinction now.

[122] Thus, the first aspect of the test is satisfied by the very provisions of paragraph 110(2)(d.1) itself inasmuch as it creates two classes of refugee claimants based on national origin: those foreign nationals from a DCO and those who are not from a DCO.

[123] As to whether the distinction between DCO and non-DCO claimants under paragraph 110(2)(d.1) of the *IRPA* creates a disadvantage by perpetuating prejudice or stereotyping, the Respondents contend that the DCO regime is not based on stereotypes but, rather, is based on informed statistical generalizations followed by thorough reviews of the country conditions. Furthermore, according to the Respondents, nationals of DCO countries do not suffer from any historical disadvantage that the DCO regime could perpetuate.

[124] I disagree with the Respondents' arguments. One of the principal reasons the DCO regime as a whole was introduced, according to Ms. Dikranian, was to "deter abuse of our refugee system by people who come from countries generally considered safe and 'non-refugee producing', while preserving the right of every eligible refugee claimant to have a fair hearing before the IRB." The distinction drawn between the procedural advantage now accorded to non-

DCO refugee claimants and the disadvantage suffered by DCO refugee claimants under paragraph 110(2)(d.1) of the *IRPA* is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and "non-refugee producing." Moreover, it perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or "bogus" claimants who only come here to take advantage of Canada's refugee system and its generosity (*Canadian Doctors* at paragraphs 814-815, 829 and 835-848; also see e.g. *House of Commons Debates*, 40th Parl, 3rd Sess, No 33 (26 April 2010) at 1944-1945; *House of Commons Debates*, 40th Parl, 3rd Sess, No 36 (29 April 2010) at 2126; *House of Commons Debates*, 41st Parl, 1st Sess, No 220 (6 March 2012) at 5886; Affidavit of Julianna Beaudoin (13 June 2013), Exhibit B: various articles).

[125] The persons directly affected by paragraph 110(2)(d.1) of the *IRPA* include many claimants who are not abusing the system. For instance, Ms. Lazar presented statistics showing that, since Hungary was designated, the abandonment/withdrawal rate is down to 19%, and acceptance rates have climbed to 44% (which is slightly more than the overall acceptance rate in 2013, which was about 38% (Affidavit of Sean Rehaag (20 May 2014), Exhibit A)). Those rates are almost five times higher than they had been before *PCISA* was enacted, and about two times higher than for so-called legacy cases which pre-date *PCISA*. The Respondents stated at the hearing this is what one would expect of DCO countries (although Croatia does not appear to have seen the same results), and explained that it showed that the DCO regime was working; the proportion of accepted claims was increasing because people looking to abuse the system were deterred from coming to Canada while those genuinely seeking protection were not. This makes

sense, but it also implies that claimants who are actually denied an appeal by virtue of paragraph 110(2)(d.1) are those who are genuinely seeking protection. Most of the abusive claimants either stayed at home or went elsewhere. Any fraudulent claims which were made here could be declared to have no credible basis or to be manifestly unfounded by the RPD, something which it is required to do in appropriate cases (*IRPA*, ss 107(2), 107.1). Those claimants are already denied an appeal (*IRPA*, s 110(2)(c)), as are any claimants who abandon or withdraw their claims (*IRPA*, s 110(2)(b)).

[126] Paragraph 110(2)(d.1) only affects the other unsuccessful claimants from DCOs – those claims which the RPD has determined had a credible basis and were not manifestly unfounded. Denying an appeal to all DCO claimants, regardless of the RPD's determination, effectively means that the stereotypical "bogus" DCO claimant is being preferred to the RPD's individual assessment of a claimant's story. There is no reason to expect that the RPD is any less likely to make a mistake when it rejects genuinely-advanced claims from DCOs than it is when it rejects claims from non-DCOs with similar rates of acceptance; and in this regard it is noteworthy that the RAD allowed about 17% of the appeals that it heard from January 2013 to May 2014 (Affidavit of Ivonilde Da Silva (16 October 2014), Exhibit B). Denying an appeal to claimants from DCOs thus does not correspond to whether those claimants are actually abusing the refugee system, nor does it correspond to whether they actually need an appeal less than claimants from non-DCOs.

[127] In *Withler*, the Supreme Court stated (at paragraph 2) that: "The central s. 15(1) concern is substantive, not formal, equality. … At the end of the day there is only one question: Does the

challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" [emphasis added]

[128] The introduction of paragraph 110(2)(d.1) of the *IRPA* has deprived refugee claimants from DCO countries of substantive equality vis-à-vis those from non-DCO countries. Expressly imposing a disadvantage on the basis of national origin alone constitutes discrimination (*Andrews* at 174; *Withler* at paragraph 29), and this distinction perpetuates the historical disadvantage of undesirable refugee claimants and the stereotype that their fears of persecution or discrimination are less worthy of attention.

[129] Thus, I reject the Respondents' contention that paragraph 110(2)(d.1) can legitimately limit access to an appeal to the RAD for DCO refugee claimants because there is still an individualized assessment before the RPD for every refugee claimant from those countries. This is akin to saying that all refugee claimants in Canada are equal, but some - i.e. those from non-DCO countries - are more equal than others. As proficient as the RPD may be, there is no question that access to the RAD is a substantial benefit which is being denied to claimants from DCOs.

[130] Consequently, I find that paragraph 110(2)(d.1) of the *IRPA* violates subsection 15(1) of the *Charter*. This paragraph draws a clear and discriminatory distinction between refugee claimants from DCO-countries and those from non-DCO countries, by denying the former a right to appeal a decision of the RPD and allowing the latter to make such an appeal. This is a denial of substantive equality to claimants from DCO countries based upon the national origin of such

claimants. In view of this conclusion, therefore, it is unnecessary to consider whether paragraph 110(2)(d.1) has a disproportionate impact on any particular subgroups of claimants.

[131] Lastly, it should be noted before leaving this issue, that no party has argued that the distinction between DCO and non-DCO claimants under paragraph 110(2)(d.1) of the *IRPA* is ameliorative. Accordingly, this aspect of subsection 15(2) is not directly at issue in these applications.

VIII. Does paragraph 110(2)(d.1) of the *IRPA* infringe section 7 of the *Charter*?

[132] Section 7 of the *Charter* states that:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

A. *Applicants' Arguments*

[133] The Applicants argue that section 7 is engaged because weakening the procedural and substantive safeguards for refugee claimants from DCOs increases the risk of *refoulement*, and there will be no other statutorily guaranteed risk assessment prior to deportation.

[134] Therefore, according to the Applicants, the DCO regime can only survive if it is consistent with the principles of fundamental justice, and they argue that it is not, since it is both overbroad and produces results that are grossly disproportionate to its objectives. In this regard,

they submit that section 7 must be interpreted through the lens of the equality guarantee provided by s. 15, and thus applied so as to ensure that prohibited distinctions cannot serve as the basis for weakened protections against threats to life, liberty and security of the person.

