Federal Court  Cour fédérale

Date: 20150720

Docket: IMM-5387-13

Citation: 2015 FC 885

Toronto, Ontario, July 20, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SELVARAJAH SRIKUMAR KANAGARATNAM

Applicant

and

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

Respondents

JUDGMENT AND REASONS

I. OVERVIEW

[1] This is an application for a stay of proceedings of the determination of the Applicant's Pre-Removal Risk Assessment [PRRA] application by the Minister's Delegate [Delegate] pursuant to subparagraph 113(d)(ii) of the *Immigration and Refugee Protection Act*, (SC 2001, c

27) [*IRPA*, the Act]. His earlier refugee claim was rejected on the basis of Article 1F of the Convention because of links to a terrorist group, pursuant to section172 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [Regulations].

[2] The Applicant, a citizen of Sri Lanka of Tamil ethnicity, is inadmissible to Canada under section 34(1)(f) of IRPA, due to his membership in the Liberal Tigers of Tamil Eelam [LTTE]. He was consequently deemed ineligible to apply for permanent residence, and issued a deportation order to leave Canada.

A. The Applicant's History with the LTTE

[3] Although the parties agree that the Applicant was a member of the LTTE, they do not agree as to the role he played.

[4] The Applicant argues that he never held a position of military authority or command responsibility. Rather, he contends that he occupied limited roles of (i) an LTTE spokesperson; (ii) an aid to Kittu, one of the LTTE's military leaders; and (iii) a Jaffna hospital representative. In other words, while he was a highly visible member of the LTTE, he was not an influential one; he was high-profile, but not high ranking.

[5] The Applicant also asserts that during his tenure, the LTTE was a *de facto* government of the northern Jaffna Peninsula in Sri Lanka, not banned in any country, and openly supported by the Indian Government.

[6] The Applicant was expelled from the LTTE in 1990, at which point he ultimately fled to Canada due to a fear of persecution from the Sri Lankan authorities. While the Applicant underlines that he was only a member of the LTTE and various immigration decision makers accepted that he was never specifically engaged in any kind of activity that was contrary to international law, the Respondents take a very different view of the facts.

[7] The Respondents assert the Applicant was a high-ranking official in the LTTE, as several sources refer to the Applicant as a 'leader' or a 'commander' in the organization. Sources also describe the Applicant as being the Deputy, or second-in-command, to Commander Kittu, a military leader of the LTTE, who was held responsible for the Anuradhapura massacre in 1985, as well as various other atrocities in Sri Lanka.

[8] The Respondents further assert that the Applicant's activities extended beyond merely being an administrative representative. He instead acted as spokesperson, was often described as being armed, and is alleged to have been involved in the Anuradhapura massacre. In short, he was profiled as being a part of the LTTE leadership in a number of pieces of literature.

[9] The Respondents contend that the Applicant continued to hold a leadership position in the LTTE until at least 1987, playing both a leadership role in negotiations and the LLTE's publicity and propaganda war. The Respondents assert that during the period in which the Applicant participated in leadership functions, the LTTE committed multiple acts of terrorism and the Applicant made no effort to disassociate himself from the organization.

B. The Applicant's History in Canada

[10] After the Applicant arrived in Canada in 1990, he claimed refugee protection. The Board found that he was an active member of the LTTE, and found there were reasonable grounds to believe that the LTTE engaged in terrorism during the time that he was a member. The Applicant was therefore found inadmissible to Canada, and his claim to refugee protection was rejected on the basis of Article 1F of the *UNHCR 1951 Convention Relating to the Status of Refugees* [Convention] due to his links to a terrorist group.

[11] The Applicant applied for a PRRA in 2002, which if positively rendered, would stay his removal from Canada pursuant to section 114(1)(b) of the Act. Section 112(3) of the *IRPA* prohibits conferring refugee protection on certain categories of persons, including those like the Applicant, whose claim to refugee protection was rejected on the basis of Article 1F of the Convention, because of links to a terrorist group. For these individuals, a distinct process for a PRRA is undertaken, pursuant to section 113(d)(ii) of the Act. For ease of reference, I will summarize this "restricted" PRRA application, which substantially differs in process and complexity from the "normal" PRRA application.

[12] The restricted PRRA comprises three distinct components. First, a Risk Assessment is undertaken to determine whether the Applicant would face a risk to his life, or risk cruel or unusual treatment or punishment should he return home — in this case, to Sri Lanka. This is the Stage 1 analysis.

[13] Second, an analysis of the nature and severity of the subject's previous actions and the danger he poses to Canada or Canadians is conducted. This second component is known as a Restriction Assessment, or Stage 2.

[14] Stages 1 and 2 are pursuant to section 113(d) of the Act and section 172(2) of the Regulations. A Stage 3 final decision is made by balancing the Stage 1 and 2 assessments, performed by the Delegate, pursuant to section 172(1) of the Regulations.

[15] Prior to the PRRA application being allowed or refused by the Delegate, the applicant is provided an opportunity to make submissions to the Delegate regarding the contents of the Stage 1 (Risk) and Stage 2 (Restriction) Assessments.

[16] On December 3, 2002, a PRRA Officer conducted a Stage 1 Assessment, finding the Applicant to be a person in need of protection, in accordance with section 97(1)(b) of the Act, due to a risk to his life or cruel and unusual treatment or punishment that would ensue upon his removal to Sri Lanka (Applicant's Record [AR], p. 242).

