Federal Court of Appeal | Cour d'appel fédérale

Date: 20190819

Docket: A-153-18

Citation: 2019 FCA 223

CORAM: **WEBB J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

REEM YOUSEF SAEED KREISHAN
GIOVANI ACEVEDO ARANGO (AKA GIOVANNI ACEVEDO ARANGO)
CRISTIAN CAMILO ACEVEDO GOMEZ
MOHAMMED ZAKIR HOSSAIN
SUAD SULIEMAN ODEH ABU SHABAB
ABDALLA MAHMOUD ABOUSHABAB
MAHA MAHMOUD MOHAMED OUDAH
ALY MAHMOUD MOHAMED OUDAH
MOHAMED MAHMOUD OUDAH
TAGI MAHMOUD MOHAMED ABOSHABAB
HUDA MARWAN KASHTEM
MHD NAZIR DEIRANI
BARA'A DERANI

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on October 2, 2018.

Judgment delivered at Ottawa, Ontario, on August 19, 2019.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WEBB J.A.
LASKIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190819

Docket: A-153-18

Citation: 2019 FCA 223

CORAM: **WEBB J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

REEM YOUSEF SAEED KREISHAN
GIOVANI ACEVEDO ARANGO (AKA GIOVANNI ACEVEDO ARANGO)
CRISTIAN CAMILO ACEVEDO GOMEZ
MOHAMMED ZAKIR HOSSAIN
SUAD SULIEMAN ODEH ABU SHABAB
ABDALLA MAHMOUD ABOUSHABAB
MAHA MAHMOUD MOHAMED OUDAH
ALY MAHMOUD MOHAMED OUDAH
MOHAMED MAHMOUD OUDAH
TAGI MAHMOUD MOHAMED ABOSHABAB
HUDA MARWAN KASHTEM
MHD NAZIR DEIRANI
BARA'A DERANI

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Table of Contents

RENNIE J.A.

I. Overview

[1] Under the safe third country concept in refugee law, claims for asylum may be rejected on the basis that the claimant should have sought protection in a country other than where the claim was made. An underlying objective of this concept is to deter asylum shopping (see Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection" (2003) 15:4 I.J.R.L. 567 at 568-71). In the context of individual claims for protection, the failure to claim protection in the first safe country of arrival may also bear on the credibility of the claimant (*Nadesan v. Canada (Citizenship and Immigration)*, 2015 FC 104 at para. 11; *Ayala Sosa v. Canada (Citizenship and Immigration)*, 2014 FC 428 at para. 34).

[2] Parliament has legislated the safe third country concept into Canadian law. Subsection 102(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) empowers the Governor in Council to designate countries that comply with international standards relating to the treatment of refugees as safe third countries. Refugee claimants coming to Canada from a designated safe third country cannot have their asylum claims determined here (IRPA, s. 101(1)(*e*)).

[3] To date the United States of America is the only country designated as a safe third country (*Immigration and Refugee Protection Regulations* (SOR/2002-227), s. 159.3 (IRPA Regulations)). Following that designation, the United States and Canada signed the *Agreement between the Government of Canada and the Government of the United States of America for*

Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (otherwise known as the "Safe Third Country Agreement" (STCA)). The STCA came into effect on December 29, 2004.

[4] The preamble to the STCA states that its objectives include the orderly handling of asylum applications, enhanced burden sharing and cooperation between Canada and the United States, and the avoidance of direct or indirect breaches of the principle of non-*refoulement*. The preamble recognizes the legal obligations of Canada and the United States under the principle of non-*refoulement*, set out in the 1951 *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150 (Convention) and the 1967 *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267. The principle of non-*refoulement* prohibits the removal of refugees to a territory where they are at risk of human rights violations, and has been described as the cornerstone of the international refugee protection regime (*Németh v. Canada (Justice)*, 2010 SCC 56 at paras. 18-19, [2010] 3 S.C.R. 281 (*Németh*)).

[5] Under the STCA, refugee claimants arriving from the United States at a Canadian land border port of entry cannot seek protection here. Responsibility over their claim falls to the United States, it being the first "safe country" in which they arrived. Claimants arriving from the United States are returned to the United States at the Canadian border and directed to make their claim for asylum there. I note, parenthetically, that claimants arriving in Canada otherwise than at a land border port of entry (*e.g.*, via an irregular border crossing or by air) are exempt from the STCA. Their claims for protection are assessed in the same manner as those of refugee claimants arriving from other countries.

[6] However, Canada retains responsibility for determining the refugee status of claimants arriving from the United States who have family members in Canada or who are unaccompanied minors. These claimants enter Canada and have their refugee status determined by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) (IRPA Regulations, s. 159.5). This appeal concerns those claimants – who I will refer to as "STCA-excepted claimants" – and the refugee determination process available to them in Canada.

[7] If an STCA-excepted claimant's application for asylum is rejected by the RPD, recourse lies in an application for leave and judicial review of the RPD decision in the Federal Court (IRPA, s. 72). Other failed claimants, however, have a right of appeal to the Refugee Appeal Division (RAD), accompanied by a statutory stay of removal. The unavailability of a right of appeal and stay pending its disposition for STCA-excepted claimants lies at the heart of this appeal.

[8] The appellants are STCA-excepted asylum seekers whose claims were rejected by the RPD. They are Bangladeshi, Colombian, Jordanian and Syrian citizens and stateless Palestinians who, after transiting through the United States, presented claims for protection at a Canadian land border port of entry. Asserting that they had family members in Canada, they were allowed into Canada to advance their claims before the RPD.

[9] The appellants' claims were heard and rejected by the RPD. They appealed the negative RPD decisions to the RAD. The RAD dismissed the appeals on jurisdictional grounds, as under paragraph 110(2)(*d*) of the IRPA the appellants had no right of appeal.

[10] All of the appellants – except Ms. Kreishan – received leave to judicially review the RPD decisions dismissing their claims. These challenges were resolved in favour of the appellants, with the exception of that of Mr. Hossain, who was unsuccessful in his motion for a stay of removal, and was deported to Bangladesh.

[11] The appellants also launched parallel applications in the Federal Court for leave to judicially review the RAD's dismissals of their appeals.

[12] In the appellants' challenges to the RAD decisions, leave was granted and the applications were consolidated. The appellants contended before the Federal Court that the denial of a right of appeal to the RAD contained in paragraph 110(2)(*d*) of the IRPA – "the RAD bar" – infringed section 7 of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (Charter). The appellants argued that their section 7 interests were engaged by the risk of *refoulement* at the end of the refugee determination process, the enhanced likelihood of *refoulement* for STCA-excepted claimants relative to those with access to the RAD and the psychological stress associated with the absence of a right of appeal. They further argued that the substantive protections of section 7 were violated by the RAD bar on the basis that it is arbitrary and overbroad in relation to its purpose, with grossly disproportionate effect, and that this infringement is not saved by section 1 of the Charter.

[13] These arguments were dismissed by the Federal Court (*Kreishan v. Canada (Citizenship and Immigration)*, 2018 FC 481, *per* Heneghan J. (*Kreishan*)), and have been advanced again on appeal.

[14] I approach the appellants' arguments from the threshold proposition that determining whether a statutory provision is compliant with section 7 of the Charter is a contextual exercise (see *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at para. 71, [2000] 2 S.C.R. 519 (and cases cited therein); *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 20, [2007] 1 S.C.R. 350 (*Charkaoui*); *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at p. 732 (*Chiarelli*); *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at 7-8). This caution has particular resonance when considering the IRPA, which provides for different streams of refugee claimants and different levels and types of review, that together form an integrated refugee determination system. Within this system there are elements of administrative, quasi-judicial, judicial and ministerial discretion which provide recourse to refugee claimants, at times sequentially, and at times concurrently. It is a *process* for the determination of refugee claims, and for that reason, it is imperative to situate the RAD bar under paragraph 110(2)(*d*) in the context of that process. This is particularly so where the argument, as it is here, is that the denial of a right to appeal violates both procedural and substantive principles of fundamental justice.

[15] The appellants' argument is ultimately predicated on the difference in treatment between different streams of asylum claimants. For that reason, any analysis requires an understanding of the process governing the adjudication of the claims of what I will call "regular claimants" –

those arriving to Canada otherwise than at a land border port of entry from the United States. I will then identify how, in that process, the treatment of STCA-excepted claimants differs from that of regular claimants, followed by a review of the purpose and powers of the RAD, the appellate body to which the appellants are denied access.