[135] The Applicants assert that the DCO regime is overbroad because, although its objective is to "deter abuse of the refugee system by people who come from countries generally considered safe," the criteria used to select countries has led to the designation of countries that do produce genuine refugees and where persecution persists. Indeed, the Applicants contend that the thresholds used to define those criteria can be selected and changed by the MCI at whim, thus allowing the designation of virtually any country. Even the minimal stipulations set out in the *IRPA* are infirm, say the Applicants; the qualitative criteria use faulty indicia of state protection that this Court has often condemned (citing e.g. *Lakatos v Canada (Citizenship and Immigration)*, 2014 FC 785 at paragraph 30); and the quantitative criteria are deficient because: (1) the formula is based on past rejection rates and ignores the future likelihood of persecution; (2) including abandoned and withdrawn claims in the calculation leads to significant distortions; (3) a high rejection rate does not imply a lack of persecution because some types of claim may be well-founded even when the overall acceptance rate is low; and (4) there is no legislated mandate to remove a country's designation. Regardless of how the MCI exercises the unfettered discretion under section 109.1 of the *IRPA*, the Applicants say the law itself is overbroad because it allows for the designation of unsafe countries.

[136] Alternatively, the Applicants say that the *Thresholds Order* is overbroad. Setting the numerical threshold for using the quantitative criteria at 30 claims in a 12-month period is far too

small a sample size to reflect actual country conditions and is easily distorted. Furthermore, the percentages allow for designation of countries where claims are accepted between 25% and 40% of the time, thus falsifying the premise that the country is non-refugee producing. These problems are only amplified by permitting the MCI to arbitrarily choose any 12-month period from the past three years in which to apply those thresholds, especially as that ensures the MCI is relying on old statistics that fail to reflect current country conditions.

[137] These problems are not cured by the secret and entirely discretionary process the MCI uses to assess country condition. According to the Applicants, safety is not a determinative factor in the assessment, and the process has in fact led to the designation of unsafe countries like Hungary, Croatia, Mexico, and South Korea. As for the process to remove a country's designation, it has no basis in law and fails to account for errors in the initial designation or even for some changes in country conditions which may put particular groups at risk. Thus, the Applicants conclude that the DCO regime is overbroad insofar as it captures unsafe countries.

[138] In addition, the Applicants say the DCO regime is a grossly disproportionate means of deterring abuse. In their view, it puts genuine refugees at great risk of *refoulement* by stripping away all safeguards that could correct any error made by the RPD. Since the other reforms introduced by the government were already correcting all the problems plaguing the refugee determination system, the Applicants say the DCO regime has grossly disproportionate effects if even one person would be exposed to persecution because of it (citing *Bedford* at paragraph 122).

B. *Respondents' Arguments*

[139] The Respondents concede that refugee determinations engage section 7 interests, but argue that any deprivation of those interests accords with the principles of fundamental justice. DCO claimants have access to the same system that all refugee claimants had before the enactment of the *BRRA*. That system complied with the *Charter* then, and it still does now. The RPD provides a full hearing with many safeguards, including the ability to extend deadlines and to reopen refugee claims. If those safeguards are not enough, the Respondents point out that an applicant can apply for judicial review, move for a stay of removal, request a deferral of removal, or even seek status by other means if they come within the exceptions.

[140] The Respondents argue that the principles of fundamental justice do not include access to an appeal (citing e.g. *R v Meltzer*, [1989] 1 SCR 1764 at 1773-1775, 96 NR 391; *Kourtessis v MNR*, [1993] 2 SCR 53 at 69-70, 102 DLR (4th) 456). Furthermore, the DCO regime is not overbroad; the legislated triggers and the discretionary review process ensure that the limitations are directed only to countries for which there is a reasonable basis to expedite the refugee determination system. Neither is it grossly disproportionate because that principle "only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure" (*Bedford* at paragraph 120).

[141] Finally, the Respondents submit that the Court should defer to Parliament's choice to limit access to the RAD because it was necessary in order to implement a more efficient and effective refugee determination system. While a refugee determination must be forward-looking,

the DCO regime could not work without referring to past statistical trends. The Respondents say there is no evidence that this system has been producing disproportionate or incorrect results. On the contrary, the RPD is granting protection to a greater proportion of DCO claimants, which indicates that well-founded claims are not negatively impacted by a country's designation.

C. *Analysis*

[142] The Applicants' arguments with respect to section 7 of the *Charter* are primarily related to the selection mechanism under section 109.1 and whether the DCO regime as a whole is a grossly disproportionate way of deterring abusive refugee claims. For the reasons given above, this issue need not be addressed in the present applications.

[143] In any event, I agree with the Respondents' arguments as to section 7 of the *Charter*. As the Supreme Court stated in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at paragraph 136: "there is no constitutional right to an appeal … nor can such a right be said to flow from the rule of law" (citations omitted).

IX. If *Charter* rights are infringed, is paragraph 110(2)(d.1) of the *IRPA* justified by section 1 of the *Charter*?

[144] Section 1 of the *Charter* provides that:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la

and democratic society.	justification puisse se démontrer dans le cadre d'une société libre et démocratique.

A. *Respondents' Arguments*

[145] If there is any violation of *Charter* rights, the Respondents argue that such violation is justified by section 1 of the *Charter*. The Respondents say the MCI's discretion to designate countries is prescribed by section 109.1 and should be presumed to be *Charter*-compliant. That discretion is also circumscribed by the qualitative and quantitative triggers set out in subsection 109.1(2) and the *Thresholds Order*, and is controlled in practice by the policies governing country review and removal of a designation. The Respondents thus argue that any limits on *Charter* rights are prescribed by law and so can engage section 1 of the *Charter* (citing *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paragraph 82, [2000] 2 SCR 1120; *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 at paragraphs 51-55, [2009] 2 SCR 295 [*GVTA*]).

[146] The Respondents also contend that section 1 of the *Charter* can justify even a violation of section 7 when the infringing statute has a pressing and substantial objective and the means used to achieve it are proportional to that objective (*Bedford* at paragraphs 126-129). The requirement of proportionality is satisfied if the state demonstrates that the measures chosen: (1) are rationally connected to the objective; (2) minimally impair *Charter* rights; and (3) are not such that their deleterious effects outweigh the public good they were adopted to advance (citing *R v Oakes*, [1986] 1 SCR 103 at 138-139, 26 DLR (4th) 200 [*Oakes*]).

[147] In this case, the Respondents say Canada has a pressing and substantial objective; it needs to offer refuge to asylum seekers and, at the same time, maintain the integrity of its borders. Under the previous system, it took approximately 20 months before a refugee claim could be heard and it took an average of 4.5 years to deport failed refugee claimants, a situation which the Auditor General reported was leading to abuse. The system was also often duplicative, with officers considering PRRA and H&C applications assessing the same risks as the RPD. Added to those challenges, the number of refugee claims kept increasing, many of which were from EU countries, and a lot of claims were being abandoned or withdrawn. Since the DCO regime was put into place though, the overall intake from DCO countries has reduced by 83%, and the average number of days between the latest negative decision and the removal date has dropped dramatically. The number of claims granted by the RPD has also increased in the same time periods. The Respondents say that the government has thus accomplished its pressing and substantial objective.

[148] According to the Respondents, it is "reasonable to suppose" that the DCO regime may have furthered that objective, in that accelerated timelines, lack of an appeal to the RAD for some claimants, and faster removals all free resources for more refugee claims to be determined within the same period of time (citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paragraph 48, [2009] 2 SCR 567 [*Hutterian Brethren*]).

[149] The Respondents also contend that the DCO regime is minimally impairing, and submit that the Court should defer to Parliament's choice when it mediates between competing social interests. In this case, Parliament ensured that every refugee claimant still receives a full hearing

from the RPD, and there are mechanisms to seek adjournments or extend filing deadlines if the expedited timelines cannot be met and to reopen an application if there was a breach of natural justice. Furthermore, any risk from the lack of a RAD appeal is mitigated by the availability of judicial review and the ability to seek a stay of removal from the Court or ask for an administrative deferral of removal. The MCI can also intervene to exempt any foreign national from the requirements of the *IRPA* on his own initiative, and a PRRA can be accessed in exceptional circumstances. As for the inability to ask for a PRRA more generally, the Respondents say that the effect is minimal since most PRRAs are rejected anyway.