[17] This Risk Assessment was updated about eleven years later on February 12, 2013, by a Citizenship and Immigration Canada [CIC] Senior Analyst [CIC Analyst]. This second Risk Assessment [Reassessment] reversed the findings of the 2002 Risk Assessment by concluding that "the situation in Sri Lanka has drastically changed" and "the absence of a category which would encompass Mr. Kanagaratnam's profile is an indicator that individuals claiming to be at

risk to the hands of the LTTE do not constitute a group that is currently at risk in Sri Lanka." The CIC Analyst that conducted the Reassessment was not a PRRA officer.

[18] On May 10, 2013, a Stage 2 Restriction Assessment was completed by an Analyst at the Canada Border Services Agency [CBSA], who concluded that the Applicant should not be allowed to remain in Canada. The following paragraph from the Risk Assessment reveals many of the Analyst's concerns (AR, p. 222):

> From the moment he arrived in Canada, Mr. Kanagaratnam has not been forthright regarding his role in the LTTE. He also became of interest to Canadian authorities shortly after his arrival and it was clearly in his best interest to maintain a clean record and have no involvement with the organization while in Canada, especially since he was facing removal. Despite apparently not having been involved with the LTTE since his arrival in Canada, Mr. Kanagaratnam cannot remove his past activities on behalf of the LTTE which reach a serious level of nature and severity.

[19] It has been over 13 years since the Applicant submitted his restricted PRRA, and while the Stage 1 and Stage 2 Assessments have been completed, the Delegate has yet to render the Stage 3 decision. Whether the Delegate proceeds with Stage 3 hangs in the balance of this judicial review, because Justice Manson stayed Stage 3 of the PRRA pending this judicial review.

[20] After significant deliberation on my part, including considering a voluminous record and pleadings, as well as two rounds of various post–hearing submissions from both parties, I have decided to order the Delegate to proceed in rendering the Stage 3 decision.

II. ISSUES AND ANALYSIS

[21] The Applicant raises the following three issues:

A. Have these proceedings resulted in an abuse of process?

B. Was the CIC Analyst entitled to conduct a Reassessment? Did it result in a violation of procedural fairness?

C. Is the Delegate sufficiently impartial and independent to adjudicate the restricted PRRA?

[22] The three issues of abuse of process, fairness of the Reassessment, and the Delegate's independence and impartiality, all turn on procedural fairness and are therefore reviewable on a correctness standard. There is no deference owed to the decision-maker under correctness, and the Court will undertake its own analysis of the issues *(Mission Institute v Khela,* 2014 SCC 24, at para 79; *Dunsmuir v New Brunswick,* 2008 SCC 9, at para 50; *Pavicevic v Canada (Attorney General),* 2013 FC 997 at para 29).

[23] The parties' position on each of the three issues, along with the legal analysis, follows. As a preliminary matter it should be noted that my approach to this decision has been informed by two realities.

[24] First, the underlying allegations are serious, including that the Applicant:

i. received military training from the LTTE in 1983 and 1984;
ii. had duties for the LTTE Intelligence Services;
iii. was the LTTE's spokesperson, and was regularly quoted, reflecting the LTTE's dedication to the continued armed struggle;
iv. is portrayed in media articles in a position of authority in the LTTE;
v. engaged in senior-level negotiations on behalf of the LTTE;

vi. is referred to as a "leader" or a "commander" in the LTTE, second in command to Kittu, a man who was responsible for many war crimes in the 1980s;

vii. is alleged to have been involved in the Anuradhapura massacre in a book which was published before the Applicant arrived in Canada.

[25] Even in criminal law, there appears to be no statute of limitations on war crimes (Hessbruegge, Jan Arno. "Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes" (2011-2012) 43 Geo J. Int'l L 335; R. v. Finta, [1994] 1 SC. 701 at para 113). This underscores the graveness of such allegations and absent exceptional circumstances, immigration proceedings dealing with war crimes should be provided generous leeway to proceed.

[26] I believe that both the legislated and fair approach ─ namely one that balances the rights of the Applicant with the interests and security of Canadians ─ must now conclude. The Delegate will consider all the evidence in coming to a conclusion, including the risk Reassessment. The Applicant will have the right to challenge the final decision of the Delegate if it does not to in his favour, (and of course, he denies all war crimes allegations including any participation in atrocities or leadership in the LTTE).

[27] Second, both parties' arguments have merit regarding delay – the Applicant in asserting that the adjudication has been unduly long, and the Respondents in citing various reasons for this, including not only administrative delays (such as departmental reorganizations and limited resources), but also intervening procedural steps, namely several immigration proceedings filed by the Applicant. The Respondents awaited outcomes in these applications before resuming this restricted PRRA process. Specifically, Mr. Kanagaratnam initiated applications for permanent

residence, humanitarian and compassionate consideration, and Ministerial Relief, all of which were actively being adjudicated during the course of this restricted PRRA, and for all of which the Respondents state they sought outcomes before deciding the PRRA application.

[28] Given that there is merit to what both parties plead, I feel that justice would best be served by concluding the process that was initiated, after all, by the Applicant, so that he might secure the right to remain living in Canada.

A. *Have these proceedings resulted in an abuse of process?*

[29] The Applicant submits that the 11 year delay between his Stage 1 Risk Assessment in 2002, and the Stage 2 Restriction Assessment in 2013, amounts to an abuse of process. The Applicant argues that this substantial delay has impaired his ability to answer the complaint against him, and is "so oppressive as to taint the proceedings" (*Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 at para 121 [*Blencoe*]).

[30] Further, the Applicant asserts that a stay would not be premature because the Court should grant one where there is an ongoing abuse of process that would be perpetuated by proceeding further (*John Doe v Canada (Minister of Citizenship and Immigration),* 2007 FC 327 [*John Doe*]; *Tursunbayev v Minister of Public Safety and Emergency Preparedness*, 2013 FC 1198, at paras 5-6 [*Tursunbayev*]).