[16] Thereafter, and with the benefit of that context, I will turn to the appellants' section 7 arguments. My analysis will address the jurisprudence of the Supreme Court of Canada on section 7 in its substantive and procedural aspects and its intersection with psychological harm and the risk of *refoulement*, to determine whether the RAD bar engages the appellants' section 7 rights.

[17] For the reasons which follow, I have concluded that paragraph 110(2)(*d*) of the IRPA does not engage section 7.

II. The refugee determination process

[18] If regular refugee claimants are unsuccessful before the RPD, they may appeal to the RAD. If their appeal is unsuccessful, further recourse lies in an application for leave to commence judicial review in the Federal Court. Leave will be granted where a "fairly arguable case" is disclosed (*Bains v. Canada (Minister of Employment and Immigration)* (1990), 47 Admin. L.R. 317; 109 N.R. 239 (F.C.A.)).

[19] If the failed claimant is unsuccessful in their application to obtain leave to commence judicial review of the RAD decision, or alternatively, if leave is granted but the RAD decision is

maintained by the Federal Court, they may, with certain exceptions, apply for a pre-removal risk assessment (PRRA). If unsuccessful before the PRRA officer, that is to say the PRRA officer concludes that there is no new evidence of risk or a change in country conditions since the RPD decision, the claimant may bring an application for leave to commence a judicial review application of the PRRA officer's decision.

[20] Regular claimants whose claims for protection are rejected by the RPD have an automatic stay of removal pending the disposition of their appeal and leave application (IRPA Regulations, s. 231(1)).

[21] If unsuccessful before the PRRA officer, a failed claimant will receive a Notice to Report to a removals officer to make arrangements for removal from Canada. Faced with a Notice to Report, a failed claimant may request a deferral of removal. The decision of a removals officer not to defer removal is a decision or order within the scope of section 2 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, and can be the basis for a further application for leave to commence judicial review in the Federal Court. It is usually accompanied by a motion for a stay of the removal order pending disposition of the application for leave to commence judicial review.

[22] Parallel to these proceedings, or in practice, contemporaneous with a request that the removal order be deferred, a claimant may apply under section 25.1 of the IRPA, requesting that the Minister dispense with compliance of provisions of the Act or Regulations on humanitarian and compassionate grounds. A claimant may bring a further application for leave to commence judicial review of a refusal of a section 25.1 application, and concurrently seek a stay from the

Federal Court pending disposition of the leave application (see *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 for consideration of the scope of the discretion under this section).

[23] There are points of both convergence and divergence in the process applicable to regular claimants and STCA-excepted claimants. Identification of these points brings the appellants' argument that section 7 is engaged into sharper relief.

[24] First, the merits of all claims for protection of all claimants, regardless of how they entered Canada, are assessed in substantively the same manner. Where, as here, the determination of refugee status involves an issue of credibility, the claimant is entitled to an oral hearing before an independent and impartial decision maker – the RPD. That is the teaching of *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (*Singh*). I am, of course, leaving aside special cases that are not pertinent here, such as those that are excluded from the refugee determination process entirely by Article 1F of the 1951 Convention and section 98 of the IRPA (see *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 (*Febles*).

[25] The second observation is that STCA-excepted claimants such as the appellants do not have access to a statutory stay of removal pending an application for leave to judicially review a negative RPD decision (IRPA Regulations, s. 231(1)). They must seek a stay in the Federal Court pending disposition of the application for leave, and if leave is granted, pending disposition of the application for judicial review on the merits. This requirement underpins the

appellants' argument of psychological stress and anxiety. Unlike regular claimants who have the certainty of a legislative stay pending their appeal to the RAD and subsequent application for leave to apply for judicial review of a RAD decision, the appellants have no such certainty and are forced to seek a stay from the Federal Court.

[26] The third observation is that following a negative RPD decision (in the case of an STCA-excepted claimant) or dismissal of an application for leave to commence judicial review of a negative RAD ruling (in the case of a regular claimant), the streams of failed claimants merge. From that point on there are no distinctions. Failed claimants, regardless of the country of origin, may follow the same path – request for a PRRA, request for deferral of removal, a section 25.1 application, each with their associated leave and stay applications. There are circumstances when claims for protection have been rejected under which both STCA-excepted claimants and regular claimants may not receive a PRRA. Paragraph 112(2)(*b.1*), for example, precludes all failed claimants, regardless of which stream they are in, from applying for a PRRA until twelve months have passed since the rejection of their claim for refugee protection.

[27] The fourth observation is that the appellants are not the only category of claimants for whom there is no right of appeal. Decisions to allow or reject a claim for refugee protection by a designated foreign national (IRPA, s. 110(2)(*a*)), and decisions rejecting claims for refugee protection with no credible basis or that are manifestly unfounded (IRPA, s. 110(2)(*c*)) may not be appealed. As noted earlier, some claimants have no access whatsoever to the refugee determination process (s. 98 of the IRPA and Article 1F of the Convention).

A. Legislative history of the RAD bar

[28] The appellants' argument is that the availability of a right of appeal for some, but not all claimants, renders their pathway through the refugee determination process unconstitutional. As in all cases where the constitutionality of a statutory provision is challenged, context is critical, and for that reason I turn to the legislative origins, purposes and powers of the RAD.

[29] I begin with the legislative history.

[30] Under the *Immigration Act*, R.S.C. 1985, c. I-2, which preceded the IRPA, refugee claims were decided by two members of the Convention Refugee Determination Division of the IRB. If either member decided in the claimant's favour, protection was granted. Unsuccessful claimants could make an application for leave for judicial review in the Federal Court. There was no appeal, to any tribunal.

[31] In 2001, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger* (now the IRPA), was introduced in Parliament (Bill C-11). Under its scheme, refugee claims would be determined by a single-member panel of the RPD with a right of appeal to a newly established appellate tribunal (the RAD).

[32] Bill C-11 received Royal Assent in November 2001, with its provisions to come into force on days to be fixed by order of the Governor in Council. However, in April 2002, the Minister of Citizenship and Immigration announced that the implementation of the RAD would be delayed

due to “pressures on the system” (CIC Press Release, “Refugee Appeal Division Implementation Delayed,” 29 April 2002). As a result, following the coming into force of many of the IRPA’s provisions in June 2002 (*Order Fixing June 28, 2002 as the Date of the Coming into Force of Certain Provisions of the Act*, SI/2002-97), refugee claims were heard by a single member of the RPD. In the absence of the RAD, section 231 of the Regulations — which also came into force in June 2002 — provided for a statutory stay of removal where leave to judicially review a negative RPD decision was sought.

[33] In 2010, the *Balanced Refugee Reform Act*, S.C. 2010, c. 8 (BRRA), was passed by Parliament. The BRRA provided that the IRPA’s RAD provisions would come into force within two years of Royal Assent. The BRRA received Royal Assent in June of that year.

[34] Two years later, in June 2012, Bill C-31, *Protecting Canada’s Immigration System Act*, S.C. 2012, c. 17 (PCISA), also received Royal Assent. The PCISA added certain restrictions on the right of appeal to the RAD. The bill’s summary states that the IRPA was to be amended to “provide for the expediting of the processing of refugee protection claims”.

[35] Of importance for the purposes of this appeal, section 110 of the IRPA, which established the RAD, was amended by the PCISA to include paragraph 110(2)(*d*). This paragraph, which is the target of the declaration of unconstitutionality, provides that no appeal to the RAD is available for STCA-excepted claimants:

Restriction on appeals	**Restriction**
110(2) No appeal may be made in respect of any of the following:	110(2) Ne sont pas susceptibles d’appel :

[…]	…
(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if	*d)* sous réserve des règlements, la décision de la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois :
(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and	(i) est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à un accord visé à l'alinéa 102(2)d),
(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;	(ii) n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c);

[36] The Regulations were also amended in 2012 (SOR/2012-272) to account for the implementation of the RAD. Subsection 231(1) of the Regulations, under which a removal order was stayed where a failed RPD claimant sought leave to file an application for judicial review of an RPD decision, was amended to limit the statutory stay to an application for judicial review of a RAD decision. In practical terms, this meant that there was no automatic stay of removal for failed STCA-excepted applicants, such as the appellants, who did not have recourse to the RAD.