[150] The Respondents submit that the Applicants have not proposed any alternative which fulfills all of the government's objectives. Contrary to the Applicants' submissions, the *BRRA* did not provide any additional safeguards, since the current method still includes an assessment of country conditions; and relying on the RPD to say when a claim is manifestly unfounded would not streamline the process or allow for expedited timelines. Furthermore, the Respondents note the DCO regime was modelled after similar concepts already in place in free and democratic countries in the EU and, thus, argue that it is appropriate to look to those countries when assessing whether a measure is minimally impairing (*Canada (AG) v JTI-Macdonald Corp*, 2007 SCC 30 at paragraphs 10 and 138, [2007] 2 SCR 610 [*JTI*]).

[151] Finally, the Respondents state that the DCO regime is proportional in its effects. It makes the asylum system sustainable while ensuring all refugee claimants have their claims fairly and thoroughly assessed. As well, the timelines make the system faster and more efficient, which is itself a salutary effect.

B. *Applicants' Arguments*

[152] The Applicants argue that section 1 cannot justify the *Charter* violations since the review process for designation of designated countries is not "prescribed by law" (citing e.g. *R v Therens*, [1985] 1 SCR 613 at 644-645, 18 DLR (4th) 655; *GVTA* at paragraphs 53-55 and 65). According to the Applicants, the designation process just gives the MCI unfettered discretion to do anything the MCI likes, and section 109.1 is "incapable of being interpreted so as to constitute any restraint on governmental power" (citing *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 94-97, 82 DLR (4th) 321).

[153] The Applicants further argue that the Respondents have not demonstrated any special or unusual circumstances which could justify limiting a section 7 right (citing e.g. *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536). As for section 15, the Applicants argue that the DCO regime is not minimally impairing for three reasons: (1) the RPD could just as easily deter unfounded claims by declaring them manifestly unfounded or without a credible basis, which has the same consequences as being from a DCO (*IRPA*, ss 107(2), 107.1, 110(2)(c)); (2) the *BRRA* contained a less intrusive DCO regime; and (3) the other measures introduced in 2012 addressed all the problems the DCO regime was intended to resolve, and there is no evidence that it was required in addition to those other measures. The Applicants argue that the DCO regime also fails the proportionality test since it is both overbroad and grossly disproportionate.

C. *Analysis*

[154] Since I have not found that paragraph 110(2)(d.1) of the *IRPA* violates section 7 of the *Charter*, it is not necessary to consider that section vis-à-vis section 1 of the *Charter*. Furthermore, since only the constitutionality of paragraph 110(2)(d.1) should be addressed for the reasons stated above, it is also not necessary to consider the Applicants' arguments that the review process for designation is not "prescribed by law."

[155] It is necessary, however, to address whether the denial of an appeal to the RAD for a DCO claimant is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

[156] The test to determine this issue is set out in *Oakes*, where the Supreme Court stated (at 138-139) as follows:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to

> balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis in original]

[157] More recently, in *Bedford*, the Supreme Court stated the following:

> [125] …The question under … s. 1 …is … whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1…
>
> [126] …Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

[158] Thus, the central question is whether the negative impact of paragraph 110(2)(d.1) on the rights of DCO claimants vis-à-vis other refugee claimants is proportionate to the pressing and substantial goal of paragraph 110(2)(d.1) in furthering the public interest.

[159] I agree with the Respondents that the denial of an appeal to the RAD by DCO refugee claimants in paragraph 110(2)(d.1) of the *IRPA* is "prescribed by law" and, therefore, section 1 of the *Charter* is engaged.

[160] I also agree with the Respondents that Canada had a pressing and substantial objective in effecting the reforms in the *BRRA* and the *PCISA*. Prior to such reforms, it took approximately 20 months before a refugee claim could be heard and failed claimants took an average of 4.5 years to deport. In 2009, the Auditor General reported that in order to prevent abuse of Canada's immigration system, "it is important that a refugee claim not be perceived as providing an automatic stay in Canada for a significant period of time" (Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons* (2009) at paragraph 2.108). Moreover, the number of refugee claims kept increasing, many of which were from EU countries, and a lot of such claims were being abandoned or withdrawn. Since the DCO regime was put into place though, the overall number of claims from DCO countries has reduced by 83%, claims are heard faster, and the average number of days between the denial of a refugee claimant's claim and the removal date for a failed refugee claimant has been cut almost in half.

[161] That said, the "objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified"

(*RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at paragraph 143, 127 DLR (4th) 1, McLachlin J; *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1 at paragraph 142, 380 DLR (4th) 1). The objective of paragraph 110(2)(d.1) specifically is to reduce the layers of recourse and ensure that failed claimants from DCOs can be removed faster; a shorter expected stay could act as a disincentive for those claimants who might otherwise come to Canada and make a fraudulent refugee claim. In this respect, Eva Lazar testified that it takes an average of 122 days from the date a claim was last rejected by the RPD to remove a non-DCO claimant, and an average of 116 days from the same date to remove a DCO claimant (Affidavit of Eva Lazar (20 November 2014) at para 24).

[162] However, even if it may have been reasonable to suppose that denying an appeal to the RAD might further such objectives (see *Hutterian Brethren* at paragraph 48), it cannot be said that paragraph 110(2)(d.1) is minimally impairing. Just because every refugee claimant still gets a full hearing before the RPD, and even though there may be provisions in the *IRPA*, the *Regulations* and the *RPD Rules* to seek adjournments, or to extend filing deadlines if the expedited timelines cannot be obeyed, or to reopen an application, these factors cannot justify the fact that some claimants can and others cannot make an appeal to the RAD.

[163] As noted in *Bedford* (at paragraph 126), assessing whether an impugned law minimally impairs a *Charter* right requires the Court to ask whether Parliament could have designed a law that infringes rights to a lesser extent and consider if there are reasonable alternatives. The Supreme Court has noted that, in making this assessment, "the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better

positioned than the courts to choose among a range of alternatives" (*Hutterian Brethren* at paragraph 60).

[164] The Respondents have not proven that an absolute bar preventing appeals to the RAD for all claims from DCOs is the least drastic means by which it could satisfy its objectives. Inasmuch as one of the goals of the reforms effected by the *BRRA* and the *PCISA* was to deter abusive or unfounded claims, this can be achieved by the RPD either declaring a claim manifestly unfounded under section 107.1 of the *IRPA* or finding that there is no credible basis for the claim under subsection 107(2). In both cases, an appeal to the RAD is precluded by virtue of paragraph 110(2)(c). Claimants who abandon or withdraw their claims are also denied an appeal to the RAD (*IRPA*, s 110(2)(b)).

[165] The Respondents have supplied no evidence to prove that paragraph 110(2)(d.1) has any additional deterrent effect, and their only argument is that declaring a claim not credible or manifestly unfounded would not streamline the refugee process because the RPD would still need to determine all claims on the same timelines. That argument could possibly justify the expedited timelines, but not the lack of an appeal. By the time an appeal would be necessary, the RPD has already assessed the claim on the expedited timelines and is required by law to declare whether it was manifestly unfounded or lacked a credible basis. The Respondents have led no evidence to suggest RPD members cannot competently detect non-credible or fraudulent claims. It was not necessary for Parliament to differentiate between DCO and non-DCO claimants to preclude appeals to the RAD since the stated goal of deterring abusive or unfounded claims

could be achieved by the combined effect of section 107.1, subsection 107(2) and paragraphs 110(2)(b) and (c) of the *IRPA*.