[31] The Applicant also alleges that some of the Respondents' allegations against him mentioned in the Restriction Assessment are completely new: they were not brought up by the

Respondents in previous admissibility proceedings, constitutional challenges, or his refugee claim. These new allegations are based upon events which took place some 30 years ago, and the length of the delay is not connected to the time required to investigate or adjudicate the matter (*Canada (Minister of Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 56) [*Parekh*]. The delay has prejudiced the Applicant's ability to respond because many potential witnesses are no longer available to testify (*Beltran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 516 at paras 51-53) [*Beltran*]. Furthermore, this delay was attributable to the inaction of the Minister, and had violated his section 7 Charter Rights (*Singh v Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 57).

[32] The Respondents disagree with the above arguments, contending that the facts in this case do not meet the high abuse of process threshold. The processing time was not abusively lengthy (*Blencoe*, above at para 122; *R v Babos*, 2014 SCC 16 at para 32 [*Babos*]).

[33] Specifically, the Respondents submit that the Applicant has not been prejudiced by the passage of time, because this is the first instance in which the nature and severity of the Applicant's acts as a member of the LTTE are at issue: he should have been aware that he would be required to defend himself against such allegations from the outset, having been a high-level negotiator and chief of staff to Kittu, who the Applicant concedes was involved in war crimes during the time he was his aid. The Respondents further assert that the Applicant was previously questioned about the Anuradhapura massacre, and to bar the consideration of these allegations would neither be unfair to the Applicant nor in the interests of justice. In any event, it is unlikely

the Applicant could have obtained further evidence, as the people who would provide this evidence, former LTTE members, are affiliated with the same organization the Applicant fears.

[34] The Respondents further submit that the risk assessment completed in 2002 found the Applicant was at risk from the LTTE. Since he no longer fears being at risk from the LTTE, which has been dismantled, and rather fears a risk only from the Sri Lankan Army, the underpinning of the earlier risk assessment cannot be supported.

[35] For all the reasons summarized above, the Respondents contend this is not one of "the clearest cases" where abuse of process should be found (*Canada v Tobiass,* [1997] 3 SCR 391 at para 90; *R v Regan,* 2002 SCC 12 at para 53 [*Regan*]). This case simply does not meet the high threshold in the abuse of process test set out in *Babos,* as stays should only be granted as a remedy of last resort (*United States v Talashkova,* 2014 ONCA 74 at para 6 [*Talashkova*]).

[36] The Respondents further assert that the application is premature, given that if the Applicant receives a positive Stage 3 decision from the Delegate, this stay application process will have been a waste of resources. If, on the other hand, the Stage 3 decision is negative, the Applicant is entitled to seek a judicial review of that decision.

[37] The Respondents emphasized that there are very few exceptions to the principle of non-interference with ongoing administrative processes (*Canada (Border Services Agency) v CB Powell Limited,* 2010 FCA 61 at paras 30-33 [*CB Powell*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61). If the Court allows this

application on the basis of the 2002 Risk Assessment, the Court would have, in effect, converted a section 112(3) restricted PRRA into a section 112(1) "regular" PRRA (*Rajan v Canada (Minister of Employment and Immigration),* [1994] FCJ No 1618 at paras 5-6).

[38] I agree with the Respondents on this first issue: the restricted PRRA process, while undoubtedly protracted, does not amount to an abuse of process.

[39] The remedy sought by the Applicant in his original submissions, a stay of proceedings, would be the equivalent of seeking a conversion of the subsection 112(3) restricted PRRA into a regular section 112(1) PRRA, because the PRRA Officer's 2002 Risk Assessment will have effectively been the determinative outcome. This would be contrary to the operation of *IRPA*, given that the Applicant was found inadmissible due to his membership in the LTTE. Under subsection 112(3) of *IRPA*, when an applicant is deemed inadmissible, the Delegate must undertake a Stage 3 analysis to complete the restricted PRRA process set out by Parliament. The Court, absent the clearest of cases and need for a remedy of last resort, cannot ignore the operative statute by ordering a stay of proceedings, as that would lead to an order that undermines the process prescribed by the legislation. For all its delays to date, that process appears to be nearly concluded.

[40] I recognize the importance of the proper adjudication of this matter for both the public and the Applicant – that is, to balance the Applicant's alleged involvement with the LTTE and any implications to Canadian national security, with the potential harm he faces upon a return to Sri Lanka. Section 112(3) establishes no time frame for which PRRA applications must be

processed. The Court at this juncture should not seek to short circuit the procedure Parliament developed to properly conduct this analysis.

[41] The Applicant points to *Jaballah v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 640 (upheld by the Federal Court of Appeal at 2004 FCA 257), where a delay in determining the applicant's application for protection was deemed to be abusive (para 29 of the FC decision). *Jaballah* can be distinguished, however, because the applicant was in detention during the entire course of the proceedings, which amounted to almost two years, with grave consequences to his liberty and other fundamental freedoms. In the present case, the Applicant has had his liberty throughout, and has continued on with an active professional and personal life during the relevant period. By all accounts, in the evidence presented to the Court, he has been a model to his friends and family, valued employee, and selfless participant in community service. These redeeming qualities, however, do not deviate or change the process that must be undertaken to render a decision under sections 112(3) and 113 of the *IRPA*.