[37] The Regulatory Impact Analysis Statement to SOR/2012-272 stated that the amendment to subsection 231(1) of the Regulations was intended to ensure that STCA-excepted claimants would not be eligible for an automatic stay of removal if they sought leave to judicially review a

negative RPD decision. This would "support the Government's goals of expedited processing and removal of certain classes of failed claimants."

[38] To summarize, during the 10-year period between the coming into force of the IRPA in 2002 and the implementation of the RAD in June of 2012 under the BRRA, all claimants, regardless of whether they transited through a safe country, had their claims determined by a single member of the RPD. All claimants could bring applications to the Federal Court for leave to judicially review the RPD decision and a stay of removal pending disposition of the leave application. At no time was the RAD operational without the restrictions on appeal under subsection 110(2); put otherwise, persons in the position of the claimants, as failed STCA-excepted claimants, never had access to the RAD.

[39] With the advent of the RAD in 2012, most but not all claimants can appeal a negative RPD decision to the RAD. For these failed claimants, removal is deferred pending disposition of both the appeal and the application for leave to commence judicial review (IRPA Regulations, s. 231).

[40] In contrast, STCA-excepted claimants who are unsuccessful before the RPD can bring an application for leave to judicially review the RPD decision. They may, in some cases, request a PRRA and a stay from the Federal Court pending its disposition. Again, should the PRRA be negative, leave to judicially review that decision may be sought. STCA-excepted claimants can also request a deferral of removal from the officer enforcing the removal order and seek leave to judicially review the officer's decision along with a stay from the Federal Court pending disposition of the leave application.

B. Purpose and powers of the RAD

[41] The legislative purpose behind the RAD's implementation was discussed in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, [2016] 4 F.C.R. 157 (*Huruglica*). In that case, this Court referred to the 2001 comments of the Minister responsible for Bill C-11, that "[t]he whole purpose [of the RAD] is to ensure that the correct decision is made" (at para. 87), as well as to those of Peter Showler, then Chair of the IRB, who stated that the RAD would "efficiently remedy errors made by the RPD" and act as a "safety net" (at para. 88). After reviewing the legislative history, this Court concluded that "[t]he RAD was essentially viewed as a safety net that would catch all mistakes made by the RPD, be it on the law or the facts" (at para. 98).

[42] The RAD has robust powers of error-correction consistent with its statutory purpose. Unless precluded by the IRPA, an appeal to the RAD from an RPD decision may be made as a matter of right by a failed claimant or by the Minister on questions of law, fact or mixed fact and law.

[43] Appeals before the RAD "must" proceed without a hearing on the basis of the record before the RPD (IRPA, s. 110(3)). New evidence may only be presented if it arose after the rejection of the claim or was not reasonably available at the time of the hearing before the RPD. Where new evidence is admitted, the RAD has the discretion to hold an oral hearing (IRPA, ss. 110(4), 110(6)) provided certain criteria are met. Subsection 110(6) provides:

Appeal to Refugee Appeal Division	**Appel devant la Section d'appel des réfugiés**
Hearing	**Audience**
110(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	110(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[44] RPD decisions are reviewed by the RAD for correctness (*Huruglica* at para. 103). The RAD may confirm the RPD determination, set it aside and substitute its own decision, including a grant of refugee protection, or refer the matter back to the RPD with directions (IRPA, s. 111(1)). The RAD does not have the power to order removal and makes no orders to that effect. Removal is an administrative action, taken by departmental officers when a claim has been rejected. The Federal Court, on the other hand, can stay or set aside removal orders.

[45] The appellants contrast the powers of the RAD with the limitations of judicial review of an RPD decision. The critical distinction between an appeal to the RAD and recourse in the Federal Court lies in the standard of review. Correctness before the RAD offers the appellants the hope that a second hearing, albeit on the same record and without oral evidence, will generate a

different result. Further, access to the RAD is as of right, whereas access to the Federal Court is dependent on leave (IRPA, s. 72(1)). New evidence is admissible before the RAD provided that the statutory criteria are met. Judicial review in the Federal Court is confined to the record.

[46] Before leaving this point, a *caveat*. It is important to note that the standard of review by which the Federal Court reviews RPD and RAD decisions does not preclude consideration of the merits or factual findings of either tribunal. Reasonableness and its criteria of justification, intelligibility and transparency, apply to how these tribunals assess the evidence before them and the inferences which may be drawn from that evidence, and correctness applies to the fairness of the procedure of the RPD hearing (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69). Adverse findings of fact and conclusions or inferences with respect to credibility must find their justification in the evidence before the RPD and their expression in the reasons of the RPD.

[47] While there is most certainly a difference in the role of RAD and the Federal Court in reviewing an RPD decision, the gulf is not as wide as contended. The difference lies in correctness review as opposed to reasonableness review. Reasonableness review requires that all elements of an RPD decision satisfy the *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) criteria.

III. Notice of constitutional question

[48] Where the constitutional validity of legislation is in question, subsections 57(1) and (2) of the *Federal Courts Act* require that a notice of constitutional question be served on the Attorney

General of Canada and on the provincial and territorial Attorneys General at least ten days before the hearing of the appeal:

Constitutional questions	**Questions constitutionnelles**
57 (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	57 (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).
Time of notice	**Formule et délai de l'avis**
(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.	(2) L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

[49] In this case, the appellants filed a notice of constitutional question on September 25, 2018, with an accompanying solicitor's certificate stating that the notice had been served on the Attorneys General on September 24, 2018, less than ten days prior to the hearing of the appeal. The parties were directed to address the implications of late service in their oral submissions.

[50] At the outset of the hearing of this appeal, counsel for the appellants advised that six of the provincial and territorial Attorneys General had indicated no intention to intervene in the appeal and that it was anticipated that none of the remaining Attorneys General would respond differently. Counsel submitted that this Court had the discretion under subsection 57(2) of the *Federal Courts Act* to abridge the time for service and hear the appeal as scheduled, as the Federal Court had done in *Tapambwa v. Canada (Citizenship and Immigration)*, 2017 FC 522, [2017] 4 F.C.R. 458 and *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FC 156, [2015] 4 F.C.R. 297, by applying the factors set out in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 (*Larkman*) relating to requests for extensions of time.

[51] Counsel for the Attorney General of Canada agreed that the *Larkman* factors were satisfied in this case and consented to the hearing of the appeal as scheduled. Both counsel submitted that the importance of the legal question at issue, as well as the large number of cases in abeyance at the Federal Court pending the outcome of this appeal, weighed in favour of granting an abridgment of time for service.

[52] After considering the parties' submissions, the Court decided to hear the appeal on a conditional basis. The parties were advised that if any of the remaining provincial or territorial Attorneys General sought leave to intervene it was possible that the appeal would need to be reheard, depending on the nature of the intervention sought. The appeal proceeded on that basis. Following the hearing of the appeal, the appellants advised the Court that they had received replies from all thirteen provincial and territorial Attorneys General and that none had expressed an intention to intervene in the appeal and either consented to, did not oppose, or expressly

declined to take a position on the appellants' request for an abridgement of the time for service of the notice.

[53] As a result of the responses from the Attorneys General, I would grant the appellants' request for an abridgement of the time for service. However, in doing so I stress that the notice requirement in section 57 of the *Federal Courts Act* is not a mere formality. In this case, the Court exercised its discretion to hear the appeal on a conditional basis, taking into account the parties' submissions and the consent of the Attorney General of Canada. This decision was not lightly made and similar results should not be expected in future cases.

[54] Further, I do not agree that the *Larkman* factors are dispositive. Those factors are designed to address the interests of and potential prejudice to the parties to a proceeding. The notice of constitutional question, by contrast, has a public dimension. It ensures that a law is not declared unconstitutional unless the fullest opportunity has been given to the government to support the law's validity (*Guindon v. Canada*, 2015 SCC 41 at para. 19, [2015] 3 S.C.R. 3, citing *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 48). As a result, it is the potential for prejudice to that public interest that is paramount.

[55] The fact that immigration is a head of exclusive federal legislative competence does not mean that the provinces are unlikely to have an interest. Provincial Attorneys General may have no great stake in whether paragraph 110(2)(*d*) of the IRPA survives Charter scrutiny, but this is irrelevant for the purposes of considering whether the time for service of the notice should be abridged. The interest of the Attorneys General is in the evolution of section 7 jurisprudence and

the implications of a decision in a particular case to analogous matters within provincial legislative competence.