[166] An appeal to the RAD is a significant benefit for claimants, and denying this appeal to some claimants based on their country of origin is a serious impairment of their right to equality. It is appropriate that DCO claimants still get a full hearing before the RPD, can seek adjournments, and can reopen an application in some circumstances, but everyone else gets that and more. These factors cannot justify the fact that some claimants can and others cannot appeal to the RAD.

[167] Furthermore, unlike non-DCO claimants who cannot be removed from Canada until after the Federal Court has dismissed any applications for judicial review of their RAD appeals, DCO claimants do not benefit from an automatic stay of removal while seeking judicial review of a negative RPD decision. They are left to seek a stay from this Court (a discretionary and uncertain process to say the least), to request an administrative deferral of removal or, in certain circumstances, request a PRRA. I disagree with the Respondents that any risk of *refoulement* from the lack of a RAD appeal is entirely mitigated by these avenues open to DCO claimants.

[168] Moreover, although the Respondents rely on the existence of the SCO concept in the EU to justify the DCO regime as a whole, even Professor Hailbronner says that "a stay of execution in administrative practice would not be considered as sufficient" to pass muster in the EU (Second Affidavit of Kay Hailbronner (19 November 2014) at paragraph 40). While Professor Hailbronner also testified that he believes the Canadian procedure is ultimately sufficient, it is

relevant to look at what other countries are doing when deciding whether a practice is justified in a free and democratic society (*JTI* at paragraph 138).

[169] Even putting aside the risk of *refoulement* though, an automatic stay of removal would at least save DCO claimants from prematurely experiencing the stress of removal that would be caused if their claims were erroneously rejected (see, for example, the Affidavit of G.S. (21 October 2014) at paragraphs 13-19; Affidavit of C.S. (20 October 2014) at paragraph 8; Affidavit of Tibor Toboz (28 August 2014) at paragraph 16). In view of paragraph 110(2)(d.1), it cannot be said, as the Respondents argue, that all refugee claimants still have their claims fairly and thoroughly assessed under the DCO regime. This is just not so, because now some claimants are unfairly and inequitably denied the obvious benefit of an appeal to the RAD in respect of a negative decision by the RPD.

[170] Denying an appeal to all claimants from DCOs is not proportional to the government's objectives; it is an inequality that is disproportionate and overbroad and cannot be saved by section 1 of the *Charter*.

X. If paragraph 110(2)(d.1) of the *IRPA* is unconstitutional, what is an appropriate remedy?

[171] The Applicants request, amongst other things, the following relief in their further memorandum of argument:

- A declaration that section 109.1 and paragraph 110(2)(d.1) of the *IRPA*, the *Thresholds Order*, and all designation orders made thereunder are void and of no force and effect pursuant to section 52 of the *Constitution Act, 1982*; and

- An order that the RAD hear the appeals of Y.Z., G.S., and C.S.

[172] As mentioned above, the Respondents contested the scope of the requested relief, and I have determined that the constitutionality of only paragraph 110(2)(d.1) of the *IRPA* should be considered in these applications. The Respondents also ask the Court to suspend any declaration of invalidity for 12 months.

[173] In view of the foregoing reasons, I am prepared to grant the Applicants some of the relief they have requested. In particular:

1. The Court declares that paragraph 110(2)(d.1) of the *IRPA* is inconsistent with subsection 15(1) of the *Charter* and has no force and effect pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; and

2. The decisions of the RAD in RAD File Nos. TB3-02838, TB4-00950 and TB4-00951 are set aside, and G.S.'s and C.S.'s appeals are returned to the RAD for re-determination.

[174] I will not order that Y.Z.'s appeal be re-determined by the RAD since the RPD decision in question has already been set aside by this Court and his claim will be re-determined by the RPD. If his claim should again be rejected by the RPD, the foregoing declaration of invalidity should grant him access to the RAD without any specific order of this Court.

[175] I will also not suspend the declaration of invalidity as requested by the Respondents. In *Schachter v Canada*, [1992] 2 SCR 679 at 719, 93 DLR (4th) 1 [*Schachter*], the Supreme Court suggested that suspending a declaration of invalidity is appropriate when an immediate declaration would pose a danger to the public, threaten the rule of law, or deprive deserving

individuals of benefits without actually helping the people whose rights were violated. None of those criteria apply in the present case.

[176] Occasionally though, the Supreme Court has suspended a declaration of invalidity where the *Schachter* conditions were arguably not present in order to give the legislature time to design an appropriate remedy (see, e.g., *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paragraphs 116-121, 173 DLR (4th) 1, L'Heureux-Dubé J, concurring; Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 2 (Toronto: Thomson Reuters, 2007) (loose-leaf updated to 2014), ch 40 at 40.1(d)). That rationale is most persuasive, however, when there are many ways the legislature could conceivably fix the problem. That is not the case here. An immediate declaration of invalidity may put some increased pressure on the resources of the RAD and may delay some removals, but every day that paragraph 110(2)(d.1) is in force is a day that claimants from DCOs are not "equal before and under the law" and will be deprived of their rights "to the equal protection and equal benefit of the law without discrimination." Anyone deported in the meantime may be returned to a persecutory situation because they could not appeal an erroneous RPD decision to the RAD. Rectifying that inequality as soon as possible outweighs any administrative burdens to the government.

[177] For the same reason, releasing this decision simultaneously in both official languages would "occasion a delay prejudicial to the public interest" (*Official Languages Act*, RSC 1985, c 31 (4th Supp), s 20(2)(b) [*OLA*]). I recognize, however, that insofar as this decision "determines a question of law of general public interest or importance" (*OLA*, s 20(1)(a)), it will be translated at the earliest possible time.

XI. What questions should be certified?

[178] At the hearing of this matter, the parties proposed questions to be certified pursuant to paragraph 74(d) of the *IRPA*.

[179] The Applicants suggested that questions along the lines of the issues as stated in their further memorandum of argument could be certified; they would therefore request that the following questions be certified:

1. Does the combined effect of section 109.1, paragraph 110(2)(d.1) of the *IRPA* and the *Thresholds Order* violate section 15(1) of the *Charter*?

2. If so, have the Respondents established that such a violation is justified under section 1 of the *Charter*?

3. Does the combined effect of section 109.1, paragraph 110(2)(d.1) of the *IRPA* and the *Thresholds Order* violate section 7 of the *Charter* in so far as those provisions are either overly broad and/or grossly disproportionate?

4. If so, have the Respondents established that such a violation is justified under section 1 of the *Charter*?

[180] The Respondents take a narrower approach to what question should be certified, suggesting the following:

1. Does paragraph 110(2)(d.1) of the *IRPA* comply with the *Charter*, and if not is it saved by section 1 of the *Charter*?

[181] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 FCR 290, the Federal Court of Appeal stated as follows:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court

> below and it must arise from the case, not from the Judge's reasons… [citations omitted]

[182] I agree with the parties that this is an appropriate case to state a certified question pursuant to paragraph 74(d) of the *IRPA*.