[42] The jurisprudence consistently and uniformly recognizes that "a stay is a remedy of last resort which will only be employed to rectify an abuse of process in the clearest of cases" (*Talashkova* at para 6; *Regan* at para 53; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 76 [*Charkaoui*]; *Re Mahjoub*, 2013 FC 1095 at paras 36-45 [*Mahjoub*]). The test used to determine whether a stay of proceedings is warranted in situations of abuse of process has been clarified in the recent case of *Babos*, at para 32:

> 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);

> 2) There must be no alternative remedy capable of redressing the prejudice; and
>
> 3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

[43] The interest of society to have the Delegate make the Stage 3 decision outweighs the prejudice suffered by the Applicant by reason of the delay (*Mahjoub* at paras 508-510). Addressing procedures relating to section 34(1) of *IRPA*, a provision that deals with terrorism and related subjects, this Court recently stated "such serious matters tend to weigh against deciding the matter procedurally rather than addressing the issues on the merits" (*El Werfalli v MPSEP*, 2013 FC 612, at paras 42-48;. see also *Ratnasingam v MPSEP*, 2007 FC 1096, at para 32).

[44] I find the facts in this case distinguishable from the jurisprudence relied on by the Applicant for his abuse of process arguments. The Applicant argues that his situation is similar to *Parekh* and *Beltran* where the proceedings were stayed because of abuse of process.

[45] The court found that *Parekh* was not a complex case (*Parekh*, at paras 32-35). This case in question today, however, spans many years and involves several applications and decisions, as well as hundreds of pages of documentary evidence. It is unquestionably complex. This case also differs from *Beltran*, where the applicant believed his case was closed, as national security issues were not questioned in the 20 years after his entry into Canada. All delays in his permanent residency application arose only due to criminality arising from a Canadian conviction for sexual

assault, for which he ultimately obtained a pardon. The Court in *Beltran* found that the applicant could not have foreseen that the respondent would bring up national security information it had 20 years prior, and with which it had done nothing. In the present case, the Applicant knew that the process was ongoing, even if significantly delayed, and that there were still steps to be decided.

[46] I would also point out factual distinctions which lie with the allegations against Mr. Beltran. In that case, the Court noted that Mr. Beltran's involvement with the group was alleged to be very limited, namely distributing pamphlets and attending demonstrations over a six week period (*Beltran*, at paras 51-52). The Court also questioned the group's classification as a terrorist group. Those are not the facts and/or allegations in the present matter.

[47] The Applicant also refers to *John Doe* and *Tursunbayev*, where the Court granted interim stays of proceedings based on abuse of process allegations. Although the Court in those cases found that the abuse of process was a serious enough issue to grant an interim stay of proceedings, it also pointed out that the merits of the arguments would be examined at the full motion hearing (*John Doe*, above at paras 10, 17; *Tursunbayev*, above at paras 3, 7, 9). Here, the stay would end the restricted PRRA process.

[48] Additionally, nothing points to the delay in this case being intentional or in bad faith, a significant consideration for a Court in determining whether there was abuse of process (*Mahjoub*, at para 54). The evidence before me states that the processing on the file was not stalled, but rather intermittently active during the 11 year period (Respondents' Record, Affidavit

of Anne-Marie Charbonneau, paras 12-43). The file was moved around different government departments and documents also had to be requested when they were missing, which was lamentable, but due to human error rather than any detectable bad faith. The Applicant also had several other applications ongoing during the period in question.

[49] While no doubt causing significant frustration to the Applicant, the delay in this case has been influenced by its factual complexity (including the presence of classified information), the involvement of agencies and the presence of departmental reorganizations during its adjudication. In addition, other applications were being considered for with the Respondents state they wanted decisions before moving towards finalization of the PRRA application.

[50] A recent case from the Supreme Court of Canada, *Hinse v Canada (Attorney General)*, 2015 SCC 35 [*Hinse*], reinforces the high threshold required to establish abuse of process. In reasons rendered by Justices Wagner and Gascon, the Supreme Court upheld a determination of the Quebec Court of Appeal that the Attorney General of Canada's conduct in an action related to the Minister's conduct in the exercise of his power of mercy did not amount to an abuse of process:

> [180] Like the Court of Appeal, however, we can see no abuse of process in the AGC's conduct. It is true that the position taken by Dr. Chamberland, a psychiatric expert, that the effects of Mr. Hinse's incarceration had been "beneficial" was unfortunate; the AGC should have disassociated himself from it. But this on its own does not amount to an abuse of process. The AGC did not multiply proceedings in an unreasonable manner or call unnecessary witnesses. He did not use procedural mechanisms excessively or unreasonably, nor did he act in bad faith or recklessly**.** The law on the federal Crown's liability for a fault committed by the Minister in exercising his or her power of mercy was far from clear at the time of the dispute. It was reasonable and appropriate for the AGC

> to contest the appellant's action and raise the defence that he did. The trial judge committed a palpable and overriding error in finding that there had been an abuse of process in the context of this case. The appellant was not entitled to the extrajudicial fees that were awarded. In my view, when view holistically, the delay in this case does not reach the high threshold required to established an abuse of process. [Emphasis added]

[51] Recognizing that this finding was in regard to conduct at a trial and not for conduct during the course of an administrative decision, I have not seen similar indicia here to find abuse of process: I see no an unreasonable duplication of proceedings, bad faith or serious recklessness. Indeed, delay in and of itself does not necessarily equate to bad faith or serious recklessness (*Hinse* at para 114).

[52] In light of my conclusion on abuse of process, this judicial review application is premature. The Stage 3 decision of the Delegate has yet to be rendered, though this should be done as soon as practicable.