IV. Standard of review

[56] The constitutionality of paragraph 110(2)(*d*) of the IRPA is a question of law. The decision of the Federal Court on this issue attracts appellate review on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 8, [2002] 2 S.C.R. 235). The Federal Court's evidentiary findings are nonetheless owed deference, including its assessment of the evidence on psychological harm.

V. The Federal Court decision and the appellants' arguments on appeal

[57] As noted earlier, the Federal Court dismissed the application. The judge observed that "[t]he heart of the applicants' arguments is not the lack of an appeal but the consequences of that lack." The appellants identified those consequences as an increased risk of *refoulement* and the imposition of serious state-imposed psychological stress. The judge assumed, but did not decide, that these consequences engaged the appellants' section 7 rights (*Kreishan* at para. 144).

[58] The judge rejected the argument that the RAD bar increased the risk of *refoulement*. The appellants, in consequence of the RPD decision, were failed claimants. They were not, on the basis of the RPD adjudication, being returned to a country where they would face persecution on Convention grounds. The judge also cited the Supreme Court's decision in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 (*Kazemi*), for the proposition that section 7 "does not protect against ordinary stress and anxiety" (*Kreishan* at para. 131) – the

inference being that the stress allegedly associated with a denial of access to the RAD was indistinguishable from the stress inherent to the refugee determination process and thus did not meet the threshold of a section 7 interest.

[59] With respect to the second phase of the section 7 analysis, namely whether the deprivation was in accordance with the principles of fundamental justice, the judge found that the legislative objective of the STCA was to regulate the entry of refugee claimants into Canada and the streamlining of the refugee determination process. In that context, the purpose of the bar on appeals to the RAD and the absence of a statutory stay of removal was to reduce incentives which would encourage the making of claims in Canada when claimants had access to protection in the United States. The judge concluded that the RAD bar was not arbitrary, but was rationally connected to the objectives of burden sharing with the United States and limiting the caseload before the RAD. The RAD bar was not overbroad because it promoted the aims of the STCA, namely to encourage claimants to present their claim in their country of first arrival, and aligned with the purposes of the safe third country concept.

[60] In broad terms, the appellants raise three challenges to the decision. They do not quarrel with the judge's characterization of the issues, rather they contend that the judge erred in law in the analysis of their section 7 interests on the assumption that they were engaged. Without determining the nature and extent to which their rights were engaged, no principled consideration could be given to the question whether the deprivation of those rights was in accordance with the principles of fundamental justice.

[61] Consequently, the appellants say that the judge erred in her analysis of whether the appellants were deprived of their rights in accordance with the principles of fundamental justice. In this regard, they point to the judge's conclusions as to the legislative purpose of the STCA, arguing that such a broad and amorphous characterization of legislative purpose in the context of section 7 analysis effectively immunizes legislation from constitutional scrutiny. With respect to the overbreadth and the proportionality criteria, they contend that the judge failed to examine the relationship between the objectives of the impugned provisions and the impact on the appellants' section 7 interests. They also argue that the judge made a palpable and overriding error of fact in concluding that the RAD bar resulted in a reduction of the time required for removal of failed claimants, and that this undermined the rational connection between the measure and the purpose.

[62] The appellants argue that the judge erred in not finding that the preferential treatment given to regular claimants triggered their section 7 interests by increasing the risk of *refoulement* and amplifying the anxiety and psychological stress associated with prosecuting a claim for protection.

[63] Citing the submissions of the United Nations High Commission for Refugees (UNHCR) to the Parliamentary Committee in its consideration of what became the PCISA, they contend that a second stage appeal for failed claimants is necessary to ensure that errors of fact or law are corrected, so as to minimize the risk of *refoulement*. The appellants point to what they characterize as the high level of successful appeals from negative RPD rulings as support for

their argument, and the correspondingly low percentage of successful applications for leave for judicial review.

VI. Analysis

A. Preliminary observations

[64] Before turning to the principles which guide the application of section 7 in these circumstances, four preliminary observations are in order.

[65] I admit that I have struggled with the appellants' arguments. The appellants concede that, under existing case law, the principles of fundamental justice do not require, as a matter of process, any right of appeal (*Sachs v. Air Canada*, 2007 FCA 279 at para. 11, 367 N.R. 384 (*Sachs*), citing *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 (*Kourtessis*); see also *Charkaoui* at para. 136; *Beer v. Saskatchewan (Highways and Infrastructure)*, 2016 SKCA 24 at para. 3; *Alberta (Attorney General) v. Malin*, 2016 ABCA 396 at para. 25, 406 D.L.R. (4th) 368; *Ruffolo v. Jackson*, 2010 ONCA 472 at para. 13; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287 at para. 27). However, they say that this rule speaks only to section 7's procedural guarantees, and does not preclude a challenge on the basis that a denial of a right of appeal offends the substantive values embodied in the principles of fundamental justice. They refer to the Federal Court's comment in *Mahjoub (Re)*, 2017 FC 334 (*Mahjoub*) that "while there is no constitutional right to an appeal, if an appeal right is created, it must be constitutionally sound" (at para. 58). Thus, in the appellants' view, while they may not have a constitutional right to access the RAD as a matter of process, they have a substantive right not to be barred from the RAD in a manner that is arbitrary, overbroad or grossly disproportionate.

[66] However, it has proven difficult not to view the appellants' argument as a disguised challenge to the principle that there is no right, constitutional or otherwise, to an appeal. The arguments which they advance in support of a right of appeal are no different, regardless of whether they are directed to the procedural or substantive considerations of section 7, and would be equally at home in an appeal that asserted, directly, a section 7 right to appeal to the RAD as a matter of procedure.

[67] In crafting these arguments, the appellants have cleaved the advantages of an appeal from the right to an appeal. They characterize the former as substantive and the latter as procedural, mirroring the dual elements of section 7. Doing so artfully avoids the instruction of the Supreme Court of Canada with respect to section 7 appeal rights, and the appellants do not point to any case law which limits the *Kourtessis* principle to procedural rights alone.

[68] Advantages are inherent in a right of appeal. There is no doubt that an appeal enhances a claimant's chances of remaining in Canada. An appeal offers hope of a different outcome on the merits, or that the jurisprudential risks associated with a loss on appeal would convince the Minister to reconsider his or her position. But section 7 is not engaged by an offer of hope – or the absence of hope. It is engaged where the claimant faces removal to risks of death, torture or cruel and usual treatment (*Charkaoui*; *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, leave to appeal to S.C.C. refused, 38589 (July 11, 2019) (*Tapambwa*)). This is consistent with this Court's observations in *Sachs*, where it held that section 7 does not grant a right to an appeal "even in matters with a significant effect on the life, liberty and security of the

person" (at para. 11). Nor does section 7 mandate a particular form of refugee determination process, let alone one that is error-free.

[69] My second preliminary observation is that the appellants' argument has echoes of a section 15 Charter argument. The appellants concede that they have no right to an appeal, but because others do have a right, they are disadvantaged in ways said to engage section 7. Much as the appellants seek to avoid arguing by way of comparison, their argument pivots on the differential in treatment between the two types of claimants. I accept that a statute creating a right of appeal cannot discriminate on a prohibited or analogous ground (see *Mahjoub*). However, the appellants do not base their case on section 15, although section 15 themes and criteria are woven into their argument in support of the scope of section 7 substantive protections.

[70] Beguiling and attractive as the argument may be, importing the language of section 15, and the concepts of "disadvantaged" and "in comparison to" into the analysis of section 7 is problematic. The focus of section 7 is on the particular rights of the claimant. Whether others are treated better is of no consequence, any more so than pointing to others that are treated worse. A court considering section 7 engagement does so with a sharp focus on the rights of the party before it and asks whether that party is running a constitutionally unacceptable risk.

[71] As noted earlier, if the appellants' section 7 interests are triggered, the treatment of others is, at this stage, of no moment. I would also add that, to the extent comparisons are being made, the proper comparator might be those arriving from the United States at a Canadian land border port of entry and turned back. Sight should not be lost of the fact that the appellants were

admitted into Canada under an exception to the STCA, and had an opportunity to advance a claim for asylum in Canada. In relation to those who are turned back, and who might be the closest comparator, the appellants are arguably more favourably treated. However, as noted, these comparative arguments have no place in considering whether section 7 is engaged. To the extent they may be pertinent, they are best situated in the consideration of whether the deprivation is in accordance with the principles of fundamental justice, and if not, section 1.