[183] The following questions are dispositive of this case in view of the finding and declaration above that paragraph 110(2)(d.1) of the *IRPA* violates subsection 15(1) of the *Charter*. They also transcend the interests of the immediate parties and raise issues of broad significance or general importance:

1. Does paragraph 110(2)(d.1) of the *IRPA* comply with subsection 15(1) of the *Charter*?

2. If not, is paragraph 110(2)(d.1) of the *IRPA* a reasonable limit on *Charter* rights that is prescribed by law and can be demonstrably justified under section 1 of the *Charter*?

XII. Conclusion

[184] In the result, the Applicants' applications for judicial review are granted, in part, the decisions of the RAD in RAD File Nos. TB3-02838, TB4-00950 and TB4-00951 are set aside, and the matters in TB4-00950 and TB4-00951 are returned to the RAD for re-determination.

[185] The questions stated above are certified pursuant to paragraph 74(d) of the *IRPA*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the applications for judicial review are granted, in part;

2. the decisions of the Refugee Appeal Division in RAD File Nos. TB3-02838, TB4-00950 and TB4-00951 are set aside;

3. the matters in RAD File Nos. TB4-00950 and TB4-00951 are returned to the Refugee Appeal Division for re-determination;

4. there shall be no award of costs; and

5. the following questions are certified pursuant to paragraph 74(d) of the *IRPA*:

    i. Does paragraph 110(2)(d.1) of the *IRPA* comply with subsection 15(1) of the *Charter*?

    ii. If not, is paragraph 110(2)(d.1) of the *IRPA* a reasonable limit on *Charter* rights that is prescribed by law and can be demonstrably justified under section 1 of the *Charter*?

"Keith M. Boswell"

Judge

Annex A – Relevant Enactments and Constitutional Documents

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
…	…
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
…	…
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are	(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés,

disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.
…	…
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6.

Article 3

NON-DISCRIMINATION

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Immigration and Refugee Protection Act, SC 2001, c 27.

3. ... (2) The objectives of this Act with respect to refugees are	**3.** … (2) S'agissant des réfugiés, la présente loi a pour objet :
...	…
(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;	*e)* de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;
…	…
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

child directly affected.

…

(1.2) The Minister may not examine the request if

…

(c) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.

(1.21) Paragraph (1.2)*(c)* does not apply in respect of a foreign national

(a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or

(b) whose removal would have an adverse effect on the best interests of a child directly affected.

…

(1.2) Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants :

…

c) sous réserve du paragraphe (1.21), moins de douze mois se sont écoulés depuis le dernier rejet de la demande d'asile, le dernier prononcé de son retrait après que des éléments de preuve testimoniale de fond aient été entendus ou le dernier prononcé de son désistement par la Section de la protection des réfugiés ou la Section d'appel des réfugiés.

(1.21) L'alinéa (1.2)*c)* ne s'applique pas à l'étranger si l'une ou l'autre des conditions suivantes est remplie :

a) pour chaque pays dont l'étranger a la nationalité — ou, s'il n'a pas de nationalité, pour le pays dans lequel il avait sa résidence habituelle — , il y serait, en cas de renvoi, exposé à des menaces à sa vie résultant de l'incapacité du pays en cause de fournir des soins médicaux ou de santé adéquats;

b) le renvoi de l'étranger porterait atteinte à l'intérêt supérieur d'un enfant directement touché.

…

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

…

30. (1) A foreign national may not work or study in Canada unless authorized to do so under this Act.

(1.1) An officer may, on application, authorize a foreign national to work or study in Canada if the foreign national meets the conditions set out in the regulations.

…

32. The regulations may provide for any matter relating to the application of sections 27 to 31, may define, for the purposes of this Act, the terms used in those sections, and may include provisions

…

25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

…

30. (1) L'étranger ne peut exercer un emploi au Canada ou y étudier que sous le régime de la présente loi.

(1.1) L'agent peut, sur demande, autoriser l'étranger qui satisfait aux conditions réglementaires à exercer un emploi au Canada ou à y étudier.

…

32. Les règlements régissent l'application des articles 27 à 31, définissent, pour l'application de la présente loi, les termes qui y sont employés et portent notamment sur :

respecting

…

(*d*) the conditions that must or may be imposed, varied or cancelled, individually or by class, on permanent residents and foreign nationals, including conditions respecting work or study;

…

…

d) les conditions qui peuvent ou doivent être, quant aux résidents permanents et aux étrangers, imposées, modifiées ou levées, individuellement ou par catégorie, notamment quant à l'exercice d'une activité professionnelle et d'études;

…

48. … (2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.

…

48. … (2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

…

49. … (2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:

(a) the day the claim is determined to be ineligible only under paragraph 101(1)*(e)*;

(*b*) in a case other than that set out in paragraph (*a*), seven days after the claim is determined to be ineligible;

(c) if the claim is rejected by the Refugee Protection Division, on the expiry of the time limit referred to in subsection 110(2.1) or, if an

…

49. … (2) Toutefois, celle visant le demandeur d'asile est conditionnelle et prend effet :

a) sur constat d'irrecevabilité au seul titre de l'alinéa 101(1)*e)*;

b) sept jours après le constat, dans les autres cas d'irrecevabilité prévus au paragraphe 101(1);

c) en cas de rejet de sa demande par la Section de la protection des réfugiés, à l'expiration du délai visé au paragraphe 110(2.1) ou, en cas

appeal is made, 15 days after notification by the Refugee Appeal Division that the claim is rejected;

(*d*) 15 days after notification that the claim is declared withdrawn or abandoned; and

(e) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)*(c)* or (*d*).

…

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

…

74. Judicial review is subject to the following provisions:

…

(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

…

99. … (3.1) A person who makes a claim for refugee protection inside Canada other

d'appel, quinze jours après la notification du rejet de sa demande par la Section d'appel des réfugiés;

d) quinze jours après la notification de la décision prononçant le désistement ou le retrait de sa demande;

e) quinze jours après le classement de l'affaire au titre de l'avis visé aux alinéas 104(1)*c)* ou *d)*.

…

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

…

74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire :

…

d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

…

99. … (3.1) La personne se trouvant au Canada et qui demande l'asile ailleurs qu'à

than at a port of entry must provide the officer, within the time limits provided for in the regulations, with the documents and information — including in respect of the basis for the claim — required by the rules of the Board, in accordance with those rules.

un point d'entrée est tenue de fournir à l'agent, dans les délais prévus par règlement et conformément aux règles de la Commission, les renseignements et documents — y compris ceux qui sont relatifs au fondement de la demande — exigés par ces règles.

…

…

100. … (4) A person who makes a claim for refugee protection inside Canada at a port of entry and whose claim is referred to the Refugee Protection Division must provide the Division, within the time limits provided for in the regulations, with the documents and information — including in respect of the basis for the claim — required by the rules of the Board, in accordance with those rules.

100. … (4) La personne se trouvant au Canada, qui demande l'asile à un point d'entrée et dont la demande est déférée à la Section de la protection des réfugiés est tenue de lui fournir, dans les délais prévus par règlement et conformément aux règles de la Commission, les renseignements et documents — y compris ceux qui sont relatifs au fondement de la demande — exigés par ces règles.

(4.1) The referring officer must, in accordance with the regulations, the rules of the Board and any directions of the Chairperson of the Board, fix the date on which the claimant is to attend a hearing before the Refugee Protection Division.

(4.1) L'agent qui défère la demande d'asile fixe, conformément aux règlements, aux règles de la Commission et à toutes directives de son président, la date de l'audition du cas du demandeur par la Section de la protection des réfugiés.

…

…

107. … (2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a

107. … (2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la

favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

107.1 If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent.

…

109.1 (1) The Minister may, by order, designate a country, for the purposes of subsection 110(2) and section 111.1.

