Federal Court  Cour fédérale

Date: 20150724

Docket: IMM-3039-15

Citation: 2015 FC 908

Ottawa, Ontario, July 24, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

JAVED MEMON

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER WITH REASONS

I. Introduction

[1] This is a motion brought by the Applicant seeking an Order staying the processing of his pending application for Ministerial Relief pursuant to the former subsection 34(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] on an interim basis until the determination of his application for leave and for judicial review.

II. Background

[2] The Applicant is a Pakistani national who became a supporter of the Muttahida Quami Movement-Altaf [MQM-A] in Pakistan in 1992 and a member of that organization in 1994. He allegedly participated in recruitment and fundraising initiatives for the MQM-A, as well as peaceful demonstrations and acted as a support worker for the president of the Kharadar unit. His evidence is that he was arrested by police in 1995 and charged with violating laws prohibiting the assembly of more than four persons, but was released with a warning.

[3] According to the Applicants' claims, in September 1996, he participated in a peaceful demonstration against the police's refusal to investigate the kidnapping, torture and murder of a MQM-A member by members of its rival, the Muttahida Quami Movement-Haqiqi [MQM-H]. Shortly afterwards, he was detained and tortured by police for his role in the protest.

[4] The Applicant states that, after this incident, he no longer took part in demonstrations continued to be involved with the MQM-A and he campaigned for a MQM-A provincial candidate in the January 1997 elections. Following the election, the MQM-H members targeted, harassed and attacked him and in December 1997 he was kidnapped, detained and tortured by unknown individuals who wanted him to cease his activities with MQM-A. After his release he went into hiding and decided to leave Pakistan.

[5] The Applicant arrived in Canada on June 15, 1998 using a fraudulent passport and made a claim for refugee protection the following day. His refugee claim was denied by the Immigration and Refugee Board [IRB] in June 1999.

[6] On November 19, 1999, the Applicant married a Canadian citizen who went on to sponsor him and submit a Request for Exemption from Immigration Visa Requirement under Humanitarian and Compassionate [H&C] grounds on January 24, 2000. The H&C exemption was granted and took effect as an application for permanent residence and the application for permanent residence was approved in principle on March 13, 2000.

[7] In the course of processing his application for permanent residence, the Applicant was interviewed on June 13, 2000, during which he described his involvement with the MQM-A. On some unstated date in 2003, Citizenship and Immigration Canada [CIC] sent a fairness letter to the Applicant, giving him an opportunity to provide submissions relating to his involvement with the MQM-A. He replied with the application for Ministerial Relief on December 17, 2003.

[8] The Applicant was interviewed by the Canada Border Services Agency [CBSA] on September 14, 2004 and based on the information obtained in that interview, the CBSA held that there were reasonable grounds to believe that the Applicant was inadmissible to Canada pursuant to paragraph 34(1)(f) of the IRPA. A report regarding his admissibility was prepared pursuant to subsection 44(1) of the IRPA on April 18, 2005.

[9] On November 30, 2005 the IRB found that the Applicant was not inadmissible to Canada, but the Respondent appealed the IRB decision and the Immigration Appeal Division [IAD] found that the Applicant was inadmissible to Canada on October 16, 2007. A removal order was issued against him.

[10] The Applicant provided further submissions to the CBSA on January 6, 2006. He also applied for leave and for judicial review of the IAD decision in this court, which was dismissed on May 14, 2008.

[11] The CBSA made recommendations to the Minister to deny the Ministerial relief, which were disclosed to the Applicant in April 2008. He provided additional submissions in response on April 23, 2008 and December 4, 2008, but no decision was taken by the Minister.

[12] On December 31, 2009, Justice Mosley set aside the Ministerial relief decision in *Ramadan Agraira v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1302 [*Agraira*] for applying too narrow a test. On March 17, 2011, this decision was reversed by the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v Agraira*, 2011 FCA 103, outlining that the principal, if not the only, consideration in the processing of a Ministerial relief application is national security and public safety and that relief is clearly intended to be exceptional.

[13] In December 2012, a second CBSA recommendation to deny Ministerial relief was disclosed to the Applicant based upon the reasons in the Federal Court of Appeal decision in *Agraira*. The recommendation indicated as follows:

> Due to a number of FCC decisions, including the FCA decision in *Canada (Public Safety and Emergency Preparedness) v. Agraira*, 2011 FCA 103, leave to appeal to the SCC granted (December 8, 2011), File No. 34258, a final recommendation was not delivered to the Minister of Public Safety for decision because the relevant Minister relief considerations changed.

[14] The Applicant requested extensions to make submissions twice: on December 18, 2012 and on January 9, 2013. The CBSA granted both requests. On February 21, 2013 the Applicant responded to the second CBSA disclosure with further submissions and he requested that a decision by the Minister be delayed until after the Supreme Court decision in *Agraira*.

[15] On June 20, 2013, the Supreme Court released its decision *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, which confirmed that the predominant considerations in granting Ministerial relief are national security and public safety, but that personal factors of an applicant may be considered insofar as they relate to determining whether the applicant's presence would be detrimental to the national interest.

[16] On March 10, 2015, a third recommendation to deny Ministerial Relief was disclosed to the Applicant by CBSA. On April 6, 2015, the Applicant requested an extension to provide submissions, which CBSA granted on April 8, 2015. The Applicant's submissions in response to

CBSA's latest disclosure were received on June 9, 2015. The submissions contained the following comment:

> The CBSA has delayed 12 years in providing an answer to this ministerial relief application. The delay has caused intense emotional and psychological distress to Mr. Memon and his family. The delay is so severe and has caused such severe psychological distress so as to constitute a breach of section seven.
>
> [Footnote omitted.]