[72] I turn to my third preliminary observation. It is important to be precise as to the argument that was made before this Court.

[73] The appellants accept that had the RAD never been created, there would be no argument that section 7 obligated that one be created. As a logical consequence, they accept that were the provisions establishing the RAD repealed, there would be no case to be advanced. This is because they do not, in the context of this case, argue that a right of appeal must exist in order to fulfill or round out the requirements of *Singh*. Nor do the appellants argue that a system of judicial review is inconsistent with section 7 if it does not have an automatic stay of removal pending disposition of the application. This, counsel noted, is an open question. These arguments were not advanced before us and nothing in these reasons should be read as commenting on their merits. Rather, their argument, and in consequence, the singular focus of these reasons, is that the RAD bar takes away a protection and triggers enhanced psychological stress (the deprivation) in an overbroad, arbitrary and grossly disproportionate manner. The infirmity arises from the uneven treatment – the amelioration of the risk of *refoulement* for some but not all.

[74] My fourth remark concerns the development of section 7 in the context of immigration law.

[75] The Supreme Court's approach to section 7 in the context of refugee determination has been the subject of critical academic commentary (see Gerald Heckman, "Revisiting the Application of section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 U.N.B.L.J. 312). Professor Heckman expresses the view that the Court's approach to section 7 in this context is inconsistent with its approach in other areas of law such as criminal and extradition law. Similarly, Professor Hamish Stewart has observed that, while criminal proceedings must comply with section 7 "from the outset" because of the "potential for imprisonment that they create", the same logic "apparently does not apply to deportation proceedings" (Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2007) at 81).

[76] It is arguable that the appellants here are at a "stage" of the refugee determination process that engages section 7. This is because all foreign nationals are issued conditional removal orders immediately upon making a refugee claim. By subsections 48(1) and (2) of the IRPA, a removal order is "enforceable" if it has come into force and not been stayed, and a claimant who is subject to an enforceable removal order must leave Canada immediately. Thus, a conditional order made with respect to an STCA-excepted claimant comes into force fifteen days after a negative RPD decision (IRPA, s. 49(2)(*c*); IRPA Regulations, s. 159.91(1)), and is not stayed by any other provision. Therefore, the RAD bar is arguably not a preliminary stage of the type at issue in *Febles* and *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3

S.C.R. 704 (*B010*), but rather the stage "immediately preced[ing] removal" (see Heckman at 347), such that it is amenable to scrutiny on section 7 grounds.

[77] This argument, as attractive as it may be, is inconsistent with the clear and consistent direction of the Supreme Court. It is well-established that the scope of the guarantees under section 7 will vary with the relevant context (*Chiarelli* at p. 732). The immigration context is no exception. In *Chiarelli*, the Supreme Court recognized that the scope of section 7 rights differ as between citizens and non-citizens in light of the fundamental principle that the latter do not have an unqualified right to enter or remain in Canada (p. 733). In consequence, the removal of a non-citizen does not in itself engage the liberty and security interests encompassed in section 7 (see also: *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 46, [2005] 2 S.C.R. 539).

B. Section 7 – General principles

[78] Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. In *Singh*, the Supreme Court held that the word "everyone" in section 7 includes every person who is physically present in Canada and thus amenable to Canadian law. Foreign nationals entering Canada without proper documentation, such as the appellants, are therefore entitled to challenge the RAD bar on the basis that it infringes section 7 of the Charter (see also *R. v. Appulonappa*, 2015 SCC 59 at para. 23, [2015] 3 S.C.R. 754).

[79] To establish an infringement of section 7, the appellants bear a dual onus.

[80] They must first show that their rights under section 7 are engaged by the RAD bar, and then that the deprivation is not in accordance with the principles of fundamental justice. This two-step analysis has been consistently followed by this Court, and most recently reiterated by the Supreme Court in *Ewert v. Canada*, 2018 SCC 30 at para. 68, [2018] 2 S.C.R. 165 and *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 58, [2013] 3 S.C.R. 1101 (*Bedford*).

[81] In the first stage of this analysis, commonly called "engagement", the appellants have to demonstrate that one of the listed rights is engaged. Regard must be had to the nature of the interests at stake (*Charkaoui* at para. 18), and in this case, the appellants' argument on section 7 engagement is limited to security of the person. They contend that as security of the person interests in section 7 are co-extensive with persecution risks, an increased risk of *refoulement* engages section 7.

[82] To discharge their first burden, the appellants must establish that their security of the person has been or may be "negatively impact[ed]" or "limit[ed]", and that there is a "sufficient causal connection" between the RAD bar and the prejudice suffered (*Bedford* at paras. 58, 75; *R. v. Michaud*, 2015 ONCA 585 at para. 64, 127 O.R. (3d) 81). The sufficient causal connection standard does not require that the RAD bar be the only or even the dominant cause of the prejudice. The deprivation and its causation may be established by a reasonable inference, drawn on a balance of probabilities (*Bedford* at para. 76).

[83] The relevant standard of causation in a section 7 challenge — a "sufficient causal connection" — requires a real and not speculative link between the prejudice and the legislative provision (*Bedford* at para. 76). The Supreme Court has held that this standard is a flexible one, which "allows the circumstances of each particular case to be taken into account" (at para. 75). In *Bedford*, the Supreme Court also rejected a higher threshold argued by the Attorney General of Canada, holding that only "a fair and workable threshold" was required for section 7 engagement, being the "port of entry" for section 7 claims (at para. 78).

[84] At the second stage of the section 7 analysis, if the appellants establish that the RAD bar interferes with their right to security of the person, they must show that the interference is contrary to the principles of fundamental justice. As the Supreme Court has stated, "[s]ection 7 does not promise that the state will never interfere with a person's life, liberty or security of the person — laws do this all the time — but rather that the state will not do so in a way that violates the principles of fundamental justice" (*Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 71 [2015] 1 S.C.R. 331).

[85] The principles of fundamental justice have both substantive and procedural elements (*A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 138, [2009] 2 S.C.R. 181, *per* McLachlin C.J.C., concurring; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 113, [2002] 1 S.C.R. 3 (*Suresh*)).

[86] The procedural elements of section 7 are grounded in the specific context of the statute involved and the rights affected (*Suresh* at para. 115). That is, the section 7 guarantee to a fair

process takes its colour from the nature of the proceedings and the interests at stake (*Charkaoui* at para. 20). The substantive elements of section 7 speak to the basic values underpinning our constitutional order (*Bedford* at paras. 96, 105).

[87] In this case, the appellants argue that the RAD bar violates the values against arbitrariness, overbreadth and gross disproportionality. They do not argue that Parliament must, as a matter of fair process, provide refugee claimants with a statutory appeal and stay pending its disposition. Instead, the appellants advance the argument, as their counsel stated during oral submissions, that Parliament cannot limit refugee claimants' access to the RAD unless it observes the substantive principles of fundamental justice in doing so.

C. Engagement

[88] In the decision under appeal, the Federal Court assumed, but did not decide, that section 7 was engaged. I agree with the appellants that this was an error. A court considering whether a law infringes section 7 should not, in the ordinary course, simply assume that life, liberty or security of the person is negatively affected or limited by the legislation in question. There are three reasons for this.

[89] First, the scope and substance of section 7 interests are, in and of themselves, matters of discrete, independent jurisprudential analysis. Their ambit must be defined and calibrated having regard to the legislation or measure in question (see *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181 at para. 99 (*Begum*)). If no interest in life, liberty or security of the person is implicated in the circumstances before the court, then the analysis stops (*Begum* at

para. 110; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 47, [2000] 2 S.C.R. 307 (*Blencoe*)).

[90] Assuming engagement also leaps over analysis of causation. A court must examine the nexus between the impugned measure and the deprivation. Causation is not to be assumed. In this appeal, the nexus between the measure and the section 7 interests is critical to the analysis.