(2) The Minister may only make a designation

(a) in the case where the number of claims for refugee protection made in Canada by nationals of the country in question in respect of which the Refugee Protection Division has made a final determination is equal to or greater than the number provided for by order of the Minister,

(i) if the rate, expressed as a percentage, that is obtained by dividing the total number of claims made by nationals of the country in question that, in a final determination by the Division during the period provided for in the order, are rejected or determined

section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

107.1 La Section de la protection des réfugiés fait état dans sa décision du fait que la demande est manifestement infondée si elle estime que celle-ci est clairement frauduleuse.

…

109.1 (1) Le ministre peut, par arrêté, désigner un pays pour l'application du paragraphe 110(2) et de l'article 111.1.

(2) Il ne peut procéder à la désignation que dans les cas suivants :

a) s'agissant d'un pays dont les ressortissants ont présenté des demandes d'asile au Canada sur lesquelles la Section de la protection des réfugiés a statué en dernier ressort en nombre égal ou supérieur au nombre prévu par arrêté, si l'une ou l'autre des conditions ci-après est remplie :

(i) le taux, exprimé en pourcentage, obtenu par la division du nombre total des demandes présentées par des ressortissants du pays en cause qui ont été rejetées par la Section de la protection des réfugiés en dernier ressort et de celles dont elle a prononcé le

to be withdrawn or abandoned by the total number of claims made by nationals of the country in question in respect of which the Division has, during the same period, made a final determination is equal to or greater than the percentage provided for in the order, or

désistement ou le retrait en dernier ressort — durant la période prévue par arrêté — par le nombre total des demandes d'asile présentées par des ressortissants du pays en cause et sur lesquelles la Section a statué en dernier ressort durant la même période est égal ou supérieur au pourcentage prévu par arrêté,

(ii) if the rate, expressed as a percentage, that is obtained by dividing the total number of claims made by nationals of the country in question that, in a final determination by the Division, during the period provided for in the order, are determined to be withdrawn or abandoned by the total number of claims made by nationals of the country in question in respect of which the Division has, during the same period, made a final determination is equal to or greater than the percentage provided for in the order; or

(ii) le taux, exprimé en pourcentage, obtenu par la division du nombre total des demandes présentées par des ressortissants du pays en cause dont la Section de la protection des réfugiés a prononcé le désistement ou le retrait en dernier ressort — durant la période prévue par arrêté — par le nombre total des demandes d'asile présentées par des ressortissants du pays en cause et sur lesquelles la Section a statué en dernier ressort durant la même période est égal ou supérieur au pourcentage prévu par arrêté;

(b) in the case where the number of claims for refugee protection made in Canada by nationals of the country in question in respect of which the Refugee Protection Division has made a final determination is less than the number provided for by order of the Minister, if the Minister is of the opinion that in the

b) s'agissant d'un pays dont les ressortissants ont présenté des demandes d'asile au Canada sur lesquelles la Section de la protection des réfugiés a statué en dernier ressort en nombre inférieur au nombre prévu par arrêté, si le ministre est d'avis que le pays en question répond aux critères suivants :

country in question

(i) there is an independent judicial system,

(ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and

(iii) civil society organizations exist.

(i) il y existe des institutions judiciaires indépendantes,

(ii) les droits et libertés démocratiques fondamentales y sont reconnus et il y est possible de recourir à des mécanismes de réparation pour leur violation,

(iii) il y existe des organisations de la société civile.

(3) The Minister may, by order, provide for the number, period or percentages referred to in subsection (2).

(3) Le ministre peut, par arrêté, prévoir le nombre, la période et les pourcentages visés au paragraphe (2).

(4) An order made under subsection (1) or (3) is not a statutory instrument for the purposes of the *Statutory Instruments Act*. However, it must be published in the *Canada Gazette*.

(4) Les arrêtés ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*, mais sont publiés dans la *Gazette du Canada*.

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

110. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

…

…

(2) No appeal may be made in

(2) Ne sont pas susceptibles

respect of any of the following:

…

(b) a determination that a refugee protection claim has been withdrawn or abandoned;

(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded;

…

(d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);

…

(2.1) The appeal must be filed and perfected within the time limits set out in the regulations.

…

111.1 (1) The regulations may provide for any matter relating to the application of this Division, and may include provisions respecting

(*a*) time limits for the provision of documents and information under subsection

d'appel :

…

b) le prononcé de désistement ou de retrait de la demande d'asile;

c) la décision de la Section de la protection des réfugiés rejetant la demande d'asile en faisant état de l'absence de minimum de fondement de la demande d'asile ou du fait que celle-ci est manifestement infondée;

…

d.1) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile du ressortissant d'un pays qui faisait l'objet de la désignation visée au paragraphe 109.1(1) à la date de la décision;

…

(2.1) L'appel doit être interjeté et mis en état dans les délais prévus par les règlements.

…

111.1 (1) Les règlements régissent l'application de la présente section et portent notamment sur :

a) les délais impartis pour fournir des renseignements et documents au titre des paragraphes 99(3.1) ou 100(4);

99(3.1) or 100(4);

(*b*) time limits for the hearing referred to in subsection 100(4.1);

b) les délais impartis pour l'audition mentionnée au paragraphe 100(4.1);

…

…

(2) With respect to claimants who are nationals of a country that is, on the day on which their claim is made, a country designated under subsection 109.1(1), regulations made under paragraph (1)*(b)* may provide for time limits that are different from the time limits for other claimants.

(2) Les règlements pris au titre de l'alinéa (1)*b)* peuvent prévoir, à l'égard des demandeurs d'asile qui, à la date de leur demande, sont les ressortissants d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), des délais différents de ceux qui sont applicables à l'égard des autres demandeurs d'asile.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

(2) Despite subsection (1), a person may not apply for protection if

(2) Elle n'est pas admise à demander la protection dans les cas suivants :

…

…

(b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under

b.1) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de trente-six mois se sont écoulés depuis le dernier rejet de sa demande d'asile — sauf s'il

subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;

s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu à la section E ou F de l'article premier de la Convention — ou le dernier prononcé du désistement ou du retrait de la demande par la Section de la protection des réfugiés ou la Section d'appel des réfugiés;

(c) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their last application for protection was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Minister.

c) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de 36 mois se sont écoulés depuis le rejet de sa dernière demande de protection ou le prononcé du retrait ou du désistement de cette demande par la Section de la protection des réfugiés ou le ministre.

…

…

(2.1) The Minister may exempt from the application of paragraph (2)*(b.1)* or *(c)*

(2.1) Le ministre peut exempter de l'application des alinéas (2)*b.1)* ou *c)* :

(a) the nationals — or, in the case of persons who do not have a country of nationality, the former habitual residents — of a country;

a) les ressortissants d'un pays ou, dans le cas de personnes qui n'ont pas de nationalité, celles qui y avaient leur résidence habituelle;

(b) the nationals or former habitual residents of a country who, before they left the country, lived in a given part of that country; and

b) ceux de tels ressortissants ou personnes qui, avant leur départ du pays, en habitaient une partie donnée;

(c) a class of nationals or former habitual residents of a country.

c) toute catégorie de ressortissants ou de personnes visés à l'alinéa *a)*.

(2.2) However, an exemption made under subsection (2.1) does not apply to persons in respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by the Refugee Appeal Division.