[53] There are very few exceptions to the general principle of judicial non-interference with ongoing administrative processes, as is seen in *CB Powell* (see also, *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35-36, 51). In that case, Justice Stratas undertook a comprehensive review of the relevant jurisprudence and concluded:

> 30 The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1

S.C.R. 3 (S.C.C.); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.); *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.) at paragraphs 38-43; *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.) at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.) at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14 (S.C.C.); *Vaughan v. R.*, [2005] 1 S.C.R. 146, 2005 SCC 11 (S.C.C.) at paragraphs 1-2; *Okwuobi c. Lester B. Pearson (Commission scolaire)*, [2005] 1 S.C.R. 257, 2005 SCC 16 (S.C.C.) at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 (S.C.C.) at paragraph 96.

31 Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

32 This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, supra at paragraph 38; *Greater Moncton International Airport Authority v. P.S.A.C.*, 2008 FCA 68 (F.C.A.) at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, supra at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C. S.C.) , aff'd (1995), 130 D.L.R. (4th) 461

> (B.C. C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Ont. Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.) at paragraph 48.

[54] All administrative options have not been exhausted in this matter given that it is awaiting the Delegate's Stage 3 decision. That outcome is not certain: the Delegate could render a positive decision, given the length of time that the Applicant has spent in Canada without incident, and the ample evidence of his integration in the community, as discussed above. If that is the decision, further judicial review may be unnecessary.

[55] In *Charkaoui*, the Supreme Court held that it would be premature to grant the remedy of a stay before a final decision on the reasonableness of the certificate, as a Federal Court judge was better placed to make that decision. (*Charkaoui* at para. 77; see also *Khalife v Minister of Citizenship and Immigration*, 2002 FCT 1145 at para 22).

[56] An analogy can be drawn to this case – the Delegate should be allowed to make a final decision before the Court intervenes. Having said that, because time can work against the individual in these matters, the Delegate should make the decision without further delay.

[57] My conclusion on this issue is that the PRRA process started under subsection 112(3) should continue. If the Applicant is not satisfied with the Delegate's decision, he will be able to apply for judicial review at that point.

B. *Was the CIC Analyst entitled to conduct a Reassessment? Did it result in a violation of procedural fairness?*

[58] The Applicant submits that only a PRRA officer can conduct a Risk Assessment or Reassessment, and that the Analyst at the Case Management Branch did not have jurisdiction to conduct its Reassessment. The expertise of PRRA officers in determining risk has been confirmed by the Federal Court in numerous cases (*Raza v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385 at para 10; *Kim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 437 at para 16). If the Minister believes there has been a change in circumstances, the determination must be sent back to a new PRRA officer pursuant to section 114(2).

[59] The Applicant acknowledges that in *Placide v Minister of Citizenship and Immigration*, 2009 FC 1056 [*Placide*], Justice Shore indicated that a Delegate is not bound by a PRRA officer's Risk Assessment. However, he argues *Placide* did not have the benefit of the arguments regarding independence and impartiality made before this Court. Accordingly, it should not be relied upon. The Applicant also argues that under sections 114(2) of *IRPA* and 173 of Regulations, any new Risk Assessment should have been sent back to a PRRA officer.

[60] The Respondents counter that it is the Delegate's responsibility to assess risk. There is nothing preventing a Reassessment because neither *IRPA* binds the Delegate to the PRRA officer's Risk Assessment, nor does Citizenship and Immigration Canada's *Instrument of Designation and Delegation* (CIC Operation Manual IL 3), and/or the relevant jurisprudence (*Placide*, above, at para 65; *Delgado v Minister of Citizenship and Immigration*, 2011 FC 1131 at

para 7 [*Delgado*]; *Muhammad v Minister of Citizenship and Immigration*, 2012 FC 1483 at para 42 [*Muhammad 2012*]; *Muhammad v Minister of Citizenship and Immigration*, 2014 FC 448 at paras 64-65, 71 [*Muhammad 2014*]).

[61] First, let me observe that the section 114 argument was addressed in *Placide*, where the Court concluded that "the change of circumstances referred to in subsection 114(2) concern changes that occurred after a final decision by the Delegate under subsection 112(3) of *IRPA*" (*Placide* at paragraph 58). In the present case, a final decision has not yet been made by the Delegate.

[62] Second, and as the Respondents note, case law, other than *Placide*, also indicates that the Delegate is not bound by a PRRA officer's Risk Assessment (*Delgado*, at para 7; *Muhammad 2012*, at para 42; *Liu v MCI*, 2009 FC 877 at para 147; *Allel v MCI*, 2003 FCT 533 at para 19). In *Muhammad 2014*, Justice Strickland confirmed that the Delegate is not bound by the PRRA officer's risk assessment:

> [64] This issue has previously been before this Court. Based on both the legislation and that jurisprudence, it is my view that the Minister's Delegate is not bound by the PRRA Officer's risk assessment.
>
> [65] The Applicant's PRRA application was processed according to subsections 172(1) and (2) of IRPA Regulations and IRPA legislative scheme as described above. Section 172(1) states that before "making a decision to allow or reject" an application described in section 112(3) of IRPA, a Minister's delegate "shall consider" the risk and security assessments and written response to them by an applicant. It does not restrict the consideration to a weighing of the assessments nor state that a Minister's delegate is bound by them.