[91] Finally, the failure to scope out the precise nature of the deprivation frustrates the second stage of the section 7 analysis — namely, whether that deprivation is in accordance with the principles of fundamental justice. It is impossible to consider whether the deprivation is in accordance with the principles of fundamental justice analysis without first understanding the nature of the rights engaged (see *R. v. McDonald*, 2018 ONCA 369 at para. 37). In this case, the appellants have argued that the RAD bar violates the basic values against arbitrariness, overbreadth and gross disproportionality (see *Bedford* at para. 96). A law is arbitrary where there is no connection between its effect and object, overbroad where it sweeps in conduct that bears no relation to its object, and grossly disproportionate where its effect is, relative to its object, entirely outside the norms of our free and democratic society (*Bedford* at paras. 98, 117, 119 and 120). All three principles "compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness" (*Bedford* at para. 123).

[92] I turn to the engagement arguments raised by the appellants.

(a) *psychological harm*

[93] The right to security of the person encompasses state-imposed psychological stress (*Blencoe* at paras. 56-57). However, the effect on a person's psychological integrity must be "serious and profound" and "greater than ordinary stress or anxiety" (*Kazemi* at para. 125, excerpting from *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 60). The evidentiary and causal threshold that must be crossed to establish that the measure has induced sufficient stress that it triggers the security of the person is high (*Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56 at para. 122, [2015] 2 F.C.R. 1006; *Begum* at para. 103).

[94] As noted, analysis of section 7 requires that in order to establish that section 7 is engaged, there must be a causal connection between the measure and the deprivation. The nexus or causal connection asserted in this appeal is that because of the inability to appeal to the RAD, the risk of *refoulement* and psychological stress and anxiety are increased.

[95] The appellants argue that the stress associated with not having a right of appeal and an automatic legislated stay pending appeal causes such psychological stress or harm that section 7 is engaged. This distils to the proposition that because they are denied a second opportunity of establishing their case, their anxiety is greater than regular claimants. In support, they rely on affidavit evidence setting out their own psychological stress, as well as expert evidence on the psychological effects of rejection of a claim for refugee claimants. At the hearing of this appeal, appellants' counsel submitted that the psychological harm suffered by the appellants was precipitated by paragraph 110(2)(*d*) of the IRPA because if the appellants had access to the RAD

then the deficient RPD decisions would have been corrected without having to go to the Federal Court to have the orders set aside.

[96] In this case, the judge found that the evidence did not establish that the stress associated with removal following a negative RPD decision was demonstrably different than that associated with removal following a negative RAD decision (*Kreishan* at para. 124). The appellants' expert evidence, in particular, pointed to no difference in the nature of the stress or its degree. There was, therefore, no nexus between the RAD bar specifically and any psychological harm experienced by the appellants. I see no basis to interfere with the judge's conclusions in this respect.

[97] Whether the psychological stresses associated with the refugee determination process engages section 7 has been considered by the Supreme Court. As noted, the Supreme Court has held that "the deportation of a non-citizen in itself cannot implicate the liberty and security interests" protected by section 7, because non-citizens do not have an unqualified right to enter or remain in Canada – even where psychological harm is alleged (*Medovarski* at paras. 45-46). Consistent with *Medovarski*, the stress associated with the fact that some claimants have only one chance to establish their claim and must seek recourse in the Federal Court does not engage section 7.

[98] The appellants seek to distinguish *Medovarski*, saying that it has been subsequently qualified by *Charkaoui*. In *Charkaoui*, the Supreme Court states, at paragraph 17: "While the deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the

Charter, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so." [emphasis added].

[99] In *Charkaoui*, the Court was considering section 7 in the context of subsection 115(2). This does not assist the appellants. Under subsection 115(2), a recipient of a certificate of inadmissibility, who may otherwise be a Convention refugee or protected person, loses the protection of non-*refoulement* under subsection 115(1), and may, subject to the Minister's proper consideration and balancing of factors, therefore be *refouled*. This is quite different from the circumstances of an STCA-excepted claimant with access to the RPD, who cannot be removed from Canada prior to adjudication of their claim.

[100] I accept that psychological stress is inherent in the refugee determination process, and that the opportunity of a second chance at establishing a claim for protection offers hope to a failed claimant. However, on the evidence, the psychological stress asserted here is indistinguishable from the ordinary stresses of deportation and, consistent with the Supreme Court's holding in *Medovarski*, does not engage section 7. In reaching this conclusion, I do not foreclose the possibility that in certain unique circumstances, depending on the legal and factual matrix of a particular case, section 7 may be engaged. In any event, as noted earlier, in the case of four of the five appellants the recourse through the Federal Court provided both a stay of removal and a reversal of the RPD determination. For these appellants, the system worked in their favour.

(b) *nature of the process*

[101] The appellants next submit that section 7 is engaged by any legal regime where the deprivation of the right to life, liberty or security of the person is a potential consequence at the end of the process. They rely again on *Charkaoui*, in which the Supreme Court noted that the appellant's security of the person was engaged by the certificate process, since it could lead to removal from Canada to a place where his life or freedom would be threatened (at para. 14). The appellants also point to the extradition context, where the Supreme Court has found that the potential imposition of a death penalty by the requesting state is sufficient to engage section 7, relying on *United States v. Burns*, 2001 SCC 7 at para. 60, [2001] 1 S.C.R. 283, and *United States of America v. Cobb*, 2001 SCC 19 at para. 34, [2001] 1 S.C.R. 587.

[102] They also rely on the decision of the Supreme Court in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, where provisions of the *National Defence Act*, R.S.C. 1985, c. N-5 permitting federal offences to be prosecuted within the military justice system were considered. In that case, the Supreme Court held that "the fact that [the impugned provision] forms part of a scheme through which a person subject to the [Code of Service Discipline] can be deprived of his or her liberty is sufficient to engage the liberty interest" (at para. 17). The appellants submit that the RAD bar is similarly part of a "process" or "scheme" through which claimants may face persecution, torture and death if returned to their countries of origin.

[103] In considering this argument, it is important to take a detour to delineate the concept of *refoulement*, and what the Supreme Court has said about its relationship with section 7.

(i) *refoulement* and risk

[104] The starting point is section 115 of the IRPA.

[105] Subsection 115(1) of the IRPA provides:

Principle of Non-refoulement	**Principe du non-refoulement**
Protection	**Principe**
115(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	115(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

[106] This provision is directed to fulfilling Canada's non-*refoulement* obligations under Article 33 of the Convention. Signatory states should normally permit refugee claimants to remain in the receiving country until their claim has been determined and they have exhausted their recourse (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para. 41, [2002] 3 FC 537, leave to appeal to S.C.C. refused, 29183 (November 21, 2002)).

[107] The Federal Court concluded that non-*refoulement* applies only to those individuals that have been recognized as protected persons, and not to failed claimants (at para. 128). This view finds support in *Suresh*, in which the Supreme Court stated that "[r]ecognition as a Convention refugee has a number of legal consequences" including that "generally the government may not

return (‘*refouler’*) a Convention refugee ‘to a country where the person’s life or freedom would be threatened’” (at para. 7). In *Febles*, however, the Court noted that Article 33(1) of the Convention, which embodies the principle of non-*refoulement*, is applicable to persons whose need for protection has been recognized or “not yet adjudicated” (at para. 25).

[108] In considering to whom and how far the obligation of non-*refoulement* applies in the Canadian refugee determination system, the Supreme Court teaches that, where possible, statutes should be interpreted in a way which makes their provisions consistent with Canada’s international treaty obligations and principles of international law (*Németh* at para. 34), a principle codified in paragraph 3(3)(*f*) of the IRPA. Indeed, there exists an underlying presumption that the legislature “acts in compliance with Canada’s obligations as a signatory of international treaties and as a member of the international community as well as in conformity with the values and principles of customary and conventional international law” (see also *R. v. Hape*, 2007 SCC 26 at para. 53, [2007] 2 S.C.R. 292; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70; and *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 at para. 50, [2002] 3 S.C.R. 269 (*Schreiber*)).

[109] However, the Supreme Court also teaches that the presumption that legislation implements Canada’s international obligations is rebuttable (*Németh* at para. 35; *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 38). Where a provision is unambiguous, it must be given effect (*Schreiber* at para. 50). It is similarly well established that where Parliament’s intention is clear and there is no ambiguity, the Charter cannot be used as an interpretive tool to ascribe to the

legislation a meaning which Parliament did not intend (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 61-62, [2002] 2 S.C.R. 559 (*Bell ExpressVu*)).