(2.2) Toutefois, l'exemption ne s'applique pas aux personnes dont la demande d'asile a fait l'objet d'une décision par la Section de la protection des réfugiées ou, en cas d'appel, par la Section d'appel des réfugiés après l'entrée en vigueur de l'exemption.

…

…

161. (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons, the Chairperson may make rules respecting

161. (1) Sous réserve de l'agrément du gouverneur en conseil et en consultation avec les vice-présidents, le président peut prendre des règles visant :

…

…

(c) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and

c) la teneur, la forme, le délai de présentation et les modalités d'examen des renseignements à fournir dans le cadre d'une affaire dont la Commission est saisie;

…

…

(1.1) The rules made under paragraph (1)*(c)* may distinguish among claimants for refugee protection who make their claims inside Canada on the basis of whether their claims are made at a port of entry or elsewhere or on the basis of whether they are nationals of a country that is, on the day on which their claim is made, a country designated under subsection 109.1(1).

(1.1) Les règles visées à l'alinéa (1)*c)* peuvent traiter différemment une demande d'asile faite par un demandeur se trouvant au Canada selon que celle-ci a été soumise à un point d'entrée ou ailleurs ou selon que le demandeur est, ou non, à la date de sa demande, ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1).

…	…
170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — a claim for refugee protection, an application for protection or an application for cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination	**170.2** La Section de la protection des réfugiés n'a pas compétence pour rouvrir, pour quelque motif que ce soit, y compris le manquement à un principe de justice naturelle, les demandes d'asile ou de protection ou les demandes d'annulation ou de constat de perte de l'asile à l'égard desquelles la Section d'appel des réfugiés ou la Cour fédérale, selon le cas, a rendu une décision en dernier ressort.

Order Establishing Quantitative Thresholds for the Designation of Countries of Origin, (2012) C Gaz I, 3378.

1. In this Order, the "Act" means the *Immigration and Refugee Protection Act*.	**1.** Dans le présent arrêté, la « Loi » s'entend de la *Loi sur l'immigration et la protection des réfugiés*.
2. For the purposes of paragraphs 109.1(2)*(a)* and *(b)* of the Act, the number provided is 30 during any period of 12 consecutive months in the three years preceding the date of the designation.	**2.** Pour l'application des alinéas 109.1(2)*a)* et *b)* de la Loi, le nombre est de trente durant toute période de douze mois consécutifs au cours des trois années antérieures à la date de la désignation.
3. For the purposes of subparagraph 109.1(2)*(a)*(i) of the Act, the period provided is the same 12 months used in section 2, and the percentage is 75%.	**3.** Pour l'application du sous-alinéa 109.1(2)*a)*(i) de la Loi, la période est la même période de douze mois retenue aux termes de l'article 2 et le pourcentage est de 75 %.
4. For the purposes of subparagraph 109.1(2)*(a)*(ii) of the Act, the period provided is the same 12 months used in section 2, and the percentage is	**4.** Pour l'application du sous-alinéa 109.1(2)*a)*(ii) de la Loi, la période est la même période de douze mois retenue aux termes de l'article 2 et le

60%.

pourcentage est de 60 %.

Immigration and Refugee Protection Regulations, SOR/2002-227.

159.9 (1) Subject to subsections (2) and (3), for the purpose of subsection 100(4.1) of the Act, the date fixed for the hearing before the Refugee Protection Division must be not later than

(a) in the case of a claimant referred to in subsection 111.1(2) of the Act,

(i) 30 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada other than at a port of entry, and

(ii) 45 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada at a port of entry; and

(b) in the case of any other claimant, 60 days after the day on which the claim is referred to the Refugee Protection Division, whether the claim is made inside Canada at a port of entry or inside Canada other than at a port of entry.

159.9 (1) Pour l'application du paragraphe 100(4.1) de la Loi et sous réserve des paragraphes (2) et (3), la date de l'audition devant la Section de la protection des réfugiés ne peut être postérieure à l'expiration :

a) dans le cas d'un demandeur visé au paragraphe 111.1(2) de la Loi :

(i) d'un délai de trente jours suivant la date à laquelle la demande est déférée à la Section, si le demandeur se trouve au Canada et demande l'asile ailleurs qu'à un point d'entrée,

(ii) d'un délai de quarante-cinq jours suivant la date à laquelle la demande est déférée à la Section, si le demandeur se trouve au Canada et demande l'asile à un point d'entrée;

b) dans le cas de tout autre demandeur — que la demande ait été faite à un point d'entrée ou ailleurs au Canada —, d'un délai de soixante jours suivant la date à laquelle la demande est déférée à la Section.

…

…

159.91 (1) Subject to subsection (2), for the purpose

159.91 (1) Pour l'application du paragraphe 110(2.1) de la

of subsection 110(2.1) of the Act,

Loi et sous réserve du paragraphe (2), la personne en cause ou le ministre qui porte en appel la décision de la Section de la protection des réfugiés le fait dans les délais suivants :

(*a*) the time limit for a person or the Minister to file an appeal to the Refugee Appeal Division against a decision of the Refugee Protection Division is 15 days after the day on which the person or the Minister receives written reasons for the decision; and

a) pour interjeter appel de la décision devant la Section d'appel des réfugiés, dans les quinze jours suivant la réception, par la personne en cause ou le ministre, des motifs écrits de la décision;

…

…

206. (1) A work permit may be issued under section 200 to a foreign national in Canada who cannot support themself without working, if the foreign national

206. (1) Un permis de travail peut être délivré à l'étranger au Canada en vertu de l'article 200 si celui-ci ne peut subvenir à ses besoins autrement qu'en travaillant et si, selon le cas :

(a) has made a claim for refugee protection that has been referred to the Refugee Protection Division but has not been determined; or

a) sa demande d'asile a été déférée à la Section de la protection des réfugiés mais n'a pas encore été réglée;

(b) is subject to an unenforceable removal order.

b) il fait l'objet d'une mesure de renvoi qui ne peut être exécutée.

(2) Despite subsection (1), a work permit must not be issued to a claimant referred to in subsection 111.1(2) of the Act unless at least 180 days have elapsed since their claim was referred to the Refugee Protection Division.

(2) Malgré le paragraphe (1), un permis de travail ne peut être délivré à un demandeur visé au paragraphe 111.1(2) de la Loi que si au moins cent quatre-vingts jours se sont écoulés depuis que sa demande d'asile a été déférée à la Section de la protection des

réfugiés.

…

231. (1) Subject to subsections (2) to (4), a removal order is stayed if the subject of the order makes an application for leave for judicial review in accordance with section 72 of the Act with respect to a decision of the Refugee Appeal Division that rejects, or confirms the rejection of, a claim for refugee protection, and the stay is effective until the earliest of the following:

(a) the application for leave is refused,

(b) the application for leave is granted, the application for judicial review is refused and no question is certified for the Federal Court of Appeal,

(c) if a question is certified by the Federal Court,

(i) the appeal is not filed within the time limit, or

(ii) the Federal Court of Appeal decides to dismiss the appeal, and the time limit in which an application to the Supreme Court of Canada for leave to appeal from that decision expires without an application being made,

(d) if an application for leave to appeal is made to the Supreme Court of Canada

…

231. (1) Sous réserve des paragraphes (2) à (4), la demande d'autorisation de contrôle judiciaire faite conformément à l'article 72 de la Loi à l'égard d'une décision rendue par la Section d'appel des réfugiés rejetant une demande d'asile ou en confirmant le rejet emporte sursis de la mesure de renvoi jusqu'au premier en date des événements suivants :

a) la demande d'autorisation est rejetée;

b) la demande d'autorisation est accueillie et la demande de contrôle judiciaire est rejetée sans qu'une question soit certifiée pour la Cour fédérale d'appel;

c) si la Cour fédérale certifie une question :