[63] Justice Strickland also found in *Muhammad 2014* that:

> [68] The Minister's Delegate in her affidavit dated August 22, 2013, made reference to section 17.2 of the PRRA Operational Manual. It concerns the circumstances in which persons who are granted stays pursuant to subsections 112(3) and 172(2)(b) of IRPA are re-examined, due to a change of circumstance, pursuant to section 172(2)(a) of IRPA Regulations. The process to be followed in that event is set out, including:
>
> > Once in receipt of the submissions of the individuals, the CBSA removal officer will forward the submissions to the Coordinator, Danger to the Public / Rehabilitation CMB for consideration by the C&I Minister's Delegate, who makes a decision to cancel or maintain the stay based on a balancing of the factors in A97(1) and A113(d)(i) and (ii) as applicable. The stay will be maintained if the C&I Minister's Delegate is of the opinion after balancing the risks to the individual against the risk to society that the individual, because of the risk that would be faced on removal, should be allowed to remain in Canada. However, should the C&I Minister's Delegate decide that risk to the individual no longer exists, or that the risk that the individual poses to Canada and Canadians outweighs the risk to the individual, the stay will be cancelled...
>
> [69] This suggests that not only may the Minister's Delegate balance the risk and security assessments, <u>but that he or she may also make a decision as to whether a risk still exists</u>. Clearly if such a decision is made it may, or may not, be in accordance with the PRRA Officer's risk assessment. (Emphasis added)

[64] If a Delegate is not ultimately bound by the conclusions of a Risk Assessment, it follows that it can be reassessed if a significant amount of time has passed since the initial assessment, as in this case, where 11 years passed between the initial Risk Assessments and the Reassessment.

[65] Indeed, the jurisprudence emphasizes the opposite. Justice Brown recently concluded in *Thiruchelvam v Canada (Citizenship and Immigration)*, 2015 FC 585, at para 27 that a

Delegate's decision rejecting an outdated Risk Assessment without a chance for the applicant to comment on the relevant circumstances was a violation of procedural fairness, because "[t]he Minister's delegate is duty bound to consider the restricted PRRA report and the CBSA report. These reports must be given to the Applicant and he has a statutory right to comment on them. That right of comment is rendered nugatory if the PRRA is so out of date as to be of no use to the Applicant or the Minister."

[66] Therefore, I find that a Reassessment was properly conducted and shared with the Applicant in this case.

[67] The Applicant also argued that having the Reassessment conducted by a Case Management Branch Analyst, as opposed to a PRRA Officer was a violation of procedural fairness. Given this Court's historic reliance on the expertise of PRRA officers in its jurisprudence, post-hearing submissions on the subject were sought from the parties.

[68] After considering the submissions, given the CIC Analyst's comparable training, seniority, compensation and tenure to that of PRRA officers, it is clear that the Reassessment was not conducted by a party ill-equipped for the task.

[69] For instance:

1) PRRA Officers are Senior Immigration Officers, with a public service classification as a PM4 and an annual rate of pay between $63,663-68,793, depending on the years of service. They may be contract or indefinite employees, contingent on staffing

requirements. A Case Management Branch Analyst (CIC Analyst) holds the same PM4 classification, with the same pay scale, and may also be a contract or indefinite employee.

2) PRRA Officers exist only in regional offices, whereas Analysts exist only in the National Headquarters region. PRRA Officers report to a PM5 Manager, who reports to a PM6 Assistant Director, who reports to an EX1 Director. An Analyst reports to a PM5 Case Management Branch Senior Analyst, who reports to a PM6 Assistant Director, who reports to an EX1 Director.
3) The Analyst who conducted the Reassessment in this case received the same training as a PRRA Officer. While it is unclear from the Crown's submissions whether every analyst receives comparable training, and there would certainly be a procedural fairness concern if a Reassessment was conducted by an official without the training to properly do so, that is not the case here.

[70] Further, in this case, the Applicant's Reassessment was reviewed by a Case Management Branch Analyst and a Case Management Branch Senior Analyst, providing the Applicant with more reviews than would have occurred if only a Risk Assessment had been conducted by a PRRA officer. In this sense, the Reassessment actually afforded the Applicant more procedural fairness than a Risk Assessment, not less. Consequently, I do not find there was a violation of procedural fairness in this case.

C. *Is the Delegate sufficiently impartial and independent to adjudicate the restricted PRRA?*

[71] The Applicant submits that the Delegate lacks the necessary independence to make a determination with respect to risk. A high level of independence is required in this case because the decision could result in the removal of the Applicant to face a risk of torture or other forms of cruel and unusual treatment or punishment, and therefore engages section 7 of the Charter (*Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 80 [*Matsqui*]).

[72] The Supreme Court in *Valente v The Queen*, [1985] 2 SCR 673 [*Valente*] indicates the three necessary criteria of independence, which also apply to administrative tribunals: security of tenure, financial security, and administrative control. The Applicant argues the Delegate does not meet these criteria. The Delegate can be selected and removed at whim by the Minister. Furthermore, the independence of the Delegate is endangered, according to the Applicant, because Government officials may meet with the Delegate's supervisor to discuss the political ramifications of a particular decision. PRRA Officers, on the other hand, have tenure for a fixed term and are not as influenced by the Minister's political considerations as the Delegate.

[73] The Applicant also argues that while Justice Strickland may have addressed the Delegate's institutional independence in *Muhammad 2014*, the Court actually conflated the concepts of institutional independence and institutional impartiality. Rather, the proper test for institutional independence of the Delegate was not considered as outlined in *Valente*, and no clear determination was made in this regard.

[74] The Respondents submit, to the contrary, that the Delegate is sufficiently independent: the process for selecting Delegates is in accordance with the *Public Service Employment Act* and

Delegates enjoy the same level of independence as PRRA officers. Consultation with government officials on various matters does not inherently cause a lack of independence (*Tursunbayev v MPSEP*, 2012 FC 532 at para 86). Additionally, it cannot be inferred solely from the political nature of a Minister's comments that there exists a reasonable apprehension of bias (*Dunova v Minister of Citizenship and Immigration*, 2010 FC 438 at para 61). These arguments only bolster this Court's recent findings that the Delegate is independent and impartial after an in depth analysis of the two concepts (*Muhammad 2014*, above at paras 124-144).

[75] The three cornerstones of independence are identified in *Valente*, and consist of (i) security of tenure, (ii) financial security, and (iii) the exercise of administrative control. The court found in *Matsqui* that there should be a high degree of independence for tribunals making decisions which affect the security of the person or an individual. The test for independence is whether there is a reasonable apprehension of bias (*Matsqui*, above at para 77, 88; *Lippé v Charest*, [1990] SCJ No 128, at para 79). In *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at para 40, the Supreme Court explains the test for reasonable apprehension of bias:

> [40]…the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude…"

The threshold to find a reasonable apprehension of bias is high (*Say v Solicitor General*, 2005 FC 739 at para 22; *R v S (RD)*, [1997] 3 SCR 484 at paras 111-113).

[76] In *Muhammad 2014*, very similar arguments were made regarding the Delegate's lack of independence, particularly that the proximity of the Delegate to the Minister, as well as contact with other senior government officials and agencies, leads to a lack of independence. On this point, Justice Strickland concluded that no such breach of fairness occurs:

> [134] Based on the foregoing and given that an allegation of a lack of institutional impartiality is of such potential significance from both an operational and a procedural fairness perspective, the grounds to establish it must be substantial. The evidence adduced by the Applicant in this case is insufficient to meet this requirement and satisfy his onus of demonstrating want of impartiality in a substantial number of cases. The mere fact that the Minister's Delegate is situated in the CMB, particularly when considered together with the evidence concerning her relationship to and communications with both Mr. Dupuis and the Minister's Office, does not meet the onus.

[77] I find this reasoning persuasive, and it is clear that Justice Strickland was aware of the *Valente* factors before coming to this conclusion (*Muhammad 2014* at 86). In any event, I find it unnecessary to conclusively decide whether the Delegate is sufficiently institutionally independent and/or institutionally impartial, as the impugned decision maker has yet to even render a decision. Such a determination may not even be necessary in this case, and in the event it is, should be decided with a complete evidentiary record, including the contested decision. It will be open to the Applicant to raise this issue in the eventuality that he challenges the Delegate's decision.

III. CERTIFIED QUESTION

[78] The Applicant proposed the following certified questions:

1. Can the Minister be stayed from bringing forward new allegations against an applicant in a section 112(3) PRRA when bringing forward those allegations constitutes an abuse of process?

2. Is the Minister's Delegate sufficiently independent and impartial to render decisions that engage section 7 with respect to risk of torture?

3. Can the Minister's Delegate when considering a PRRA under subsection 112(3) reconsider and overturn the decision of the PRRA officer in relation to risk or is the Delegate's role restricted to balancing the two opinions provided to him/her?

4. Can the Delegate consider a risk opinion provided by a senior analyst when he/she renders his/her decision and is it a violation of an individual's procedural fairness rights, as provided by section 7 of the Charter, to have a senior analyst reconsider the risk assessment of a PRRA Officer?

5. Is the senior analyst sufficiently independent to render decisions that engage section seven with respect to the risk of torture?

[79] The Respondents submit that only the Applicant's second through fifth questions may raise issues of general importance, but propose the following wording to better reflect the dispositive issues of general application:

1. Is there a reasonable apprehension that the Minister's Delegate is not independent or impartial to make determinations on section 112(3) PRRA's?

2. Is the Minister's Delegate, in determining a section 112(3) PRRA, bound by the risk assessments provided to him by PRRA Officers and Case Analysts?

3. In a section 112(3) PRRA, where there has been a significant passage of time since the initial PRRA was determined, is it a violation of procedural fairness to

> conduct an updated risk assessment? Does it violate procedural fairness to allow an Analyst, rather than a PRRA Officer, to conduct that update?

[80] After careful consideration, I will not certify any of the proposed questions, as per the guidance of the Federal Court of Appeal in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, at para 9. I do not see the resolution of the proposed questions to have transcended the interests of the immediate parties to the litigation because the ultimate decision has yet to even be rendered (see my comments at paragraphs 53-57 above). That is, it is too early to tell if these issues will even have a tangible effect on the ultimate outcome, let alone transcend the parties' interests. Higher courts, if these issues are certified, would benefit from having a decision which reveals how they may have impacted the end result, if at all. As Justice Stratas wrote in *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139, at para 30, "…[u]nless there is a good reason, a reviewing court should not offer views on those issues in advance." Prematurity is one of those reasons (*Budlakoti* at para 28).

IV. CONCLUSION

[81] The components that must be considered in a restricted section 112(3) PRRA are a Stage 1 Risk Assessment, a Stage 2 Restriction Assessment, and a Stage 3 Decision from the Delegate balancing these Assessments. A Reassessment may supplant the Risk Assessment if, as is the case here, it does not violate procedural fairness. The Stage 3 decision has yet to be made, and this application therefore comes at an interlocutory stage, where administrative law principles weigh against judicial intervention.

[82] While there have undeniably been long delays in the processing of this matter, the Government has nonetheless furnished evidence to show that the file has been active through much of the eleven years in question, albeit with various lulls. Certain of these lulls resulted from the Applicant's other immigration-related filings.

[83] The time has come for the Delegate to make the Stage 3 Decision. After it is rendered, the Applicant can decide whether it is necessary to seek judicial review. Given the prematurity of this application for judicial review, it is dismissed and the matter will proceed to the Delegate for a decision on the restricted.

[84] This application for judicial review is dismissed. No costs award will be made. The Delegate shall render a PRRA Decision under subsection 112(3) of the IRPA within 90 days of this judgement.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No costs are awarded.
3. No questions will be certified.
4. The Delegate shall render the final PRRA decision under subsection 112(3) of the *IRPA* within 90 days of this decision.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5387-13
STYLE OF CAUSE:	SELVARAJAH SRIKUMAR KANAGARATNAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 4, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	DINER J.
DATED:	JULY 20, 2015

APPEARANCES:

Jacqueline Swaisland	FOR THE APPLICANT
Judy Michaely	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS

Annex A

Immigration and Refugee Protection Act **S.C. 2001, c 27**

112. (3) Refugee protection may not result from an application for protection if the person

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection 77(1).

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

…(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

…(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the

Loi sur l'immigration et la protection des réfugiés, **L.C. 2001, ch. 27**

112. (3) L'asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

d) il est nommé au certificat visé au paragraphe 77(1).

113. Il est disposé de la demande comme il suit :

…d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

…(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue

security of Canada; and

114. (1) A decision to allow the application for protection has

(a) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

114. (2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay.

pour la sécurité du Canada;

114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

114. (2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113d) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

Immigration and Refugee Protection Regulations, (SOR/2002-227)

172. (1) Before making a decision to allow or reject the application of an applicant described in subsection 112(3) of the Act, the Minister shall consider the assessments referred to in subsection (2) and any written response of the applicant to the assessments that is received within 15 days after the applicant is given the assessments.

Assessments

(2) The following assessments shall be given to the applicant:

(a) a written assessment on the basis of the factors set out in section 97 of the Act; and

(b) a written assessment on the basis of the factors set out in subparagraph 113(d)(i) or (ii) of the Act, as the case may be.

Certificate

Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

172. (1) Avant de prendre sa décision accueillant ou rejetant la demande de protection du demandeur visé au paragraphe 112(3) de la Loi, le ministre tient compte des évaluations visées au paragraphe (2) et de toute réplique écrite du demandeur à l'égard de ces évaluations, reçue dans les quinze jours suivant la réception de celles-ci.

Évaluations

(2) Les évaluations suivantes sont fournies au demandeur :

a) une évaluation écrite au regard des éléments mentionnés à l'article 97 de la Loi;

b) une évaluation écrite au regard des éléments mentionnés aux sous-alinéas 113d)(i) ou (ii) de la Loi, selon le cas.

(2.1) Despite subsection (2), no assessments shall be given to an applicant who is named in a certificate until a judge under section 78 of the Act determines whether the certificate is reasonable.

When assessments given

(3) The assessments are given to an applicant when they are given by hand to the applicant or, if sent by mail, are deemed to be given to an applicant seven days after the day on which they are sent to the last address that the applicant provided to the Department.

Applicant not described in s. 97 of the Act

(4) Despite subsections (1) to (3), if the Minister decides on the basis of the factors set out in section 97 of the Act that the applicant is not described in that section,

(a) no written assessment on the basis of the factors set out in subparagraph 113(d)(i) or (ii) of the Act need be made; and

(b) the application is rejected.

173. (1) A person in respect of whom a stay of a removal order, with respect to a country or place, is being re-examined under subsection 114(2) of the Act shall be given

(a) a notice of re-examination;

(b) a written assessment on the basis of the factors set out in section 97 of the Act; and

(c) a written assessment on the basis of the factors set out in subparagraph 113(d)(i) or (ii) of the Act, as the case may be.

Assessments and response

(2) Before making a decision to cancel or maintain the stay of the removal order, the Minister shall consider the assessments and any written response of the person in respect of whom the stay is being re-examined that is received within 15 days after the assessments are given to that person.

Certificat

(2.1) Malgré le paragraphe (2), aucune évaluation n'est fournie au demandeur qui fait l'objet d'un certificat tant que le juge n'a pas décidé du caractère raisonnable de celui-ci en vertu de l'article 78 de la Loi.

Moment de la réception

(3) Les évaluations sont fournies soit par remise en personne, soit par courrier, auquel cas elles sont réputées avoir été fournies à l'expiration d'un délai de sept jours suivant leur envoi à la dernière adresse communiquée au ministère par le demandeur.

Demandeur non visé à l'arti-cle 97 de la Loi

(4) Malgré les paragraphes (1) à (3), si le ministre conclut, sur la base des éléments mentionnés à l'article 97 de la Loi, que le demandeur n'est pas visé par cet article :

a) il n'est pas nécessaire de faire d'évaluation au regard des éléments mentionnés aux sous-alinéas 113d)(i) ou (ii) de la Loi;

b) la demande de protection est rejetée.

173. (1) Les documents ci-après sont fournis à la personne dont le sursis à la mesure de renvoi, pour le pays ou le lieu en cause, fait l'objet d'un examen aux termes du paragraphe 114(2) de la Loi :

a) un avis d'examen;

b) une évaluation écrite au regard des éléments mentionnés à l'article 97 de la Loi;

c) une évaluation écrite au regard des éléments mentionnés aux sous-alinéas 113d)(i) ou (ii) de la Loi, selon le cas.

Évaluations et réplique

(2) Avant de prendre sa décision révoquant ou maintenant le sursis, le ministre examine les évaluations et toute réplique écrite de la personne dont le sursis à la mesure de renvoi fait l'objet d'un examen, reçue dans les

When assessments given

(3) The assessments are given to an applicant when they are given by hand to the applicant or, if sent by mail, are deemed to be given to an applicant seven days after the day on which they are sent to the last address that the applicant provided to the Department.

quinze jours suivant la réception des évaluations.

Délivrance

(3) Les évaluations sont fournies soit par remise en personne, soit par courrier, auquel cas elles sont réputées avoir été fournies à l'expiration d'un délai de sept jours suivant leur envoi à la dernière adresse communiquée au ministère par le demandeur.