(ii) *Supreme Court jurisprudence and its implications*

[110] There is no daylight between the concept of *refoulement* under the Convention and its clear and unambiguous expression in the IRPA. The obligation not to *refoule* applies to individuals who have been adjudicated to be persons in need of protection. However, and as I will next explain, whether failed asylum claimants are being *refouled*, or are at greater risk of being *refouled*, is, in the end, a debate, label or appellation of no consequence. This is because section 7 re-engages at the removal stage of the process to protect against that risk.

[111] The appellants argue that the obligation not to *refoule* extends beyond the adjudication of their claim before the RPD. This is not in question. International law and domestic law recognize that refugee status is constitutive, that is to say, it may be lost, and it may be regained. In light of this, the appellants contend that to discharge the obligation, a failed claimant must have access to an appellate tribunal.

[112] In essence, the appellants' argument is that in between those two points – at the beginning of the refugee claim adjudication process, and at the removal stage – the obligation not to *refoule* continues, with the result that section 7 is engaged by the channelling of the appellants into a process which does not minimize the risk of *refoulement*.

[113] Neither international nor domestic law principles support this argument.

[114] The Convention is not prescriptive as to how signatory countries fulfill their obligation not to *refoule*. The legislative design, including the nature of the adjudicative body, whether administrative or judicial, or a combination of both, is a matter of domestic law. International law does not mandate any particular form of refugee determination process, or that an appeal mechanism exist (*Németh* at para. 51). Neither the Convention nor the Charter require review mechanisms, let alone compel review by appeal or judicial review.

[115] What international immigration law does require, however, is recognition that the obligation not to *refoule* is transitory. It may be adjudicated not to exist at any given point in time. But a new risk may arise following a negative ruling. Drawing on Hathaway (James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 158 and 278), the Supreme Court in *Németh* concluded, at paragraph 50, that:

> It follows that the rights flowing from the individual's situation as a refugee are temporal in the sense that they exist while the risk exists but end when the risk has ended. Thus, like other obligations under the Refugee Convention, the duty of *non-refoulement* is "entirely a function of the existence of a risk of being persecuted [and] it does not compel a state to allow a refugee to remain in its territory if and when that risk has ended": Hathaway, at p. 302; *R. (Yogathas) v. Secretary of State for the Home Department*, [2002] UKHL 36, [2003] 1 A.C. 920, *per* Lord Scott of Foscote, at para. 106. **The relevant time for assessment of risk is at the time of proposed removal**: Hathaway, at p. 920; Wouters, at p. 99. […]
>
> [Emphasis added]

[116] In recognition of the fact that circumstances may change or that a new risk might arise, Parliament has inserted additional protections at the time of removal. The purpose of a PRRA, for example, is to determine whether on the basis of a change in country conditions or on the basis of new evidence that has come to light since the RPD decision, there has been a change in the nature or degree of risk. The PRRA recognizes that the principle of non-*refoulement* is

prospective, and that, in some cases given the delay between adjudication and removal, a second look at country conditions may be required (*Tapambwa* at para. 53). In the same vein, Parliament has given the Federal Court supervisory jurisdiction over all aspects of the immigration process, with the result that most decisions, at all stages, are subject to an application for leave to commence judicial review and a concurrent stay.

[117] In broad terms, the refugee determination process is framed by two constitutional protections. Upon first presentation of a claim for asylum, section 7 mandates that claimants have a right to a hearing before an independent decision maker (*Singh*). Section 7 re-engages at the conclusion of the process to ensure that failed or excluded claimants are not removed to face section 7 risks (*B010* at para. 75). It is for this reason, as I noted earlier, that the discussion whether failed claimants are being "*refouled*" is a diversion. The jurisprudence is clear that, at the point of removal, section 7 interests are engaged.

[118] The Supreme Court has been consistent in its determination that the substantive elements of section 7 are addressed at the removal stage.

[119] In *Febles,* for example, the Supreme Court held that section 98 of the IRPA — under which an individual may be excluded from even advancing a claim for protection — was consistent with section 7 of the Charter because, even if so excluded, an individual may still apply for a stay of removal under the IRPA's PRRA provisions if he or she faces a risk of death, torture or cruel and unusual treatment or punishment (at para. 67).

[120] The weakness in the appellants' argument is apparent if their situation is contrasted to such individuals who are denied the right to advance any claim for protection. The Supreme Court considered the constitutionality of those circumstances in *B010*. Citing *Febles*, the Supreme Court stated at paragraph 75:

> … s. 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada under s. 37(1). This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the *IRPA* did not engage s. 7, because "even if excluded from refugee protection, **the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place**" (para. 67). **It is at this subsequent pre-removal risk assessment stage of the *IRPA*'s refugee protection process that s. 7 is typically engaged.** The rationale from *Febles*, which concerned determinations of "exclusion" from refugee status, applies equally to determinations of "inadmissibility" to refugee status under the *IRPA*.
>
> [Emphasis added]

[121] Analogy may be drawn to other asylum claimants who, for reasons of criminality or participation in crimes against humanity, are inadmissible under Article 1F of the Convention. In commenting on the role of section 7 in relation to this category of claimants, Evans J. (as he then was) observed in *Jekula v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 266, 154 F.T.R. 268 (*Jekula*), "while it is true that a finding of ineligibility deprives [a] claimant of access to an important right, namely the right to have a claim determined by the Refugee Division, this right is not included in 'the right to life, liberty and security of the person'" … "[A] determination that a refugee claimant is not eligible to have access to the Refugee Division is merely one step in the administrative process that may lead eventually to removal from Canada" (at paras. 31-32).

[122] So too is the denial of an appeal to the RAD. It is but one measure in a process that may lead to removal. The section 7 interests of all claimants, regardless of the underlying administrative basis of their rejection – excluded under Article 1F, rejected by the RAD or rejected by the RPD, ineligible to appeal as having no credible basis – are protected at the removal stage, whether by a PRRA, a request to defer removal or the right to seek a stay of removal in the Federal Court. This section does not mandate appeals or judicial review at every stage of a process (*Canada (Secretary of State) v. Luitjens* (1991), 46 F.T.R. 267, 155 Imm. L.R. (2d) 40 (F.C.T.D.).

[123] The appellants note that STCA-excepted claimants are removed, on average, 198 days after a negative RPD decision. This is compared to 197 days for regular claimants. As a result of the twelve-month legislative bar under paragraph 112(2)(*b.1*) of the IRPA, STCA-excepted claimants therefore do not typically have the benefit of a PRRA prior to their removal.

[124] However, the manner in which section 7 risks of applicants who are PRRA-barred are assessed is a process where "an enforcement officer assesses the sufficiency of the evidence of risk, and if satisfied the evidence is sufficient, defers removal and refers the risk assessment to another decision-maker" (*Atawnah v. Canada (Public Safety and Emergency Preparedness*) 2016 FCA 144 at para. 27, [2017] 1 F.C.R. 153, leave to appeal to S.C.C. refused, 37122 (December 1, 2016) (*Atawnah*)). As noted by Dawson J.A. in *Atawnah*, the rights available to those being removed in the absence of a PRRA are "not illusory", but real and effective.

[125] Requests for deferral are also available where failure to defer would expose the applicant to the risk of death, extreme sanction or inhumane treatment. Importantly, removal officers also retain a discretion to defer removal in cases where these elements are not strictly met. For example, new evidence may substantiate an allegation of risk that was not previously considered. Similarly, evidence that pre-dates the last risk assessment may arise where there are reasons justifying why it was not presented before the last assessment (*Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133 (*Shpati*)).

[126] An enforcement officer's refusal to defer removal may be challenged by way of an application for leave and judicial review in the Federal Court, and a claimant may bring a motion for a stay of removal pending the outcome of their application for judicial review. The Federal Court can, and often does, consider a request for a stay of removal in a more comprehensive manner than an enforcement officer can consider a request for deferral (*Shpati* at para. 51).

[127] For these reasons, the appellants' arguments cannot succeed. Section 7 is engaged at the point of removal, and is protected by the opportunity to seek a deferral of removal administratively, failing which, to seek a stay in the Federal Court. Nor does the Charter require that, in order to avoid the possibility of *refoulement*, an appellate tribunal be put in place. The IRPA, the jurisprudence of the Supreme Court of Canada, and international law are aligned on each of these conclusions.