(i) soit l'expiration du délai d'appel sans qu'un appel ne soit interjeté,

(ii) soit le rejet de la demande par la Cour d'appel fédérale et l'expiration du délai de dépôt d'une demande d'autorisation d'en appeler à la Cour suprême du Canada sans qu'une demande ne soit déposée;

d) si l'intéressé dépose une demande d'autorisation d'interjeter appel auprès de la

from a decision of the Federal Court of Appeal referred to in paragraph *(c)*, the application is refused, and	Cour suprême du Canada du jugement de la Cour d'appel fédérale visé à l'alinéa *c)*, la demande est rejetée;
(e) if the application referred to in paragraph (d) is granted, the appeal is not filed within the time limit or the Supreme Court of Canada dismisses the appeal.	*e)* si la demande d'autorisation visée à l'alinéa d) est accueillie, l'expiration du délai d'appel sans qu'un appel ne soit interjeté ou le jugement de la Cour suprême du Canada rejetant l'appel.
(2) Subsection (1) does not apply if, when leave is applied for, the subject of the removal order is a designated foreign national or a national of a country that is designated under subsection 109.1(1) of the Act.	(2) Le paragraphe (1) ne s'applique pas si, au moment de la demande d'autorisation de contrôle judiciaire, l'intéressé est un étranger désigné ou un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1) de la Loi.

Refugee Protection Division Rules, SOR/2012-256.

3. … (2) Subject to paragraph 3*(b)*, the officer must select the date closest to the last day of the applicable time limit set out in the Regulations, unless the claimant agrees to an earlier date.	**3.** … (2) Sous réserve de l'alinéa (3)*b)*, l'agent choisit la date la plus proche du dernier jour du délai applicable prévu par le Règlement, à moins que le demandeur consente à une date plus rapprochée.
(3) In fixing the date, time and location for the hearing, the officer must consider	(3) Pour fixer les date, heure et lieu de l'audience, l'agent prend en considération les éléments suivants :
…	…
(b) counsel's availability, if the claimant has retained counsel at the time of referral and the officer has been informed that counsel will be available to attend a hearing on one of the	*b)* la disponibilité du conseil, si le demandeur d'asile a retenu les services d'un conseil au moment où sa demande a été déférée et que l'agent a été avisé de la disponibilité du conseil pour assister à

dates provided by the Division.

l'audience à l'une des dates proposées par la Section.

…

…

7. (1) A claimant referred to in subsection 99(3.1) of the Act must provide the original and a copy of the completed Basis of Claim Form to the officer referred to in rule 3.

7. (1) Le demandeur visé au paragraphe 99(3.1) de la Loi transmet l'original et une copie du Formulaire de fondement de la demande d'asile rempli à l'agent visé à la règle 3.

(2) A claimant other than a claimant referred to in subsection 99(3.1) of the Act must provide the original and a copy of the completed Basis of Claim Form to the Division.

(2) Le demandeur autre qu'un demandeur visé au paragraphe 99(3.1) de la Loi transmet à la Section l'original et une copie du Formulaire de fondement de la demande d'asile rempli.

(3) The claimant must attach to the original and to the copy of the completed Basis of Claim Form a copy of their identity and travel documents, genuine or not, and a copy of any other relevant documents in their possession. The claimant does not have to attach a copy of a document that has been seized by an officer or provided to the Division by an officer.

(3) Le demandeur d'asile joint à l'original et à la copie du Formulaire de fondement de la demande d'asile rempli, une copie de ses documents d'identité, de ses titres de voyage, qu'ils soient authentiques ou non, et de tout autre document pertinent en sa possession. Il n'a pas à le faire dans le cas d'un document saisi par l'agent ou transmis à la Section par l'agent.

…

…

8. (1) A claimant who makes an application for an extension of time to provide the completed Basis of Claim Form must make the application in accordance with rule 50, but the claimant is not required to give evidence in an affidavit or statutory declaration.

8. (1) Le demandeur d'asile qui présente une demande de prorogation du délai pour transmettre le Formulaire de fondement de la demande d'asile rempli fait sa demande conformément à la règle 50 mais il n'est pas tenu d'y joindre un affidavit ou une déclaration solennelle.

…

…

54. (1) Subject to subrule (5), an application to change the date or time of a proceeding must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

54. (1) Sous réserve du paragraphe (5), la demande de changer la date ou l'heure d'une procédure est faite conformément à la règle 50, mais la partie n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle.

…

…

(4) Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as

(4) Sous réserve du paragraphe (5), la Section ne peut accueillir la demande, sauf en cas des circonstances exceptionnelles, notamment :

(a) the change is required to accommodate a vulnerable person; or

a) le changement est nécessaire pour accommoder une personne vulnérable;

(b) an emergency or other development outside the party's control and the party has acted diligently.

b) dans le cas d'une urgence ou d'un autre développement hors du contrôle de la partie, lorsque celle-ci s'est conduite avec diligence.

(5) If, at the time the officer fixed the hearing date under subrule 3(1), a claimant did not have counsel or was unable to provide the dates when their counsel would be available to attend a hearing, the claimant may make an application to change the date or time of the hearing. Subject to operational limitations, the Division must allow the application if

(5) Si, au moment où l'agent a fixé la date d'une audience en vertu du paragraphe 3(1), il n'avait pas de conseil ou était incapable de transmettre les dates auxquelles son conseil serait disponible pour se présenter à une audience, le demandeur d'asile peut faire une demande pour changer la date ou l'heure de l'audience. Sous réserve de restrictions d'ordre fonctionnel, la Section accueille la demande si, à la fois :

(*a*) the claimant retains counsel no later than five working days after the day on which the hearing date was fixed by the

a) le demandeur d'asile retient les services d'un conseil au plus tard cinq jours ouvrables après la date à laquelle

officer;

(*b*) the counsel retained is not available on the date fixed for the hearing;

(*c*) the application is made in writing;

(*d*) the application is made without delay and no later than five working days after the day on which the hearing date was fixed by the officer; and

(*e*) the claimant provides at least three dates and times when counsel is available, which are within the time limits set out in the Regulations for the hearing of the claim.

…

62. (1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to

…

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

(7) In deciding the application, the Division must consider any

l'audience a été fixée par l'agent;

b) le conseil n'est pas disponible à la date fixée pour l'audience;

c) la demande est faite par écrit;

d) la demande est faite sans délai et au plus tard cinq jours ouvrables après la date à laquelle l'audience a été fixée par l'agent;

e) le demandeur d'asile transmet au moins trois dates et heures auxquelles le conseil est disponible, qui sont dans les délais prévus par le Règlement pour l'audience relative à la demande d'asile.

…

62. (1) À tout moment avant que la Section d'appel des réfugiés ou la Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.

…

(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

(7) Pour statuer sur la demande, la Section prend en

relevant factors, including

(a) whether the application was made in a timely manner and the justification for any delay; and

(b) the reasons why

(i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or

(ii) a party did not make an application for leave to apply for judicial review or an application for judicial review.

considération tout élément pertinent, notamment :

a) la question de savoir si la demande a été faite en temps opportun et, le cas échéant, la justification du retard;

b) les raisons pour lesquelles :

(i) soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés,

(ii) soit une partie n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3700-13
STYLE OF CAUSE:	Y.Z. AND THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-5940-14
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