[17] The June 9 submissions also included a section entitled "Delay is an Abuse of Process" containing submissions and citing jurisprudence in support of this submission. It also contained submissions alleging that the Minister failed to apply the *Agraira* factors and that the MQM-A is not a terrorist organization.

[18] The Applicant thereafter requested a three-week extension to allow for further submissions, which was granted by the CBSA. The Applicant's further submissions were received on July 2, 2015. He submitted that "the delay of 13 years was so extreme and the prejudice so severe that the Minister must exercise his discretion and allow the application" and included submissions of procedural and severe emotional prejudice, along with an argument based on section 7 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 [the Charter]. The submissions also contained a confidential forensic psychological assessment dated June 24, 2015 from Dr. Warren Weir.

[19] The Applicant's Ministerial relief application remains outstanding and cannot be rendered until such time as the Applicant's submissions are considered and a further recommendation is provided to the Minister.

III. Submissions

A. *Serious Issue*

(1) Delay as an Abuse of Process

[20] The Applicant submits that the underlying application raises the serious issue of whether the unexplained and extreme delay in processing the Ministerial relief application constitutes an abuse of process that would warrant providing him an appropriate remedy before the Minister renders a decision.

[21] The Applicant's primary position is that there are serious reasons for believing that the delay amounts to an abuse of process as characterized by the Supreme Court in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 30 [*Blencoe*].

[22] The Applicant argues that the delay in this case is substantial and has caused him severe prejudice. It has impaired his ability to answer the complaint against him, has caused him severe emotional prejudice and because the delay itself is "so oppressive as to taint the proceedings" (citing *Blencoe* at para 121). The Applicant submits that the concerns raised in the recent CBSA recommendations have changed, it is now alleged that he had in-depth involvement with the

MQM-A, and that he has been unable to receive a response from the MQM-A in order to defend himself against these allegations due to the passage of time. On the issue of the length of the delay, the Applicant submits that there is no reasonable explanation for the delay because the issues at hand are not complex and there is nothing inherent to the administrative process that requires several years for a decision. Finally, the Applicant submits that all of the information necessary for these proceedings was available at the time of the Applicant's original application in 2003 and the cause of the delay rests entirely on the Respondent(see *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 56, [2012] 1 FCR 169 per Tremblay-Lamer J [*Parekh*]).

[23] The Respondent contends that to obtain a permanent stay based on abuse of process, the Applicant must also demonstrate that if the Minister were to make a decision, the abuse in question would be "manifested, perpetuated or aggravated" to such an extent as to constitute one of the "clearest of cases" warranting a stay of proceedings (citing *Mahjoub Re*, 2013 FC 1095 at paras 383 & 491). It is the Respondent's position that this is not one of the "clearest of cases" – the processing time of the application has been lengthy but not excessively long, the Applicant has suffered no prejudice from the delay, there are alternative and more appropriate remedies available to the Applicant, the Applicant has not outlined any conduct that can be characterized as intentionally abusive or in bad faith, and the harm to the public interest if the determination is halted outweighs any damage to the public interest caused by the administrative delay in the process (citing *Blencoe* at paras 101, 120-121, *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 76, [2008] 2 SCR 326).

[24] Further, the appropriate time to determine Ministerial Relief was after a conclusive determination on his inadmissibility had been made, which in this case occurred on May 14, 2008 when the Federal Court dismissed leave for his judicial review of the IAD decision (citing *Hassanzadeh v Canada (Citizenship and Immigration)*, 2005 FC 902, [2005] 4 FCR 430). Further, the Respondent submits that the changes in the jurisprudence caused by the Federal Court, the Federal Court of Appeal and Supreme Court decisions involving Mr. Ramadan Agraira (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 86-87, [2013] 2 SCR 559 [*Agraira SCC*], *Canada (Public Safety and Emergency Preparedness) v Agraira*, 2011 FCA 103, 415 NR 121 [*Agraira FCA*], setting aside *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1302, 357 FTR 246 [*Agraira FC*]) would have affected the processing time for the Ministerial relief applications.

[25] The Respondent argues that "absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course," so the application is premature because the administrative process is still ongoing, the Applicant has other available, appropriate and effective remedies, and he will not be prejudiced by waiting for a decision to be made (citing *Canada (Border Services Agency) v C.B. Powell Ltd*, 2010 FCA 61, [2010] FCJ No 274 at paras 30-31 [*C.B. Powell*], leave to appeal to Supreme Court of Canada refused, [2011] SCCA no 267 , [2011] 2 FCR 332, *Bruzzese v MPSEP*, June 23, 2014 (IMM-3119-14) at 5 (unpublished) (FC)).

(2) Section 7 of the Charter

[26] It has also been contended by the Applicant that the prolonged delay in this case renders the determination process unfair and contrary to section 7 of the Charter. It is the Applicant's position that the principles of fundamental justice include the right to a fair hearing in a reasonable time and excessive administrative delay has been previously held to be a breach of fundamental justice (citing *Blencoe*). The Court finds no reasonable basis for this contention in the jurisprudence in the circumstances alleged by the Applicant and will not respond to the submissions in a stay application.

B. *Irreparable Harm*

[27] The Applicant submits that he will suffer irreparable harm if the stay is not granted because he will be subjected to continued abuse due to the associated delay and prejudice. The Applicant's position is that a continuation of the proceedings related to his Ministerial relief application amounts to an abuse of process and to continue to subject him to these proceedings would harm him and the public's confidence in the fairness of the proceedings, neither of which can be remedied after the fact (citing *John Doe v Canada (Citizenship and Immigration)*, 2007 FC 327 at para 18, per Phelan J [*John Doe*], *Tursunbayev v Canada (Citizenship and Immigration)*, IMM-2220-12, May 4, 2012, per Russell J (unpublished) (FC) [*Tursunbayev*], *Kanagaratnam v Canada*, IMM-5387-13, 28 August 2013, per Manson J (unpublished) (FC) [*Kanagaratnam (2013)*]).

[28] The Respondent submits that if the Court grants the stay, it will only serve to further delay the processing of the application. In the Respondent's estimation, the only harm feared by the Applicant is that a decision will be made and that this is not irreparable harm since he would be able to seek judicial review of an unfavourable decision. The Respondent notes that the Applicant has himself contributed to the delay by requesting extensions of time and for a delay until after the Supreme Court's decisions in *Agraira SCC*. Any prejudice to his ability to defend the allegations has already occurred and would not be perpetuated by proceeding with the Ministerial Relief decision.

C. *Balance of Convenience*

[29] It is the Applicant's position that if the Court is satisfied that he has demonstrated a serious issue and irreparable harm, the balance of convenience will flow (citing *Membrano-Garcia v Canada (Minister of Employment and Immigration)*, [1992] 3 FC 306, 55 FTR 104). The Applicant argues that the balance of convenience favours maintaining the status quo, particularly since the Respondent has delayed his application for almost 13 years and there is no evidence that the Minister will be prejudiced if the stay is granted to relieve him of the ongoing abuse of process (citing *Turbo Resources* at para 27).

[30] The Respondent argues that contrary to the Applicant's submissions, the balance of convenience is a distinct portion of the tripartite test that must be met (citing *Nalliah v Canada (Solicitor General),* 2004 FC 1649 at 38, [2005] 3 FCR 210). It is the Respondent's position that Canadian society has a compelling interest in having a final decision rendered on issues of

terrorism and that the balance of convenience favours the Minister in maintaining its discretion to render its decision, as intended by Parliament.

IV. Analysis

A. *Irreparable harm remains the essential issue for determination*

[31] The tripartite test enunciated in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA) [*Toth*] governs whether or not to grant a stay. It must be determined that there is a serious issue to be tried, that the Applicant would suffer irreparable harm by reason of his or her deportation, and that the balance of convenience lies in the Applicant's favour. The *Toth* test is conjunctive and the Applicant must satisfy each branch of the test to be successful.

[32] The Applicant argues that he need only demonstrate a serious issue of an abuse of power by delay in an administrative process in order to succeed on his motion for an interim stay. Once the Court is satisfied that the first factor of the standard tripartite test for an interim stay is met, then based upon the jurisprudence described below, there is no need for the Applicant to demonstrate irreparable harm or the balance of convenience for the prohibition order to issue. His argument is set out at para 73 of his memorandum as follows:

> 73. In this case, the Applicant will suffer irreparable harm if the stay is not granted because the applicant will be subjected to continued abuse as a result of the delay and the prejudice associated with it. In *John Doe v. Canada (M.C.I.)* the Court granted a stay in the middle of a hearing noting that "a continuance

> of proceedings may well cause prejudice to both the individual and to the public interest by continuing a process which may be found to be abusive." Such is the situation in the case at bar. The Applicant's position is that a continuation of the proceedings amounts to an abuse of process. As such, the Applicant should not be subjected to proceedings which are later found to be abusive. To do so would harm the Applicant and the public's confidence in the fairness of the proceedings in ways which cannot be remedied after the fact.

[33] While it is obvious that prejudice by delay is a form of irreparable harm, the Applicant only deals with the prejudice required to demonstrate abuse of process as a factor under the serious issue step of the test. In this regard, he stresses that the Court should not be applying a legal standard of a probability or higher as described in paragraph 37 of his memorandum as follows:

> 37. With respect to the serious issue, in order to obtain a stay, the Applicant need only show that the application before the Court is not frivolous or vexatious:
>
> The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability", a "prima facie case" or a "strong prima facie case": that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried... (*Turbo Resources Ltd. v. Petro Canada Inc.*, [1989] 2 F.C. 451 at para. 19).

[34] In my view, dealing with the prejudice issue under the serious issue analysis is insufficient for the purposes of establishing irreparable harm under the *Toth* test. It is beyond contention that the downgrading of the first prong of the tripartite test in an interim application

from a "strong *prima facie*" requirement to a "serious issue" was the recognition that the court's focus should be on the clear and convincing evidence establishing a probability of irreparable harm between the date of the stay or injunction application and the final order sought by the applicant. A test that the alleged wrong not be "vexatious or frivolous" is a direction to the motions court that the outcome turns on the interim nature of the order, not the probative level of the substantive injury alleged. The limited role of the court at the interlocutory stage was well described by Lord Diplock in *American Cyanamid Co. v Ethicon Ltd.*, [1975] 1 All ER 504 (adopted in *A.G. Manitoba v Metropolitan Stores*, [1987] 1 SCR 110 at para 83):

> It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.

[35] The fact that an abuse of process argument may be unencumbered by some of the strictures of other doctrines plays no role in changing the essential nature and issue of an interim application (*Behn v Moulton Contracting Ltd*, 2010 SCC 26, [2013] 2 SCR 227).

[36] Similarly, the fact that an abuse of process for delay requires the applicant to demonstrate significant prejudice, which may be a factor considered under the "serious issue" step, does not exempt normal consideration of the prejudice issue for the purposes of irreparable harm. This requires demonstrating with clear and convincing evidence the likelihood that serious prejudice will arise, with the focus being on the period between the stay order and the final determination in the judicial review application, including the issue of alternative remedies.

[37] In other words, demonstrating a possibility of significant prejudice on the final order does not meet the requirements of demonstrating irreparable harm on the basis of a probability for the intervening period.

B. *Guiding Principles on Delay as an Abuse of Process*

[38] Any application disrupting an administrative process that is underway will be granted only in exceptional circumstances. The exceptional nature of the Applicant's motion in the logic underlying this rule is captured at paragraphs 31 to 33 of the Federal Court of Appeal's decision in *C.B. Powell*, excerpts of which are as follows:

> [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. …
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> [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. Public Service Alliance of Canada*, 2008 FCA 68 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 (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: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.
>
> [33] … Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, supra; *Okwuobi*, supra at paragraphs 38-55*; University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
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> [Emphasis added.]

[39] To establish an abuse of process due to delay, the Applicant must demonstrate based on an exceptional standard such that the administrative process in question is brought into disrepute. This applies to both the issue of unreasonable delay and to whether the delay has significantly prejudiced him. Justice Bastarache, speaking for the Supreme Court majority in *Blencoe* at paragraph 115, summed up the law with respect to the high standard that must be met before lengthy delays not constituting procedural unfairness are sufficient to establish an abuse of process:

> [115] I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute.
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> [Emphasis added.]

[40] Justice Lebel, speaking for the minority in *Blencoe*, described the threshold for delay for an abuse of process not involving fairness considerations in a similar fashion, as one constituting a "shocking abuse," at paragraph 182:

> [182] The approach of the courts should change when it appears that the hearing will remain fair, in spite of the delay and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. More limited and narrowly focused remedies would then become appropriate [thereafter referring to a mandamus procedure, or an order for an expedited hearing].
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> [Emphasis added.]

[41] Justice Bastarache at paragraph 122 of *Blencoe* describes the factors (enumerated by my numbering in the following passage) in determining whether the delay is abusive:

> [122] The determination of whether a delay has become inordinate depends on [1]the nature of the case and its complexity, [2] the facts and issues, [3] the purpose and nature of the proceedings, [4] whether the respondent contributed to the delay or waived the delay, and [5] other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.
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> [Emphasis added.]

[42] The highlighted portion of paragraph 122 of *Blencoe* emphasizes the various rights at stake in the proceedings as being factors in attempting to determine whether the community's sense of fairness would be offended by the delay. The Respondent argues that "other circumstances of the case" play an important role in the security certificate proceedings where it has been clearly determined by the Supreme Court in *Agraira* that subsection 34(2) is intended to protect Canada, and that it should not be transformed into an alternative form of humanitarian review (*Agraira SCC* at paras 86-87). They also argue that the unsettled state of the Minister's test for relief by the series of cases involving Mr. Agraira contributed to the delay in processing the Applicant's application.

C. *Federal Court jurisprudence on delay as an abuse of process*

[43] In *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002, 247 ACWS (3d) 650 [*Almrei*], Mr. Justice Richard Mosley rejected a motion for an order that the application for leave and for judicial review was premature. The application was for a declaration that the question of Mr. Almrei's admissibility was, among other things, an abuse of process. Mr. Almrei sought an

injunction enjoining the Minister from finding the applicant inadmissible. The decision by Justice Mosley followed an interim stay order granted by Justice Richard Boivin.

[44] Mr. Almrei had been required to defend his admissibility three times since 2001, the first two times on the basis of a flawed procedure, and the third when the claims against him were not reasonable. Mr. Almrei was held in detention for over seven years during these events. After being accepted in February 2012 at the first stage of a humanitarian and compassionate application, he was required to bring a mandamus application to compel the Minister to make a decision on his request for permanent residence because of the delay. Four days prior to the hearing Mr. Almrei was provided with a procedural fairness letter indicating that the Minister was considering finding him inadmissible under paragraph 37(1)(b) of the Act. Mr. Almrei then brought the application for declaratory and injunctive relief.

[45] Justice Boivin found that the interlocutory application staying the determination of Mr. Almrei's admissibility delayed bringing forward the new allegation for approximately 12 years. Justice Mosley agreed, and also found that the fairness letter misrepresented that there was new information forming the basis of the fresh allegation of inadmissibility which the question had arisen collaterally or incidentally in the security certificate proceedings. He concluded that Mr. Almrei had been undoubtedly prejudiced, thereby alluding to what was, in essence, an attempt to re-litigate a claim after two failed security certificates had been issued.

[46] He also found the public interest in proceeding to determination was not significant when the allegations against the Applicant related to the commission of a passport and other fraudulent

documents. Although serious, he concluded they were not of the same order as a crime against humanity, citing Mr. Justice James Russell in *Valle Lopes v Canada (Citizenship and Immigration)*, 2010 FC 403, 367 FTR 41 at paragraph 87:

> [87] Finally, when granting relief for abuse of process, one must balance competing public interests. While it is not necessary to canvass all arguments under this heading, it will suffice to say that there is significant public interest behind the enactment of paragraph 35(1)(a) and the general condemnation of crimes against humanity committed abroad. Those interests militate in favour of getting at the truth and holding those accused of committing such crimes accountable, even though much time has passed. As stated in *Al Yamani* above, at paragraph 38:
>
> > [38] While the respondent does not challenge the applicant's assertions that he provided assistance to Canadian authorities, by providing information, it is unlikely that the Canadian public would agree that such assistance should be sufficient to grant an individual a full pardon from such crimes.

[47] Justice Mosley also relied upon the decision of Mr. Justice Sean Harrington in *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516, 204 ACWS (3d) 602 [*Beltran*]. This was a case where the Minister's delay was considered inexcusable and, similarly, the Minister had been aware of all the relevant information for 22 years. At paragraph 54, Justice Harrington reached this conclusion:

> [54] It is a fundamental principle of natural justice and the rule of law under which we live that a person be given a fair opportunity to answer the case against him. That opportunity has been lost. It was abusive to issue an opinion in 2009 that Mr. Beltran is inadmissible considering that the authorities had been aware of his situation for 22 years.

[48] In addition, Justice Mosley was critical that the Minister acted at the last moment effectively pre-empting a judicial hearing on an application for *mandamus* that may have resulted in a positive remedy for the Mr. Almrei in his efforts to obtain permanent resident status.

[49] The learned Judge also found Mr. Almrei's exceptional circumstances to be relevant – he had been detained under strict custody for over seven years in a maximum security in a provincial remand facility under harsh conditions and thereafter released under very strict limitations. Such treatment exceeded any prison sentence or other punishment that could have been expected had he been charged and convicted for the offences that were now being used to serve as a basis for the inadmissibility proceeding. Such facts he concluded engages the liberty interest of the individual under section 7 of the *Charter*.

[50] Justice Mosley was not satisfied that Mr. Almrei had an alternative remedy available to him that was an adequate effective recourse to the allegations against him under paragraph 37(1)(b) of the Act.

[51] The Court notes that, despite the foregoing circumstances in *Almrei* that are of considerably higher probative persuasion than those in the present matter, Justice Mosley emphasized on a number of occasions the exceptional nature of the intervening order which he concluded was only met in the final analysis of all the circumstances.

[52] The Applicant cites other cases in support of his position. In *Tursunbayev*, Mr. Justice James Russell accepted an abuse of process argument at an early stage of the admissibility

process. However, it should be noted that this was a case of disguised extradition involving an allegation of bad faith against the Minister. This involves entirely different considerations warranting an early intervention than are raised in this matter. *United States of America v Tollman*, 271 DLR (4th) 578, 2006 OJ 3672 (QL) (ONSCJ), also cited by the Applicant, is another decision concerning an allegation of the Minister's bad faith involving disguised extradition.

[53] More recently in *Kanagaratnam (2013)*, Mr. Justice Michael Manson granted a stay prohibiting a Ministerial delegate from making a decision on whether the applicant posed a danger to the security of Canada, where there had been a twelve year delay between the finding that the applicant faced a risk of torture and the Ministerial delegate's assessment. It is to be noted that no action whatsoever was taken for 11 years before the Minister took action and the applicant received the CBSA's position. That case is comparable to those of *Beltran* and *Almrei* where there was an inordinate delay in bringing forward what appeared to be a new or abandoned matter, somewhat analogous to the line of reasoning in the doctrine of laches. That is not the case here as there were ongoing processes where the delay relates to the various steps that occurred without any sense that the matter had been dropped.

[54] In *John Doe*, Mr. Justice Michael Phelan granted a stay in the middle of a hearing noting that "a continuance of proceedings may well cause prejudice to both the individual and to the public interest by continuing a process which may be found to be abusive." This was a case where the IRB had admitted exculpatory evidence from several witnesses where the applicant would not be in a position to cross-examine them because the government considered it too

costly to require their appearance, which raised a serious issue therefore of procedural fairness. I find no serious procedural fairness issues arising in this matter.

[55] In *Parekh*, the respondent pled guilty to making false representations on his family's citizenship applications in 2002. The Minister of Citizenship and Immigration delayed bringing citizenship revocation proceedings for about five years. The Court concluded that there was an abuse of process because, as in this case, the Minister alone bore responsibility for the delay, which was unexplained and unwarranted, the respondents admitted all the relevant facts, the proceeding was not complex, and the delay was not a result of procedural safeguards for the respondent. The Court concluded that the proceedings were inordinate and unconscionable to the point of being oppressive.

[56] The *Parekh* case is distinguishable from the facts in this matter, which concerns inadmissibility proceedings arising from the Applicant's involvement in a terrorist organization and having been the subject of protracted administrative processes. There was no evidence of the severe prejudice to the Applicant and to that extent it would appear to be an outlier in the cases based on delay to establish abuse of process. In *Beltran*, based on the *Blencoe* decision, the Court noted at paragraph 36 that "a state caused delay, without more, will not warrant a stay as an abuse of process at common law" and that "there must be proof of significant prejudice." Certainly in this matter the Applicant is alleging both procedural and severe psychological prejudicial consequences.

D. *Application to the Present Case*

(1) Serious Issue

(a) *Delay*

[57] The Applicant submits that the process was unreasonably delayed for almost 12 years without any inherent reason for the delay and without the Applicant being responsible for any of the delay. While it is beyond question that the Applicant has been a victim of some unaccounted delay approaching what may be considered unreasonable, I find his submission significantly overstated the length of the delay, or the fact that he participated extensively in the process.

[58] There was some unaccounted delay between the period when the Applicant was first interviewed on June 13, 2000, when the Applicant described his involvement with the MQM-A, and some unstated date in 2003 when CIC provided him the fairness letter enclosing its intended recommendation (approximately three years later). I would estimate the unaccounted delay being two years, if the processing was operating efficiently without backlog. The Respondent offered no evidence to explain this delay.

[59] However, with respect to the more than five year delay from when the Applicant received his fairness letter in 2003 to the completion of processing the inadmissibility issue through all of the stages of the IRB, IAD and leave application ending in December 2008, I find that the delay was not untoward and mostly not attributable to the Minister.

[60] Thereafter, while there was considerable delay, there is no question that the test to be applied in a Ministerial Relief decision was in flux due to the decisions in the *Agraira* cases as they progressed through the three court levels to be concluded in the Supreme Court. Justice Mosley of the Federal Court, in setting aside the Minister's decision in *Agraira FC*, certified a question that went to the heart of the Minister's exercise of discretion, i.e. whether the Minister was required to consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest. In doing so, he confirmed that the issue was serious and one of general importance.

[61] The decision of the Federal Court of Appeal in *Agraira FCA* confirmed the wisdom in holding off on making decisions that were not at least clear on their facts, thereby overturning the Federal Court decision and removing humanitarian and compassionate factors from the test. As soon as leave was granted six months later to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada, the appropriate test remained in flux until modified by the final decision of the Supreme Court.

[62] In the face of the *Agraira* leave application, the CBSA decided to proceed with the new fairness letter in 2012. It is noted above that situation of delay was explained by the unsettled determination of the Minister's test that remained unresolved by the decision of the Federal Court of Appeal. I think the delay was reasonable in the circumstances up to this point given the complications of proceeding to render decisions based on a standard that was in flux and the subsequent litigation that could arise should that standard be modified and an attempt made to issue a new decision.

[63] However in doing so, the Minister was aware that leave had been granted to appeal the decision of the Federal Court of Appeal to the Supreme Court, meaning that the question of the proper test for Ministerial Relief was one of national importance on which there was some doubt about its correctness. There is probably less justification in declining to proceed to make a decision when it had the Federal Court of Appeal decision in hand.

[64] However, it is important to note that the Applicant appears to have agreed to and contributed to the Minister's delaying exercise of Ministerial Relief. He requested extensions to make submissions twice: on December 18, 2012 and on January 9, 2013. The CBSA granted both requests. On February 21, 2013, the Applicant responded to the second CBSA disclosure with further submissions, which it is understood would further delay the Minister's decision. Most importantly, he requested that a decision by the Minister be delayed until a Supreme Court ruling was issued in *Agraira*.

[65] On June 20, 2013, the Supreme Court released its decision. There is certainly some unaccounted delay on CBSA's part as it waited until March 10, 2015 (a further 20 months) before providing the third fairness letter to the Applicant. No explanation was provided for this delay. While I expect there may have been a backlog of similar Ministerial Relief cases standing in abeyance awaiting the Supreme Court decision in *Agraira*, without evidence this remains an unexplained delay.

[66] In any event, from March 10, 2015 onward, the Applicant contributed in deferring the Minister's decision. On April 6, 2015, the Applicant requested an extension to provide

submissions, which CBSA granted on April 8, 2015. The Applicant's submissions in response to CBSA's latest disclosure were received on June 9, 2015. It should be noted that it was only at this time that the abuse of process issue was raised.

[67] The Applicant thereafter requested a three-week extension to allow for further submissions, which was granted by the CBSA. The Applicant's further submissions were received on July 2, 2015 submitting that "the delay of 13 years was so extreme and the prejudice so severe that the Minister must exercise his discretion and allow the application." The July 2 submissions are similar to those made in this stay application.

[68] If the Minister decides to decline relief in the decision that is the subject of a judicial review application, then the same issues will be central to the application, as are being raised in the underlying application to this stay proceeding.

[69] It is also noted that the late filing of the submissions raised new and considerably more complex issues for consideration, which in turn would not have enabled the Minister to provide a target date for the Ministerial Relief decision.

[70] Moreover, this case demonstrates some of the unique challenges facing the administrators in this area during the relevant time period. There are obvious quantitative challenges raised by the large number of applications and procedures. In addition, the issues raised were often complex, multifaceted and interconnected, not to mention invariably involving interventions by the Federal Court, and sometimes concerning questions of national importance.

[71] In conclusion, while there was some untoward delay in the processing of the Applicant's Ministerial Relief application, I do not find that the circumstances of the delay in this case approaches anything described in the cases relied upon by the Applicant or that the delay is of an exceptional nature, particularly having regard to the serious nature of the inadmissibility allegations made against the Applicant.

[72] There is no basis therefore, to conclude that the delay, absent consideration of other issues such as serious prejudice to the Applicant or the public interest involving the enjoining of the exercise of Ministerial Relief, could give rise to a claim of abuse of process.

(b) *Procedural Prejudice to the Applicant*

[73] The Applicant claims that the most recent fairness letter raised new allegations that the Applicant was involved in the MQM-A in an in-depth way. He analogizes his situation to that in *Beltran* of the Minister keeping information up its sleeve for 20 years to reassess the same information. He claims that he would have been in a much better position to lead evidence to rebut these allegations had they been raised in previous proceedings.

[74] After carefully reviewing the allegations in the three fairness letters, I do not agree that new issues were raised. The Applicant provided a chart selecting the statements in the 2008 recommendation for comparison with statements in the 2015 recommendation, which I set out below:

2008 Recommendation	2015 Recommendation
Mr. Memon aware of MQM-A's involvement in violence, as testified at IRB hearing that he was aware of violence, specifically fistfights, taking place between the MQM factions, and also that "certain party members had taken to criminal acts to sustain themselves." Mr. Memon stated in an interview with the CBSA that although there was no violence in his area, he was aware of instances in other areas.	Given Mr. Memon's level of involvement with the MQM-A, which included functioning in a support role to the local president, his level of education and period of involvement in Karachi, the historical stronghold of the organization, it is unreasonable that Mr. Memon would not have been aware of the MQM-A's involvement in terrorist activities.
Mr. Memon's involvement with the MQM-A is more extensive than he admits, as in IRB testimony he states his membership in 1994 resulted from the fact that "he had done a lot for the party and for the country."	Mr. Memon voluntarily became involved with the MQM-A gaining what he termed official membership after having already been affiliated with the organization for two years. He was promoted to higher responsibilities within his local unit, eventually being responsible for activities such as demonstrations. He was relied heavily upon by his unit, including the local president, to whom Mr. Memon functioned in a support capacity. Mr. Memon stated himself that the unit used him extensively, focusing on his high level of education and skills. Given the level of education Mr. Memon had attained prior to becoming involved in the MQM-A, coupled with the level of support he provided to the organization, it is reasonable to conclude that he was considered a valuable asset by, at minimum, his local leadership.
Mr. Memon significantly committed to the organization, as he resumed his activities after he was detained and tortured, and after he had fled Karachi and gone to a different part of the country. This demonstrates a considerable level of commitment and dedication to the MQM-A and its goals.	Mr. Memon consistently displayed commitment to the MQM-A by resuming his involvement after each respective detention, kidnapping or episode of physical abuse. It is clear from the information on record that he elevated the needs of the organization above his own safety at the time. Moreover, Mr. Memon continued his involvement in the MQM-A even after having to relocate from Karachi to Hyderabad. This action further

	demonstrates his commitment to the organization as he continued to work for the MQM-A even after leaving his home unit. Mr. Memon provided a broad range of support to the organization, in fact not limited to his local unit, but also in relation to operations in the Hyderabad area.

[75] As far as I am able to determine, all three fairness letters are based upon information provided by the Applicant. On that premise alone, I do not see how any issue of a new allegation that takes the Applicant by surprise could possibly arise.

[76] I agree that the opinions expressed on the basis of the Applicant's statements are somewhat more critical of his involvement in the MQM-A, but they do not qualitatively change what the reports say.

[77] For example in the upper row, the remarks in 2008 recounting the acknowledgment by the Applicant that certain criminal acts were undertaken by the MQM-A and that violence occurred in other areas form the basis for the conclusion in 2015 that "it is not unreasonable that he would not have been aware of the MQM-A's involvement in terrorist activities" given that this is the conclusion that must be found by the Minister for inadmissibility. In addition, the statement in 2015 that the Applicant functioned in a support role to the local president because of his high level of education is found elsewhere in the 2008 letter: "Mr. Memon indicated that he served as "support worker" to the unit president, Zaheer Ahmed, due to his level of education."

[78] In the second row, the statement in 2015 that "[he] was relied heavily upon by his unit, including the local president, to whom Mr. Memon functioned in a support capacity," assuming

that is the new allegation being complained of by the Applicant, is supported by his statements to the CBSA. In addition, the fairness letter of 2008 includes similar statements, such as "Mr. Memon enjoyed a position of responsibility and trust within the MQM-A, drafting MQM-A propaganda, as well as organizing and leading protests and fundraising drives".

[79] In the circumstances, if the Applicant thought he did not enjoy a position of responsibility and trust with the president for whom he was a support worker, this is something that ought to have been addressed by him. In fact, he obtained a letter from the MQM International Secretariat for the purpose of his 2013 submissions contradicting this evidence.

[80] To the extent that the Applicant thought that the CBSA's opinion that "he was considered a valuable asset by his local leadership" was not a reasonable inference, his counsel could have challenged this finding as being speculative. In any event, I do not find that the opinion adds anything to what was contained in the 2008 fairness letter on this issue.

[81] In addition, it appears that the CBSA abandoned the significant negative conclusion in the 2008 application that, "it is likely that Mr. Memon's membership in support for the organization continued on his arrival to Canada." Such a conclusion would have strongly supported a denial of relief by the Minister.

[82] The third and final finding concerning the Applicant's "commitment to the organization" is found in the 2008 recommendation. The underlying statements of commitment, such as continuing to work after being kidnapped and tortured twice and after fleeing to Karachi in a

different part of the country, is found in the 2008 report. I do not see any qualitative difference between the statements.

[83] Finally, as an overarching response to the Applicant's submissions, it appears that these new issues were allegedly raised for the first time in the Applicant's 2015 response. If the process goes forward, the CBSA would have the option to withdraw the additional inferences prior to placing the final recommendation before the Minister for consideration. In regard to the procedural unfairness, I conclude that these allegations are premature.

(c) *Emotional prejudice of the Applicant*

[84] The Applicant and his wife have filed affidavits describing emotional, psychological, and practical hardships that they claim arose from the uncertainty surrounding the Applicant's immigration status in Canada. The principal evidence in support is an assessment by a psychologist diagnosing the Applicant as suffering from a "major Depressive Disorder" which he categorizes in the "severe" range and includes significant agitation and suicidal intention.

[85] The principal problem with this forensic report (defined as a report obtained for the purpose of litigation) is the absence of any underlying medical records describing a chronic problem over time for which the Applicant has been treated by a physician. The Applicant only met with this particular psychologist for two hour-long meetings prior to the drafting of the June 24, 2015 report which was ordered by counsel for the purpose of this and related proceedings.

[86] Where claims of severe emotional depression over a very lengthy period of time are concerned, the Court's expectation would be that medical information from family practitioners, who if sufficiently concerned would have prescribed appropriate treatment, would have been submitted to the Court. If extremely serious, the Applicant would have been referred to a psychologist or psychiatrist for assessment and treatment. There would have been medical records available from treating physicians, hospitals or drugstores, as these are normally provided to the court in litigation were claims are made based upon the severe emotional condition of the patient.

[87] Relying on the fact that Dr. Weir made no mention of what treatment the Applicant received, I conclude that none was provided over the previous 12 years, or even since 2008 when the Applicant claims that the medical condition first arose. The analysis was based upon a self-reporting questionnaire. I agree with the Respondent that the Applicant is highly motivated to remain in Canada. Moreover, if the Applicant was susceptible to this type of severe emotional condition, at the sufficiently exceptional level to meet the high threshold of an abuse of process, one would have thought that it would have manifested itself long before 12 years had passed and that it would have required earlier medical attention.

[88] I also agree with the Respondent's submissions that the report appears to have been made to support legal arguments rather than representing a comprehensive analysis and long standing treatment plan. The psychologist offers opinions that the deportation would be "catastrophic" for the Applicant. On the other hand, the physician opines that "where a positive resolution to Mr. Memon's immigration situation … of a sense of a secure immigration status in Canada … a

prognosis would be favourable, especially as they both present as people with considerable inner resilience."

[89] I have expressed my view in the past that the Canadian legal system has extensive experience in dealing with forensic experts testifying on matters relating to technical evidence for the purpose of assisting courts in their determinations (*Czesak v Canada (Citizenship and Immigration*), 2013 FC 1149 at paras 37-40, 235 ACWS (3d) 1054). From that experience, the courts have developed what I would describe as a highly guarded and cautionary view on conclusions of forensic experts which have not undergone a rigorous validation process under court procedures. This would be all the more so for medical opinions when they are not based upon a pre-existing medical file, as is normally the situation when they are offered.

[90] This skepticism is accounted for in an adversarial context, because the court normally faces diametrically opposing opinions from experts. This is particularly the situation where physicians opine on the psychological frailties of the claimant where no objective corroborating evidence exists to support the claims found in the medical files upon which the opinion is based. The lack of probative value of such reports is even more so where the physician appears to be advocating on the Applicant's behalf in the guise of an opinion on the very issues that determine the case.

[91] I conclude that the evidence is insufficient to support the Applicant's claims of severe emotional problems and other hardship beyond those suffered by unsuccessful refugee claimants facing the prospect of being removed from Canada. I am not suggesting in any way that such

emotional hardship is not likely in a removal case or that there may be troubles of anxiety or depression. However, the jurisprudence repeats over and over again that this rarely meets the threshold for serious consideration unless demonstrated to be exceptional and usually relating to the personal safety of the Applicant upon return to the country of origin, bearing in mind that the Minister is not carrying out an H&C application.

[92] In addition, while sympathetic to the situation of the Applicant, I note Dr. Weir's opinion that the Applicant demonstrates considerable inner resilience. I think it cannot be predicted that these problems are permanent, such that the strength of character of the Applicant would prevail upon his return to Pakistan.

(d) *Conclusion on Serious Issue*

[93] The delay in processing the Ministerial Relief application was not acceptable as it exceeded the reasonable norms. However, much of the delay was accounted for or explained by the intervening procedures, the extenuating circumstances surrounding the Minister's legal test under section 34 of the Act and the Applicant's own contribution to the delay. I cannot find that a serious issue exists and that the delay reaches an oppressive stage without more supporting evidence.

[94] The evidence on prejudice does not support the Applicant's claim for an abuse of process. The allegations of procedural unfairness do not attain a level of a serious issue. Furthermore, in considering an abuse of process claim at the serious issue stage, the Applicant's claims must be balanced against other factors underlying a Ministerial Relief application. In

particular, the objective of the protection and safety of Canadian society by facilitating removal of foreign nationals who constitute a risk to Canadian safety and security must be considered. This is a factor where the underlying evidence relates to being a member of a terrorist organization. Bearing in mind the exceptional nature of the Applicant's claim and taking the matter as a whole, compared against the backdrop of the jurisprudence in this area, I conclude that the Applicant has not established that there is a serious issue of an abuse of process.

(2) Irreparable harm and balance of convenience

[95] In light of the Court's preceding analysis on the absence of procedural or emotional, psychological and practical prejudice, the Applicant has not established by clear and probative evidence that he would likely suffer irreparable harm in the intervening period until the underlying application is determined.

[96] I also agree with the Respondent's submission that the delay in accompanying emotional distress will continue, whether or not the stay is granted until the underlying application for leave and for judicial review is finally determined.

[97] Moreover, the Court finds that an alternative remedy exists by the very nature of the Applicant's latest submissions to the Minister. By raising the issue of abuse of process with similar particulars raised in this matter, this issue will squarely arise in any judicial review application taken from an unsuccessful determination by the Minister. In such circumstances, the Court would be aware of the CBSA's response to the Applicant's latest submissions and the Minister's decision.

[98] As a result, not only is there no need for the prohibition application, but by the Minister expediting the relief determination process, which is reasonable in the circumstances, and assuming the two applications would, if necessary, be heard at the same time, the Applicant avoids the risk of greater delay. This is meant for the Applicant to avoid any untoward risk of failing to stay the Ministerial Relief, only to occasion further delay as that process would continue to completion and thereafter be the subject of a judicial challenge that may follow from an unsuccessful result. This would meet both parties' objectives: the Applicant's desire having a speedy determination of his situation to limit the anxiety and depression caused by delay of the final decision; and the Minister's desire to remove inadmissible claimants not deserving of relief under subsection 34(2) of the Act as soon as possible.

[99] Given the parties' concern for avoiding further untoward delay, in addition to my conclusions on serious issue and irreparable harm, the balance of convenience would favour the Respondent.

V. Conclusion

[100] For all of the foregoing reasons, the motion is dismissed. The Respondent did not seek costs and none will be ordered.

ORDER

THIS COURT ORDERS that the motion is dismissed and no costs are ordered.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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