(c) *increased risk of refoulement*

[128] Finally, the appellants put considerable emphasis on the Supreme Court's decision in *Bedford*. In that case, at issue was the constitutionality of provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, preventing sex workers from accessing private protection measures, such as hiring security guards, while engaging in the lawful activity of sex work. The Supreme Court held that the provisions engaged section 7 because they imposed "*dangerous* conditions on prostitution," by preventing people engaged in a legal activity from "taking steps to protect themselves from the risks" inherent in that activity (at para. 60, emphasis in original).

[129] The appellants analogize this to the RAD bar. They argue that the RAD makes it more dangerous to be a refugee claimant in Canada, because it heightens the risk of *refoulement*, relative to claimants with access to the RAD, and that it therefore engages section 7. They cite, in their favour, statistics that show a higher rate of success on appeal for failed RPD claimants compared to failed RPD claimants on judicial review, and say that out of this difference arises a threat to their life, liberty and security of the person.

[130] *Bedford* is distinguishable, and in a fundamental respect. As I explained earlier, the scope of section 7, at both stages, is driven by context. Part of that context includes the fact that the appellants have had a constitutionally compliant adjudication of their claims for asylum (*Singh*) and constitutionally compliant assessment of new risks prior to removal (*Febles*, *B010*, *Tapambwa*, *Atawnah*). Unlike Ms. Bedford who had a right to work, the appellants have no legal right to remain in Canada.

[131] Turning to the statistics, the evidence demonstrates that between 2013 and 2014, 26.4% of negative RPD decisions appealed to the RAD were "incorrect". From 2005 to 2010 (before the implementation of the RAD), 7.8% of perfected applications for judicial review were successful. It is in this difference of nearly 19% in the success rate that the appellants say the risk of *refoulement* is enhanced to the point of triggering section 7.

[132] At the outset, while these statistics may provide some insight into the relative success of claimants of the same general class before and after the availability of the RAD, I am hesitant to derive substantial conclusions from them. They are necessarily limited to a comparison of different individual claimants during different time periods. In effect, we are completely blind to the potentially wide range of factors and circumstances which may explain the different rates of success (changing socio-political climates in the countries of origin, to name but one). Furthermore, the rate of success for claimants with access to the RAD is averaged across a relatively short time period (2 years *versus* 6 years) which raises concern for anomalous results, especially given the RAD's nascence during this time.

[133] More importantly, these statistics are illustrative of the latent difficulty in the appellants' argument. At what point along the continuum of differing success rates is the risk of *refoulement* sufficiently mitigated that no section 7 interest is engaged? There is no answer to this, of course, which is why the Supreme Court has, in its reasons, focused on the bookends of the process – initial adjudication (*Singh*), and consistent with international law, removal (*Suresh*, *Febles*, *B010*).

[134] The appellants concede that the RAD bar would be constitutional if there was no deviation in the success rates between Federal Court judicial review applications and RAD decisions. The appellants' argument disappears if the success rates were identical. While the appellants concede that perfection is not the standard, the subjectivity associated with choosing a point on a continuum where the constitutional infirmity evaporates, reinforces the conclusion on engagement.

(d) *positive rights and section 7*

[135] What the appellants assert in this appeal is a positive rights claim. Put otherwise, the appellants' position that the advantages of the RAD ought to be extended to include STCA-excepted claimants rests on the presupposition that section 7 imposed a positive obligation on Parliament to create the RAD in the first place.

[136] The Supreme Court has rejected the notion that section 7 imposes positive obligations on the state (*Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at para. 82, [2002] 4 S.C.R. 429 (*Gosselin*); *Charkaoui* at para. 136; *Febles* at para. 68). There is no constitutional requirement for the government to act affirmatively to ensure that each person enjoys a minimum of life, liberty and security of the person. Section 7, as the jurisprudence currently stands, requires a deprivation of these interests in order to be engaged (see *Baier v. Alberta*, [2007] 2 S.C.R. 673 at paras. 35-36; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016; *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 1308). Consequently, the absence of measures aimed at reducing an existing risk of harm such as the risk of *refoulement* does not amount to deprivation

within the meaning of section 7, and the failure to extend appeal rights to the RAD to encompass others is not a deprivation.

[137] The circumstances of this case are analogous to those considered by the BCCA in *Scott v. Canada (Attorney General)*, 2017 BCCA 422. Under consideration by the court was what was characterized as a deficient benefit compensation scheme for those injured in the course of military service. In dismissing the section 7 argument, Groberman J.A. observed that the case was not concerned "…with a deprivation imposed by government, but rather with the inadequacy of a government program designed to ameliorate the situation of the plaintiffs" (at para. 89).

[138] Unless Parliament was otherwise constitutionally required to establish the RAD, neither the repeal nor limitation of the RAD amounts to deprivation within the meaning of section 7 (see *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 (Ont. C.A.); *Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (Ont. C.A.); *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (Ont. C.A.) at para. 94). If Parliament was not obliged to enact the RAD in the first place, it cannot be the case that any limitation on the scope of its ameliorative reach can give rise to a section 7 engagement. (I am leaving aside, of course, section 15 considerations.) Therefore, the only argument that could be advanced is that the appellants have a constitutional right to an appeal, a proposition which we know from well-established case law, would fail (*Kourtessis*; *Sachs* at para. 11).

[139] I am cognizant of the fact that section 7 is not frozen in time, nor is its content exhaustively defined, and that it may, some day, evolve to encompass positive obligations – possibly in the

domain of social, economic, health or climate rights. I have therefore given careful consideration to whether this case falls within the scope of the "special circumstances" left open by the Supreme Court in *Gosselin*, which would require an affirmative obligation on government. McLachlin C.J.C., in leaving open the possibility of development in this direction, did not articulate what criteria or considerations might constitute special circumstances.

[140] While it is always tempting to boldly go where no one has gone before, I do not see special circumstances here.

[141] The appellants had the benefit of the safety net provided by the obligations of the removals officer and the jurisdiction of the Federal Court to stay removal, and for four of the five appellants, the safety net worked to their advantage. Secondly, at a policy level, I do not see any objective benchmark or measure by which the risk of inadvertent *refoulement* could be guaranteed. There is no such thing as an error free system – even the criminal justice system, with its elevated evidentiary burdens and procedural protection, has failed on occasion. In any event, I would echo the observation of Groberman J.A. in *Scott* that there is no suggestion in *Gosselin* that section 7 is triggered in the absence of a deprivation by government. As the government did not impose a measure which deprived the appellants of a section 7 interest, no special circumstances could arise.

VII. Conclusion

[142] The Federal Court certified the following question:

> Does paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 infringe section 7 of the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11* and, if so, is this infringement justified by section 1?

[143] As the appellants' argument fails at the engagement stage of the section 7 analysis it is unnecessary to answer the consequential issues - whether the RAD bar deprives the appellants of their section 7 rights in accordance with the principles of fundamental justice, and, if so, whether the infringement is justified under section 1.

[144] With this *caveat*, I would answer the question in the negative and dismiss the appeal.

"Donald J. Rennie"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MAY 4, 2018, IN THE CONSOLIDATED FEDERAL COURT FILES IMM-3193-15, IMM-248-16, IMM-932-16, IMM-1354-16, AND IMM-1604-16.

DOCKET:	A-153-18
STYLE OF CAUSE:	REEM YOUSEF SAEED KREISHAN et al v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2018
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	WEBB J.A. LASKIN J.A.
DATED:	AUGUST 19, 2019

APPEARANCES:

Jared Will Joshua Blum	FOR THE APPELLANT Huda Marwan Kashtem
Wennie Lee	FOR THE APPELLANT Reem Yousef Saeed Kreishan
Ben Liston	FOR THE APPELLANTS Suad Sulieman Odeh Abu Shabab Abdalla Mahmoud Aboushabab Tagi Mahmoud Mohamed Aboshabab
David W. Tyndale Amy King Meva Motwani	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jared Will & Associates Toronto, Ontario	FOR THE APPELLANT Huda Marwan Kashtem
Lee and Company Toronto, Ontario	FOR THE APPELLANT Reem Yousef Saeed Kreishan
The Refugee Law Office Toronto, Ontario	FOR THE APPELLANTS Suad Sulieman Odeh Abu Shabab Abdalla Mahmoud Aboushabab Tagi Mahmoud Mohamed Aboshabab
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT