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IMM-3855-15

IMM-3838-15

IMM-591-16

IMM-3515-16

IMM-1552-17

2019 FC 335

Ferenc Feher, Richard Sebok and the Canadian Association of Refugee Lawyers, Erika Horvath and Ferenc Tibor Saalai, and **Aniko Horvathne Serban** (*Applicants*)

v.

The Minister of Public Safety and Emergency Preparedness (*Respondent*)

INDEXED AS: FEHER V. CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Federal Court, Boswell J.—Toronto, October 23-25, 2018; Ottawa, March 20, 2019.

Citizenship and Immigration — Exclusion and Removal — Removal of Refugees — Judicial reviews of decisions by inland enforcement officers refusing applicants’ requests for deferrals of removal — Applicants, citizens of Hungary of Roma descent, challenging validity of Immigration and Refugee Protection Act, s. 112(2)(b.1) — S. 112(2)(b.1) precluding refugee claimants from Designated Countries of Origin (DCO) from applying for pre-removal risk assessment (PRRA) before 36 months elapsing from last determination of risk before Refugee Protection Division (RPD) — Applicants’ refugee claims refused by RPD — Applicants served with Direction to Report for removal — Applicants DCO nationals, having to wait 36 month before applying for PRRA — Applicants stating, inter alia, that s. 112(2)(b.1) denying class of persons right to timely PRRA by virtue of their nationality — Whether s. 112(2)(b.1) inconsistent with Canadian Charter or Rights and Freedoms, s. 15(1); if so, whether s. 112(2)(b.1) justifiable under Charter, s. 1 — S. 112(2)(b.1), insofar as pertaining to DCO nationals, inconsistent with Charter, s. 15(1) — Differential treatment of DCO nationals constituting distinction based on national origin — Distinction not based on country conditions — Serving to marginalize, prejudice, stereotype refugee claimants from DCO countries — S. 112(2)(b.1) depriving refugee claimants from DCO countries of substantive equality — Expressly imposing disadvantage based on national origin alone constituting discrimination — Denying nationals from DCOs access to PRRA for 24 months longer than non-DCO nationals not proportional to government’s objectives, not minimally impairing — This inequality not saved by Charter, s. 1 — Not necessary for Parliament to differentiate between DCO, non-DCO claimants when imposing restriction on when failed refugee claimant could access PRRA — S. 112(2)(b.1) declared inconsistent with Charter, s. 15(1) insofar as concerning DCO nationals — Words therein “or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months” having no force or effect with respect to DCO nationals — Questions certified —

Applications allowed.

Constitutional Law — Charter of Rights — Equality Rights — Enforcement officers refusing applicants' requests for deferrals of removal — Applicants, citizens of Hungary of Roma descent, challenging validity of Immigration and Refugee Protection Act, s. 112(2)(b.1) — S. 112(2)(b.1) precluding refugee claimants from Designated Countries of Origin (DCO) from applying for pre-removal risk assessment (PRRA) before 36 months elapsing from last determination of risk — Applicants' refugee claims refused — Applicants DCO nationals, having to wait 36 month before applying for PRRA — Applicants stating, inter alia, that s. 112(2)(b.1) denying class of persons right to timely PRRA by virtue of their nationality — S. 112(2)(b.1), insofar as pertaining to DCO nationals, inconsistent with Charter, s. 15(1) — Differential treatment of DCO nationals vis-à-vis non-DCO nationals constituting distinction based on national origin for purposes of Charter, s. 15(1) — Distinction not based on country conditions — First aspect of substantive equality test satisfied by wording of s. 112(2)(b.1) — Distinction drawn between non-DCO, DCO refugee claimants in s. 112(2)(b.1) discriminatory on its face — Serving to further marginalize, prejudice, stereotype refugee claimants from DCO countries — S. 112(2)(b.1) depriving refugee claimants from DCO countries of substantive equality — Expressly imposing disadvantage based on national origin alone constituting discrimination — Denying nationals from DCOs access to PRRA for 24 months longer than non-DCO nationals not proportional to government's objectives, not minimally invasive — 112(2)(b.1) declared inconsistent with Charter, s. 15(1) insofar as concerning DCO nationals, not saved by Charter, s. 1.

Constitutional Law — Charter of Rights — Limitation Clause — Enforcement officers refusing applicants' requests for deferrals of removal — Applicants, citizens of Hungary of Roma descent, challenging validity of Immigration and Refugee Protection Act, s. 112(2)(b.1) — S. 112(2)(b.1) precluding refugee claimants from Designated Countries of Origin (DCO) from applying for pre-removal risk assessment (PRRA) before 36 months elapsing from last determination of risk — Applicants' refugee claims refused — Applicants DCO nationals, having to wait 36 month before applying for PRRA — Applicants stating, inter alia, that s. 112(2)(b.1) denying class of persons right to timely PRRA by virtue of their nationality — S. 112(2)(b.1), insofar as pertaining to DCO nationals, inconsistent with Charter, s. 15(1) — Whether impact of s. 112(2)(b.1) on rights of DCO claimants vis-à-vis non-DCO claimants proportionate to pressing, substantial objectives of s. 112(2)(b.1) — Charter, s. 1 engaged herein — Objective of s. 112(2)(b.1) part of overall objectives of immigration reforms — However, s. 112(2)(b.1) not proportional to government's objectives, not minimally impairing — Risk of refoulement not mitigated by other avenues open to DCO claimants — Not proven herein that s. 112(2)(b.1) least drastic means by which government could satisfy its objectives, that s. 112(2)(b.1) having additional deterrent effect — Not necessary for Parliament to differentiate between DCO, non-DCO claimants when imposing restriction on when failed refugee claimant could access PRRA —- Act, s. 112(2)(b.1) not saved by Charter, s. 1.

Practice — Mootness — Enforcement officers refusing applicants' requests for deferrals of removal — Applicants, citizens of Hungary of Roma descent, challenging validity of Immigration and Refugee Protection Act, s. 112(2)(b.1) — S. 112(2)(b.1) precluding refugee claimants from Designated Countries of Origin (DCO) from applying for pre-removal risk assessment (PRRA) before 36 months elapsing from last determination of risk — Applicant' refugee claims refused — Applicants served with Direction to Report for removal — Deferrals of removal refused — Applicants DCO nationals, having to wait 36 month before applying for PRRA — Applicant Feher subsequently becoming eligible for PRRA — However, case management Judge dismissing respondent's motion to dismiss applications based on mootness — 36-month PRRA waiting period eventually expiring for remaining applicants — Issue of mootness res judicata — Even though other individual applicants not becoming PRRA-eligible until after date of case management Judge's order, same considerations, analysis applying to them mutatis mutandis — Discretion exercised herein to decide case on its merits — Case raising important constitutional question otherwise evading judicial

review, adversarial context still present.

These were consolidated applications for judicial review of decisions made by various inland enforcement officers refusing the applicants' requests for deferrals of removal.

The applications involved a constitutional challenge to a part of the Designated Countries of Origin (DCO) regime established under the *Immigration and Refugee Protection Act* (Act). The applicants, all citizens of Hungary and of Roma descent, alleged that paragraph 112(2)(b.1) of the Act infringed subsection 15(1) of the *Canadian Charter of Rights and Freedoms*. Paragraph 112(2)(b.1) precludes a refugee claimant from a DCO from applying for a pre-removal risk assessment (PRRA) before 36 months have elapsed from the last determination of their risk before the Refugee Protection Division (RPD) or the Refugee Appeal Division of the Immigration and Refugee Board. The applicants each made a refugee claim in 2011, alleging a well-founded fear of persecution based on their ethnicity and a fear of gender-based violence. The RPD refused their claims. The Canada Border Services Agency served each applicant with a Direction to Report for removal. The applicants requested deferrals of removal, which were all refused. But for the 36-month waiting period applied to DCO nationals by virtue of paragraph 112(2)(b.1), the applicants would have had access to a further risk assessment by way of a PRRA prior to removal. While the applicant Mr. Feher later became eligible for a PRRA, a case management Judge dismissed a motion by the respondent to dismiss Mr. Feher's applications based on mootness, finding that there was a clear adversarial context between the parties with respect to the constitutionality of the DCO provisions of the Act. The 36-month PRRA waiting period eventually expired for all the applicants.

The applicants stated, *inter alia*, that paragraph 112(2)(b.1) denies a class of persons the right to a timely PRRA by virtue of their nationality. According to the applicants, the nationality-based discrimination was intimately connected with discrimination based on the ethnicity of the Roma applicants who were affected. The applicants contended that the purpose and effect of paragraph 112(2)(b.1) is to single out all DCO from the pool of unsuccessful claimants and deny them access to a PRRA for a further 24 months. They claimed this clearly denies DCO nationals a benefit under the law.

The main issue was whether paragraph 112(2)(b.1) of the Act, insofar as it pertains to nationals from a DCO, is inconsistent with subsection 15(1) of the Charter and if so, whether paragraph 112(2)(b.1) could be justified under section 1 of the Charter.

Held, the applications should be allowed.

The issue of mootness was *res judicata*. Even though the other individual applicants did not become PRRA-eligible until after the date of the case management Judge's order, the same considerations and analysis applied to them *mutatis mutandis*. Discretion was therefore exercised herein to decide the present case on its merits. This case raised an important constitutional question that might otherwise have evaded judicial review, and there was still an adversarial context.

Paragraph 112(2)(b.1) of the Act, insofar as it pertains to DCO nationals, is inconsistent with subsection 15(1) of the Charter. The question to be determined was whether the differential treatment as to when a DCO claimant and a non-DCO claimant can apply for a PRRA constitutes a distinction based on an enumerated or analogous ground of discrimination. It was previously determined in *Canadian Doctors for Refugee Care v. Canada (Attorney General)* (*Canadian Doctors*) and *Y.Z. v. Canada (Citizenship and Immigration)* (*Y.Z.*) that the differential treatment of DCO nationals vis-à-vis non-DCO nationals constitutes a distinction based on national origin for the purposes of subsection 15(1) of the Charter. To argue that the distinction between DCO and non-DCO nations is not nationality but, rather, the country conditions that exist at any point in time, is not persuasive. The fact that a country could conceivably be removed from the list of designated

countries in the future does not make a claimant's national origin mutable. The first aspect of the substantive equality test was satisfied by the very wording of paragraph 112(2)(b.1) itself, which creates two classes of refugee claimants based solely on national origin. The distinction drawn between non-DCO and DCO refugee claimants in paragraph 112(2)(b.1) is discriminatory on its face. This distinction serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and "non-refugee producing". Paragraph 112(2)(b.1) deprives refugee claimants from DCO countries of substantive equality vis-à-vis those from non-DCO countries with respect to their access to a PRRA. Expressly imposing a disadvantage based on national origin alone constitutes discrimination.

Denying nationals from DCOs access to a PRRA for 24 months longer than non-DCO nationals is not proportional to the government's objectives. This is an inequality that is disproportionate and overbroad and could not be saved by section 1 of the Charter. The central question was whether the impact of paragraph 112(2)(b.1) on the rights of DCO claimants vis-à-vis non-DCO claimants is proportionate to the pressing and substantial objectives of this paragraph. Denying a PRRA for a DCO claimant until 36 months have passed since final determination of their refugee claim, is "prescribed by law" and, therefore, engages section 1 of the Charter. Canada did have a pressing and substantial objective in effecting the reforms in the *Balanced Refugee Reform Act* and the *Protecting Canada's Immigration System Act*. The objective of paragraph 112(2)(b.1) was part of the overall objectives of those reforms. However, even if it may have been reasonable to suppose that denying a PRRA to a DCO national for 24 months more than a non-DCO national might further these objectives and be rationally connected to them, it could not be said that paragraph 112(2)(b.1) was minimally impairing. Any risk of *refoulement* from the delayed access to a PRRA for DCO nationals is not mitigated by other avenues open to DCO claimants. It was not proven herein that denying a PRRA to a DCO national for 24 months more than a non-DCO national is the least drastic means by which the government could satisfy its objectives. Nor was evidence supplied to prove that paragraph 112(2)(b.1) has any additional deterrent effect. It was not necessary for Parliament to differentiate between DCO and non-DCO claimants when imposing a restriction on when a failed refugee claimant could access a PRRA.

Paragraph 112(2)(b.1) was declared to be inconsistent with subsection 15(1) of the Charter insofar as it concerns DCO nationals under subsection 109.1(1) of the Act; and the words "or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months", in paragraph 112(2)(b.1) were declared to have no force or effect with respect to such nationals. The respondent's request that the effect of the declaration be suspended was refused. Rectifying the inequality at issue as soon as possible outweighed any administrative burdens to the government. Questions were certified as to whether paragraph 112(2)(b.1) is inconsistent with subsection 15(1) of the Charter insofar as it pertains to DCO nationals, and if so, whether paragraph 112(2)(b.1) is a reasonable limit prescribed by law that can be demonstrably justified under section 1 of the Charter.

STATUTES AND REGULATIONS CITED

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Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52.

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Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(2)(e), 74(d), 96, 97, 99(3.1), 100(4),(4.1), 107(2), 107.1, 109.1, 110(2)(d.1), 111.1(1)(a),(2), 112(1),(2),(2.1),(2.2), 161(1)(c),(1.1).

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DISTINGUISHED:

Y.Z. v. Canada (Citizenship and Immigration), 2015 FC 892, [2016] 1 F.C.R. 575.

CONSIDERED:

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APPLICATIONS for judicial review of decisions made by various inland enforcement officers refusing the applicants' requests for deferrals of removal. Applications allowed.

APPEARANCES

Anthony Navaneelan, *Benjamin Liston*, *Andrew Brouwer*, *Alyssa Manning*, *Chelsea Peterdy* and *Amedeo Clivio* for applicants.

Martin Anderson, *Modupe Oluyomi* and *Laoura Christodoulides* for respondents.

SOLICITORS OF RECORD

Legal Aid Ontario Refugee Law Office, Toronto, for applicants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

Boswell J.:

I. Introduction

[1] These applications for judicial review involve a constitutional challenge to a part of the Designated Countries of Origin (DCO) regime established under the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (IRPA). This Court has previously determined that one aspect of this regime withstands constitutional scrutiny. Other cases have found that the differential treatment of refugee claimants from a DCO is inconsistent with the Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Charter).

[2] In this case, the applicants challenge paragraph 112(2)(b.1) of the IRPA on the basis that it infringes subsection 15(1) of the Charter. This paragraph precludes a

refugee claimant from a DCO from applying for a pre-removal risk assessment (PRRA) before 36 months have elapsed from the last determination of their risk before the Refugee Protection Division (RPD) or the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (I.R.B.).

[3] In these reasons for judgment, I will first review the procedural history of these five judicial review applications which have been consolidated. From there, I will proceed to provide a general overview of the DCO regime. After that overview, I will identify the issues raised by these applications, and following that I will address the issue of whether the applications have become moot.

[4] The affidavit evidence will then be summarized once the various issues have been identified. The Respondent's motion to strike certain affidavits or portions of them from the record will be considered after the evidence has been summarized.

[5] The parties' submissions as to whether paragraph 112(2)(b.1) of the IRPA violates subsection 15(1) of the Charter will be considered after dealing with the respondent's motion. If it is determined that there is a constitutional infringement, it will then be necessary to consider what is an appropriate remedy. Lastly, I will consider whether any questions should be certified pursuant to paragraph 74(d) of the IRPA.

II. Procedural History

[6] The individual applicants in this consolidated matter are all citizens of Hungary and are of Roma descent. They each made a refugee claim in 2011, alleging a well-founded fear of persecution in Hungary based on their Roma ethnicity, and in the case of the applicant Aniko Horvathne Serban, a fear of gender-based violence. The RPD refused each of their claims.

[7] After the RPD refused their claims, the Canada Border Services Agency (CBSA) served each individual applicant with a Direction to Report for removal from Canada. A Direction to Report was served on Mr. Sebok and Mr. Feher more than one year (but less than 36 months) after the RPD refused their claims. Ms. Serban and Ms. Horvath were each served with a Direction to Report less than one year after the RPD refused their claims. Ms. Serban failed to appear for her scheduled removal but came to the attention of CBSA again approximately one and a half years later; she was detained and shortly thereafter served with another Direction to Report. All of the individual applicants requested a deferral of removal. None of their requests for a deferral were granted. They each filed applications for leave and for judicial review of the negative decisions made by various inland enforcement officers. But for the 36-month waiting period applied to DCO nationals by virtue of paragraph 112(2)(b.1), Mr. Sebok, Mr. Feher, and Ms. Serban would have had access to a further risk assessment by way of a PRRA prior to removal.

[8] Ferenc Feher made two requests for his removal to be deferred, resulting in two applications for leave and for judicial review (IMM-3855-15 and IMM-3838-15). In August 2015, this Court stayed Mr. Feher's deportation until the applications were

decided. These two applications were consolidated in September 2015, with IMM-3855-15 designated as the lead file. Leave for judicial review was granted in December 2015. Mr. Feher became eligible for a PRRA on December 31, 2015.

[9] In January 2016, Mr. Feher brought a motion to amend his application for judicial review to include a request for a declaration that paragraph 112(2)(b.1), insofar as it expressly pertains to DCO nationals, be declared to be an unjustified infringement of subsection 15(1) of the Charter and of no force and effect pursuant to section 52 of the Constitution Act, 1982. This amendment was allowed in November 2016.

[10] Also, in January 2016, the respondent brought a motion in writing to dismiss Mr. Feher's applications based on mootness since he had become eligible for a PRRA. The case management Judge (CMJ or case management Judge) for this matter dismissed the motion in an order dated November 10, 2016 (see: Feher v. Canada (Public Safety and Emergency Preparedness), 2016 FC 1259, 277 A.C.W.S. (3d) 812 (Feher No. 1)). She determined that, although the applications were moot, it was appropriate under the second stage of the two-step test for mootness in Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, (1989), 57 D.L.R. (4th) 231 (Borowski), to exercise her discretion and consider the motion on its merits.

[11] The CMJ found, considering the decisions of this Court in Y.Z. v. Canada (Citizenship and Immigration), 2015 FC 892, [2016] 1 F.C.R. 575 (Y.Z.) and Canadian Doctors for Refugee Care v. Canada (Attorney General), 2014 FC 651, [2015] 2 F.C.R. 267 (Canadian Doctors), there was a clear adversarial context between the parties with respect to the constitutionality of the DCO provisions of the IRPA. With respect to judicial economy, she determined in Feher No. 1 [at paragraph 23] that:

> … it would be perverse to dismiss the current application for judicial review. This would force the Applicant to pursue his remedy of declaratory relief in an action under subs 17(1) of the *Federal Courts Act* when such an action, if brought earlier, would have been struck on the basis that the relief could be sought in an application for judicial review. That would not only be an unnecessary use of judicial resources, but would also be punitive to the Applicant.

[12] As to whether the Court would be encroaching on the legislative sphere, the CMJ concluded that, but for the finding of mootness because Mr. Feher was PRRA-eligible, there was "no doubt this judicial review would have proceeded to adjudication. Review of decisions that may be unconstitutional is one of the roles of the Court. There is no encroachment on the legislative sphere by allowing this application to continue" (Feher No. 1, at paragraph 26). The CMJ dismissed the respondent's mootness motion.

[13] Richard Sebok and the Canadian Association of Refugee Lawyers (CARL) filed an application for leave and for judicial review in February 2016 (IMM-591-16). This application also challenged the 36-month PRRA bar on the basis that it infringes subsection 15(1) of the Charter. This Court stayed Mr. Sebok's deportation on February 10, 2016, until the application was determined. Leave was granted in May 2016. The 36-month PRRA waiting period for Mr. Sebok expired on December 19, 2017.

[14] Mr. Feher's applications for judicial review were scheduled to be heard in March 2016, but they were adjourned and ordered to proceed as specially managed proceedings. As other applicants filed applications questioning the constitutionality of paragraph 112(2)(b.1) of the IRPA, namely, Richard Sebok, Erika Horvath (and her son), and Aniko Horvathne Serban, these were assigned to the CMJ who ordered that they be consolidated in an order dated June 4, 2018.

[15] Erika Horvath and her son filed their application for leave and for judicial review in August 2016 (IMM-3515-16). They requested that their removal from Canada be deferred on the grounds that paragraph 112(2)(b.1) is unconstitutional, there was a pending application for permanent residence on humanitarian and compassionate (H&C) grounds, and deferral was not in the best interests of the child. After the deferral request was refused, this Court stayed the removal of Ms. Horvath and her son on August 30, 2016, until the application was decided. Leave was granted in December 2016. The 36-month PRRA waiting period for Ms. Horvath and her son would have expired on August 4, 2018, but they were granted permanent residence on H&C grounds in July 2017.

[16] Aniko Horvathne Serban filed her application for leave and for judicial review in April 2017 (IMM-1552-17). Ms. Serban requested that her removal from Canada be deferred on the ground that paragraph 112(2)(b.1) is unconstitutional. After her deferral request was refused, this Court stayed Ms. Serban's removal on April 6, 2016, until the application was determined. Leave was granted in June 2017. The PRRA bar for Ms. Serban expired on March 5, 2018.

[17] In November 2017, the respondent filed a motion for an order removing CARL as an applicant in the Sebok application. The CMJ denied the motion to strike CARL as an applicant in an order dated January 31, 2018. She found that CARL satisfied the three factors for public interest standing set out in Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 S.C.R. 524, at paragraph 37. In the order, the CMJ described CARL as follows:

> CARL is an association of lawyers and academics with an interest in legal issues related to refugees, asylum-seekers, and the rights of immigrants. It is a legal advocate on behalf of these groups. It engages in public interest litigation on behalf of vulnerable refugees, asylum-seekers, permanent residents and migrants. CARL has been accorded status as an intervener or a public interest litigant many times in the trial and appellate courts of Canada. In both *Canadian Doctors* and *YZ*, CARL was granted public interest standing as a party in this Court. CARL has also been granted intervenor status a number of times before the Supreme Court of Canada.…

[18] The respondent also filed in November 2017 identical motions in each of the applications for an order striking the affidavits, or portions of them, filed by the applicants. The CMJ, in an order dated February 1, 2018, dismissed the motion to strike. This order provided that the respondent's motion to strike could be brought before the applications judge in due course, and that leave was granted for all the existing affidavits filed in the record to remain until such time as the applications judge otherwise determined.

III. Overview of the Designated Countries of Origin Regime

[19] When Parliament replaced the *Immigration Act, 1976*, S.C. 1976-77, c. 52, with the IRPA, subsection 112(2) introduced a PRRA procedure. This subsection allowed (with certain exceptions) persons in Canada who were subject to an in-force removal order and who alleged a risk of torture, risk to life, or risk of cruel treatment or punishment if removed, to apply for a PRRA. This subsection contained no time limitations as to when a PRRA application could be made.

[20] The *Balanced Refugee Reform Act*, S.C. 2010, c. 8 (BRRA), added a requirement in paragraph 112(2)(b) of the IRPA that a person who had made a refugee claim, or who had previously applied for a PRRA, which was rejected, abandoned or withdrawn, was ineligible to apply for a PRRA unless at least 12 months had passed since the rejection, abandonment or withdrawal.

[21] As part of the reforms enacted by the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17 (PCISA), Parliament introduced the concept of a DCO. The PCISA replaced paragraph 112(2)(b.1) of the IRPA. This new paragraph became effective on December 15, 2012. It constitutes an exception to subsection 112(1), under which a person in Canada may apply for protection if they are subject to an enforceable removal order.

[22] Subsection 112(2) states in relevant part:

> **112 (1)** …
>
> **Exception**
>
> **(2)** Despite subsection (1), a person may not apply for protection if
>
> …
>
> **(b.1)** subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;
>
> **(c)** subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their last application for protection was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Minister.

[23] Teny Dikranian, the Director of Citizenship Legislation and Program Policy in the Citizenship Branch of Immigration, Refugees and Citizenship Canada (IRCC), states in her affidavit that one of the main goals of the DCO regime was to shorten the process for making a refugee claim, to produce either a positive decision granting protection or a

negative decision leading to removal. Other factors also motivated reforms to the refugee system: it was too slow, there were multiple layers of recourse, the number of claims was increasing, and the backlog of unheard claims was growing.

[24] Before the BRRA was passed, it would take about 19 months after a person made a claim for protection for a decision by the RPD and it would take about four and a half years from the initial claim until removal of a failed refugee claimant. According to Ms. Dikranian, Parliament created a separate procedure for refugee claims made by nationals of a DCO to speed up the processing of all refugee claims. DCO nationals still have access to a PRRA but they must wait longer before they are eligible. Their claims are treated differently under the IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations).

[25] Section 109.1 of the IRPA governs how a country is designated. Countries can be triggered for potential designation through either quantitative or qualitative triggers. When this matter was heard, 42 countries had been designated as a DCO. Hungary has been a DCO since the inception of the regime in December 2012. There is no express authority set out in the IRPA for removing a country's designation, but in November 2014 the Minister approved a process for doing so. This process involves monitoring all DCOs for significant deterioration in country conditions and assessment against various factors. At the time of the hearing of this matter, no DCO has been removed from the list of DCOs.

[26] The legislative provisions which establish the DCO regime contemplate several unique consequences for claimants from DCOs. I will review these consequences in more detail below; but for the moment, the most significant consequences are summarized in the following chart:

	DCO Claimants	*Non-DCO Claimants*	*IRPA and Regulations*
Eligible for work permit under R206?	180 days after claim referred to RPD	Immediately after claim referred to RPD	A30(1.1); A32(d); R206(1); R206(2)
Time to RPD hearing?	Within 45 days (port of entry); Within 30 days (inland)	Within 60 days	A100(4.1); A111.1(1)(b); A111.1(2); R159.9(1)
Automatic stay of removal until judicial review decided and any appeals exhausted?	No	Yes, if applying for judicial review of RAD decision, or subsequent appeals to higher courts up to the Supreme Court of Canada	R231(1); R231(2)

Pre-Removal Risk Application bar?	36 months	12 months	A112(2)(b.1); A112(2)(c)

[27] The differential procedures faced by DCO claimants vis-à-vis non-DCO claimants are as follows:

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

2. Subsection 111.1(2) of the IRPA authorizes the creation of regulations that "provide for time limits [for claimants from DCOs] that are different from the time limits for other claimants" when scheduling a hearing pursuant to subsection 100(4.1) of the IRPA. This has been done by paragraph 159.9(1)(a) of the Regulations, which provides that an RPD hearing for a DCO claimant must be scheduled within 45 days if he or she requests protection at a port of entry, or within 30 days if he or she asks for protection inland. For claimants from non-DCOs, hearings are expected to be scheduled within 60 days no matter where they make their refugee claim (Regulations, paragraph 159.9(1)(b)). Subject to the availability of counsel, a hearing will be scheduled on "the date closest to the last day of the applicable time limit set out in the Regulations, unless the claimant agrees to an earlier date" (*Refugee Protection Division Rules*, SOR/2012-256 [repealed by SOR/2012-256, s. 73], subsection 3(2) (RPD Rules)). All claimants can apply to change the date of the hearing in exceptional circumstances (RPD Rules, subsections 54(1), 54(4)). However, since 2017 the RPD no longer strictly enforces the shortened timelines set out in the legislation for adjudicating claims by DCO, employing a "first in, first out" system for adjudicating all refugee claims.

3. Subsection 161(1.1) of the IRPA permits the Chairperson of the I.R.B. to differentiate between DCO and non-DCO claimants when making rules about "the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board"(IRPA, paragraph 161(1)(c), subsection 161(1.1)). To date, it appears that no rules which make such distinctions have been enacted. Every claimant must submit their basis of claim form and other relevant documents as soon as their claim is referred to the RPD if their claim is made inland, or within 15 days if their claim is made at a port of entry (IRPA, subsections 99(3.1), 100(4), paragraph 111.1(1)(a); Regulations, section 159.8; RPD Rules, section 7). All claimants can also

seek extensions of time (Regulations, subsection 159.8(3); RPD Rules, section 8).

4. Subsection 231(1) of the Regulations grants an automatic stay of removal to refugee claimants who seek judicial review of a RAD decision, but subsection 231(2) prevents DCO claimants from benefiting from such an automatic stay. DCO claimants will not get an automatic stay of removal if they subsequently apply for judicial review. Consequently, unless they can obtain a judicial stay of removal from this Court, DCO claimants may be removed from Canada before their applications for leave and for judicial review are even considered by this Court.

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

[28] Designation as a DCO also affected the level of government-funded health care that DCO claimants received until the *Order Respecting the Interim Federal Health Program, 2012*, SI/2012-26, (2012) *C. Gaz.* II, 1135, was invalidated in *Canadian Doctors*. A DCO claimant was precluded from bringing an appeal to the RAD until paragraph 110(2)(d.1) of the IRPA was declared to be inconsistent with subsection 15(1) of the Charter and had no force and effect in *Y.Z.*

[29] In *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, [2017] 1 F.C.R. 153 (*Atawnah*), the Federal Court of Appeal determined that the prohibition contained in paragraph 112(2)(b.1) against bringing a PRRA application until 36 months have passed after a claim was abandoned did not violate section 7 of the Charter.

[30] It is important to note though, that this Court and the [Federal] Court of Appeal in *Atawnah* did not examine the time differential between the 12-month and the 36-month PRRA bars. This Court stated in *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 774, 256 A.C.W.S. (3d) 399 [at paragraphs 61–62]:

> The applicants also say that the 36-month PRRA bar in paragraph 112(2)(b.1) of *IRPA* is arbitrary. According to the applicants, the rationale behind a 12- or 36-month PRRA bar is that country conditions that have already been assessed are unlikely to change during those timeframes. If no risk assessment has ever been carried out, however, then the conditions in an individual’s country of origin are likely to be the same on the day after their refugee claim was declared to be abandoned as they will be 12 or 36 months hence.
>
> From this is it apparent that what the applicants take issue with is not the *length* of the PRRA bar, but the fact that there is a bar at all. There is clearly a rational connection between the imposition of a PRRA bar on individuals who have abandoned their refugee claims and the limits that paragraph 112(2)(b.1) of *IRPA* imposes on the section 7 rights of the applicants. [Italic in original; emphasis added.]

[31] In this case, the time differential in eligibility for a PRRA is being raised directly.

IV. Issues

[32] Before identifying the issues to be addressed, it deserves note that this case is, conceptually, distinguishable from *Y.Z.* In that case, the DCO claimants were being entirely denied a right to appeal to the RAD, while non-DCO claimants had that right. In this case, the DCO claimants do have a right to apply for a PRRA but their right to do so is delayed and denied for two years longer than non-DCO claimants. The fundamental question in this case, therefore, is whether this distinction and denial runs afoul of subsection 15(1) of the Charter.

[33] The issues to be addressed are as follows:

1. Are the applications for judicial review moot?

2. Should the impugned affidavits be struck out in whole or in part?

3. What is the standard of review?

4. Is paragraph 112(2)(b.1) of the IRPA, insofar as it pertains to nationals from a DCO, inconsistent with subsection 15(1) of the Charter?

5. If so, is paragraph 112(2)(b.1) of the IRPA justifiable under section 1 of the Charter?

6. If paragraph 112(2)(b.1) of the IRPA is unconstitutional, what is an appropriate remedy?

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

[34] I turn now to deal with the first issue.

V. Are the Applications for Judicial Review Moot?

[35] With the passage of time, each of the individual applicants has now jumped over the 36-month PRRA bar. Mr. Feher was the first on December 31, 2015; Mr. Sebok became eligible on November 4, 2017; Ms. Serban was the last on March 8, 2018 (Ms. Horvath and her son would have been eligible on August 4, 2018, but they were granted permanent residence based on H&C factors in July 2017). At the time of *Feher No. 1*, only Mr. Feher was eligible to apply for a PRRA.

[36] The respondent says all the applications for judicial review are now moot because the factual basis upon which they were brought has disappeared, no adversarial context persists, and the outcomes of the applications will not result in a practical effect on the parties. In the respondent’s view, mootness is not a static issue but is continuously evolving. The respondent notes that: “the inapplicability of a statute to the party challenging the legislation renders a dispute moot” (*Borowski*, at page 355).

[37] The respondent further says I am not bound by *Feher No. 1* as facts have changed, in that all individual applicants are now eligible for a PRRA. The respondent urges the Court not to exercise its discretion to decide the case, noting that the record is insular and only deals with a minority in one DCO country when there are numerous DCO countries, and that this weighs against exercising my discretion. The discretion to decide this matter should not be exercised in this case as it would be better to wait for a genuine adversarial context.

[38] The applicants contend that the respondent's motion to dismiss the applications based on mootness is futile. CARL has public interest standing and is not subject to the mootness doctrine and its standing is not being opposed. According to the applicants, the Court is bound by *Feher No. 1* as it was a final order, and nothing indicates that it was interlocutory. The applicants say the issue of mootness is *res judicata* in view of *Feher No. 1*.

[39] In the applicants' view, *Borowski* supports the Court hearing this matter because it involves an important constitutional issue, there is a fulsome record, and there is a strong public interest in finding not only an answer to the question of whether the three-year PRRA bar violates subsection 15(1) of the Charter, but also in not allowing a potentially unconstitutional provision to persist. The Supreme Court of Canada stated in *Borowski* that the doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case" (at page 353). This involves a two-step analysis: "First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case" (*Borowski*, at page 353).

[40] Accordingly, in a case where there is "no longer a live controversy or concrete dispute" the case can be determined to be moot (*Borowski*, at page 357). Even if a case may be moot because there is no longer a live controversy or concrete dispute, it is nevertheless necessary for the Court to determine whether it should exercise its discretion to hear and determine the case on the merits where circumstances warrant.

[41] Three overriding principles are to be considered in this second step of a mootness analysis: (1) the presence of an adversarial relationship (*Borowski*, at pages 358–359); (2) the need to promote judicial economy (*Borowski*, at page 360); and (3) the need for the court to show a measure of awareness of its proper role as the adjudicative branch of government (*Borowski*, at page 362). The Court should consider the extent to which each of these principles may be present in a case, and the application of one or two may be overborne by the absence of the third and vice versa (*Borowski*, at page 363).

[42] The Supreme Court in *Borowski* identified several instances where a court's discretion may be exercised to allow it to hear and decide a case which might otherwise be moot. For example, if: (1) there is still the necessary adversarial relationship between

the parties even though the live issue or concrete dispute no longer exists (at pages 360–361); (2) the Court's decision will have practical effect on the rights of the parties (at page 360); (3) the case is one of recurring but brief duration, such that important questions might otherwise evade judicial review (at page 360–361); or (4) where issues of public importance are at stake such that resolution is in the public interest, though the mere presence of a matter of national importance is insufficient (at page 362).

[43] In view of *Feher No. 1*, I agree with the applicants that the issue of mootness is *res judicata*. Even though the other individual applicants did not become PRRA-eligible until after the date of *Feher No. 1*, the same considerations and analysis as that conducted by the CMJ apply to them *mutatis mutandis*. I will, therefore, exercise my discretion to decide this case on its merits.

[44] This case is one which raises an important constitutional question that might otherwise evade judicial review. As the Supreme Court remarked in *Borowski*: "an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly" (at page 360).

[45] The evidence in the record shows that most DCO claimants, as well as most non-DCO claimants, are generally removed from Canada within one year from when their refugee claim has been finally determined (cross-examination of Teny Dikranian, questions 62 to 72 and 149 to 152). This means that most failed refugee claimants will never be able to access a PRRA regardless of whether they are or are not a DCO claimant. It is likely, therefore, (though possible) that the constitutional question raised in this case might otherwise evade judicial review. For this reason, and as there is still an adversarial context, I have determined it is appropriate to determine the matter on its merits.

VI. The Affidavit Evidence

[46] The parties have filed numerous affidavits which contain written testimony and dozens of exhibits. The respondent seeks an order striking all or parts of eight affidavits filed by the applicants on the grounds that they are irrelevant, unnecessary, or contain improper opinion evidence.

[47] Before considering the merits of the respondent's motion, it is useful to summarize some of the evidence presented by the parties.

A. *The Applicants' Affidavit Evidence*

(1) Ferenc Feher

[48] Ferenc Feher was born on October 12, 1985 in Pecs, Hungary. He is one of the individual applicants in these applications. He came to Canada in June 2011, seeking refuge from ethnic persecution at the hands of the Hungarian Guard as well as the

general public in Hungary. He has filed an affidavit dated September 18, 2015, in support of his applications for leave and for judicial review.

[49] Mr. Feher fears returning to Hungary as violence has increased since he left. He says the RPD found every other member of his family to be a refugee, and in his view, this is a strong indication that there was a miscarriage of justice in his claim before the RPD.

[50] Mr. Feher's hearing before the RPD took place in November 2012. In a decision dated December 31, 2012, the RPD rejected his claim, finding him to be not credible. He applied for leave to judicially review the RPD's decision, but this was denied as was an application for the RPD to reopen his claim due to a lack of procedural fairness.

[51] In early August 2015, Mr. Feher attended a pre-removal interview at CBSA. He was asked to purchase a non-refundable, one-way ticket to Hungary for travel by August 25, 2015. He was served with a Direction to Report for removal a week before the August 25th deadline. Mr. Feher and his family were deeply agitated by his impending deportation since it was likely they would not be able to see each other again.

[52] When Mr. Feher met with his legal counsel to discuss his concerns about returning to Hungary, he learned that, while almost all unsuccessful refugee claimants have a right to a further risk assessment prior to removal where more than 12 months have elapsed since the I.R.B. last refused the claim, he did not have access to this assessment because he was from a DCO. He says he has seen news articles about the PRRA bar for DCO nationals which state that their refugee claims were bogus, and they were only looking to exploit Canada's social services. Many of those articles refer directly to Hungarian Roma, and he felt degraded by this rhetoric.

[53] Mr. Feher submitted a deferral request to CBSA on August 18, 2015, with additional documentation sent on the 19th and on the 20th. On August 20, an inland enforcement officer denied the request; later that day, unsure of whether the officer had considered all of the submissions (including those sent earlier in the day), Mr. Feher requested that the negative deferral request be reconsidered. The next day, Mr. Feher filed an application for leave and for judicial review in respect of the denial as well as a motion to stay his removal to Hungary. Later that day, the reconsideration request was denied. Three days later, Mr. Feher filed another application for leave and for judicial review in respect of the refusal to reconsider his deferral request. This Court stayed Mr. Feher's removal from Canada on August 25, 2015.

[54] Mr. Feher says the pressure and stress of not knowing whether he would be deported was terrible, and he had to say goodbye to all his friends and family and put his affairs in order in Canada. Although these goodbyes proved unnecessary, Mr. Feher states that it was a very expensive process and physically and emotionally exhausting for him.

(2) Richard Sebok

[55] Richard Sebok was born on January 5, 1988, in Nyiregyhaza, Hungary. He fled Hungary in April 2011 and shortly thereafter made a claim for refugee protection in Canada. He details the racism and violence he experienced because he was Roma; and although his uncle and other extended family members have been accepted as refugees in Canada, the RPD found him not to be a Convention refugee in December 2014. After the RPD rejected his claim, he stayed in Canada because he feared returning to Hungry.

[56] Mr. Sebok says he has had difficulty living without status and without a job. In June 2015, he was required to attend at CBSA, which he did, and was told he would have to return the next month. A warrant was issued for his arrest in July 2015 after he failed to appear for a pre-removal interview. On November 10, 2015, he was placed in immigration detention in a maximum-security prison. He says his time in prison was the worst time in his life. He was scared to be in a jail with men who had committed dangerous crimes and he cried a lot.

[57] Mr. Sebok received notice on January 27, 2016, that he would be deported back to Hungary on February 10, 2016. He describes this period as a very difficult time when he would get so anxious, he felt like he had to throw up. CBSA denied his request to defer his removal on February 9, 2016. This Court stayed Mr. Sebok's removal from Canada on February 10, 2016, and he was subsequently released from immigration detention.

[58] Mr. Sebok reports monthly to CBSA, and he says every time he reports he feels a knot tightening in his stomach as he is not aware what is going to happen. He says when he learned about how he was not eligible for a PRRA until three years had passed from the time when the RPD refused his claim, while others were eligible after one year, he felt discriminated against because he was Roma.

(3) Aniko Horvathne Serban

[59] Ms. Serban was born on December 17, 1965, in Szombathely, Hungary. She left Hungary due to an abusive relationship. She says she was unable to receive state protection as Hungary does not take domestic violence seriously and she is Roma. She arrived in Canada in May 2011 and made a refugee claim which the RPD rejected in March 2015.

[60] Ms. Serban was first scheduled to be removed in June 2015. Fearing return to Hungary and believing nothing could be done, she did not appear for her removal and remained without status in Canada. CBSA issued a warrant for her arrest due to her failure to appear for removal, and in March 2017 CBSA arrested her and placed her in immigration detention. Because she was from Hungary, a country which is on the DCO list, she was unable to apply for a PRRA because 36 months had not elapsed since the date when the RPD rejected her claim.

[61] She was notified on March 27, 2017, that she would be removed four days later, but CBSA cancelled the removal and rescheduled it for April 10, 2017. During this time,

Ms. Serban says she was living in total fear: she cried a lot; lost her appetite; began having suicidal thoughts; and had flashbacks about the abuse she suffered from her ex-husband. She would frequently call her lawyer and beg and plead to avoid return to Hungary. Her lawyer explained to her that it was difficult to gather all the necessary information and evidence in such a short amount of time, and that nothing could be guaranteed.

[62] On April 6, 2017, Ms. Serban's lawyer informed her that this Court had granted a stay of her removal. She describes how she was relieved and, although she was still being detained, she no longer felt despair. On June 26, 2017, she was released from immigration detention.

(4) Erika Horvath

[63] Erika Horvath is another individual applicant in this case. She was born in Budapest, Hungary on June 21, 1988, and is of Roma ethnicity. She has an 11-year-old son, Ferenc Tibor Sallai, who was also born in Budapest.

[64] Ms. Horvath and her son entered Canada in October 2011. They made a claim for refugee protection about a month after their arrival. In a decision dated August 4, 2015, the RPD found that she and her son were neither Convention refugees nor persons in need of protection. Nearly a year after the RPD's decision, Ms. Horvath learned she was going to be removed from Canada. Her lawyer filed a request to defer the removal on August 15, 2016. On the same day she filed an application for permanent residence on H&C grounds.

[65] CBSA denied Ms. Horvath's deferral request on August 18, 2016. One day before her scheduled removal, this Court ordered that her removal be stayed. She describes this period in her life as being very stressful. During this period her son was very sad and was deeply concerned about leaving his father in Canada.

[66] Ms. Horvath informed the Court in July 2017 through an affidavit, that she had been granted permanent residence based on humanitarian and compassionate grounds in July 2017.

(5) Christopher Anderson

[67] Christopher Anderson is an Assistant Professor in the Department of Political Science at Wilfrid Laurier University. He has a lengthy research history in the area of Canadian immigration and refugee policy. His affidavit focuses on identifying historical trends animating Canada's immigration and refugee policy.

[68] In his view, Canada's desire to attract some immigrants has always been accompanied by a determination to exclude others, and negative stereotypes often inform which groups are excluded (including refugees and asylum-seekers). At times, this was based on explicit racial discrimination, such as the head tax on Chinese immigrants. Though less explicit, Canada has discriminated against other groups as well, such as Japanese and East Indian immigrants. This was not always done through

legislation, and Mr. Anderson says the trend has been to assign extensive regulatory powers to the executive, thus making immigration law less subject to parliamentary and public scrutiny.

[69] When Parliament passed *The Immigration Act*, S.C. 1906, c. 19, it did so to provide that the Minister could, “by proclamation or order, whenever he considers it necessary or expedient, prohibit the landing in Canada of any specified class of immigrants” (at section 30). The Minister at the time admitted that this was “very drastic but the reason of its insertion is that there has been an immigration of gypsies lately and it is thought that such people are not desirable under any circumstances although they are physically and mentally fit, and that it would be quite proper to take power to say: You cannot come in” (Canada. Parliament. *House of Commons Debates*, 10th Parl., 2nd Sess., Vol. 3 (June 13, 1906), at pages 5252–5253). With the passage of *The Immigration Act*, S.C. 1910, c. 27, the federal cabinet was granted authority to “prohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry in Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character” (at section 38).

[70] After the Holocaust, it became harder for Canada to defend explicitly racist policies, but Professor Anderson says Canada simply masked the debate over race within discourse that, while rarely mentioning which groups would be restricted, ensured that some would be. Canada kept discriminating by vesting wide discretion in officials to establish geographical tiers of preferred immigrants. Professor Anderson says the last vestiges of formal discrimination were only removed in 1967 and Canada eventually made a formal commitment to equality when it enacted the *Immigration Act, 1976*, S.C. 1976-77, c. 52.

[71] As explicit racial discrimination diminished though, Professor Anderson says that security and abuse concerns arising from the Cold War created barriers for refugees fleeing right-wing political oppression. According to Professor Anderson, these concerns continue to inform refugee policy today, from the imposition of visa requirements, to the way the government handles irregular arrivals, and to the creation of the DCO system. He states that visa provisions, the DCO regime, and other restrictive immigration provisions have a negative effect; for example, on the ability of Roma refugee claimants to seek protection in Canada.

(6) Sean Rehaag

[72] Professor Sean Rehaag has a doctorate in law focusing on refugee law. He is an Associate Professor at Osgoode Hall Law School who specializes in immigration and refugee law and its intersection with gender and sexuality. His affidavit dated July 14, 2017, contains his affidavit which was filed in *Y.Z.*, where he attacks the use of the quantitative trigger permitting designation of a country as a DCO. His affidavit also contains two 2016 law journal articles, one he co-authored with Julianna Beaudoin and Jennifer Danch, entitled “No Refuge: Hungarian Romani Refugee Claimants in Canada” [(2015), 52 *Osgoode Hall L.J.* 705] and another he co-authored with Angus Gavin

Grant, entitled “Unappealing: An Assessment of the Limits on Appeal Rights in Canada’s New Refugee Determination System” [(2016), 49 *U.B.C. Law Rev.* 203].

[73] Professor Rehaag states that statistics on outcomes in refugee determinations from a given country can vary substantially over time, due to changing country condition evidence and random factors. He points out that some countries which meet the quantitative criteria for designating a country in one year can have high recognition rates in subsequent years. According to Professor Rehaag, these problems are compounded by including abandoned and withdrawn claims when calculating the rejection rate, because it can give the impression that claimants from a country are often being rejected when it may just be that the I.R.B. has not scheduled many claims to be heard on their merits.

[74] A second problem Professor Rehaag identifies is that a country may be safe for many claimants but unsafe for subsets of claimants. He specifically points to claims based on gender and sexual orientation, which he says are more likely to succeed than other types of claims from the same country of origin and often come from countries that typically do not produce many refugees.

[75] According to Professor Rehaag, I.R.B. data cannot be counted on to reliably record demographic information because that is not its purpose. He says it may not properly account for claimants who are nationals of multiple countries or who are determined by the RPD to be from countries other than the one they claimed.

(7) Audrey Macklin

[76] Audrey Macklin is a law professor and chair in human rights law at the University of Toronto. Since January 2017 she is also Director of the Centre for Criminology and Sociolegal Studies at the University of Toronto. From 1991 to 2009 she was a member of the Immigration and Refugee Board of Canada. She wrote a chapter in Hélène Lambert et al., eds., *The Global Reach of European Refugee Law* (New York: Cambridge University Press, 2013). This chapter entitled “A safe country to emulate? Canada and the European refugee” is an exhibit to her affidavit and discusses the introduction of designated or safe countries of origin. Her thesis is that adoption of the DCO regime was at least partially motivated by a desire to keep Roma claimants out of Canada without irritating the European Union [EU] by imposing visa requirements, since the Canadian government needed the co-operation of each member state in order to facilitate the Canada-EU comprehensive trade agreement.

[77] Professor Macklin explains how countries are designated. She describes the DCO designation practice allows for a feedback loop (she uses the term endogenous, meaning that it originates from within the refugee determination system itself), where statistical anomalies in one year can place a country on the list, with no measures to reconsider even in the outbreak of a civil war.

[78] She also discusses the myth that Hungarian Roma, indeed any EU citizen, can seek protection in another EU country. The Aznar Protocol [Protocol No. 24 on Asylum

for Nationals of Member States of the European Union] renders citizens of EU member states ineligible for asylum in another EU member state. Although EU citizens have mobility rights, different mechanisms have been used to limit the Roma's mobility within the EU. Professor Macklin says there is a misunderstanding that the EU acts as a "United States of Europe" (where each member state is a sub-federal unit of the greater whole), when the legal reality is that each member state is its own country.

(8) Aadil Mangalji

[79] Aadil Mangalji is a founding partner of Long Mangalji LLP, a law firm which focuses exclusively on refugee and immigration law. He has been certified by the Law Society of Upper Canada as a Specialist in Citizenship and Immigration Law as well as a Specialist in Refugee Protection Law. He describes the legislation grounding the PRRA process, the disadvantages PRRA-ineligible individuals from DCOs face, and his experiences as a lawyer assisting various clients who have access to a PRRA and those who do not.

[80] According to Mr. Mangalji, PRRA-ineligible individuals are often unaware of the existence of the deferral request process or the eligibility to submit a deferral request, and CBSA's website does not provide this information. Mr. Mangalji says that, while most PRRA applicants are lawfully entitled to 30 days to prepare and submit a PRRA application and typically benefit from months in which to do so, deferral request applicants are entitled to no lawful minimal period in which to prepare and submit a deferral request and typically only have weeks or sometimes even days in which to do so. Based on his experience, the short time periods as well as the absence of a statutory stay create additional monetary obligations and stresses that can seriously impede the ability of deferral request applicants to dedicate the time and resources needed to submit a thorough deferral request.

[81] Mr. Mangalji notes that CBSA has published no procedures for when an oral hearing should be convoked in the context of a deferral request and what procedures are to be followed. To his knowledge, no deferral request applicant has been granted an oral hearing by a CBSA officer who subsequently denied the deferral request. He states that applicants who receive a positive deferral request decision do not receive refugee protection, nor are they eligible for permanent residence. Just as there are no statutory or regulatory criteria for when a deferral request should be granted, there are no criteria for when a granted deferral should be revisited or revoked.

(9) Lisa Andermann

[82] Lisa Andermann is a psychiatrist and Associate Professor of Psychiatry in the Division of Equity, Gender and Populations, Department of Psychiatry at University of Toronto. She is attached to the Psychological Trauma Clinic at Mount Sinai Hospital and New Beginnings Clinic at the Centre for Addiction and Mental Health serving newcomers and refugees, and a consultant psychiatrist at the Canadian Centre for Victims of Torture. She has been working in the area of psychological trauma and cultural psychiatry since 2001.

[83] She was asked to answer the question of “what, if any, are the likely psychological/psychiatric effects of uncertainty in terms of procedure and/or timelines for refugee claimants and refused refugee claimants?” Her affidavit focuses on how the uncertainty and delays in the refugee process increase mental health issues for refugees.

[84] She speaks to how the mental health of refugee claimants is adversely affected by uncertainty of process and unknown procedural timelines in both the adjudication and post-adjudication process. In particular, the uncertainty prevents treatment of post-traumatic stress disorder since the first stage of many treatment procedures is “Safety and Stabilization”, which involves removing risk of further trauma and treating concurrent symptoms. She states: “inordinate delays in the refugee adjudication process and heightened uncertainty regarding post-determination timelines and processes prolong the period of uncertainty and lack of safety. During this time, trauma-related symptoms of mental disorder or distress are unlikely to improve and may indeed deteriorate further.”

(10) Julianna Beaudoin

[85] Julianna Beaudoin has a PhD in Anthropology and completed her dissertation, entitled *Challenging Essentialized Representations of Romani Identities in Canada* [University of Western Ontario, 2014], on Roma in Canada and the various issues they face. She says Roma people are often portrayed and treated negatively, and that Canadians lack accurate information about the Roma. Because there is so little exposure to Roma, she opines that it is problematic when government officials say that Roma individuals make bogus claims or are undeserving of refugee protection.

[86] In her affidavit she opines that the DCO regime should not count abandoned or withdrawn claims as failures, since this ignores the rate at which claims are accepted. In particular, she says there may be many reasons why a claim might be withdrawn or abandoned that are unrelated to whether a person would face persecution in their country of origin. She says she interviewed many Romani newcomers for her dissertation, and that some of the reasons claimants abandoned their claims include: their representatives either defrauded them or were incompetent; some claimants do not understand that they cannot return home for any reason or mistakenly believe they can restart their claim later; some claimants often need to change addresses and do not realize how important it is to inform the I.R.B., causing them to miss deadlines; some claimants suffer from mental disabilities that make it difficult; and some grew discouraged when they heard the former Minister of Citizenship and Immigration, Jason Kenney, say their claims were “bogus”.

[87] Her dissertation is attached as an exhibit to her affidavit as well as two articles: “The exclusion of Roma claimants in Canadian refugee policy” [(2013), 48 *Patterns of Prejudice* 67] and “No Refuge: Hungarian Romani Refugee Claimants in Canada” A fourth exhibit is a compilation of excerpts from articles detailing comments and views on Romani refugee claimants made by Government of Canada officials.

(a) *Thesis*

[88] Julianna Beaudoin's thesis examines how Romani identity processes can emerge and be instrumentalized to struggle against discrimination, essentialized stereotypes, and exclusionary policies and attitudes.

[89] Section 3.1 of her thesis describes how genealogy and linguistic analysis has been used to trace Romani historical origins in northwest India. Ms. Beaudoin also discusses how Roma have experienced numerous injustices throughout their history, including enslavement, forced sterilization, expulsions, special "hunts" and permissions to kill on sight, legalized rape and murders, segregated communities and schools, property theft, linguistic restrictions, forced adoptions, and outright genocide. This persecution continues to present day educational segregation, forced sterilization, state sanctioned police brutality, and ghettoization of the Roma. In a later section, she describes how Roma compared the current rise in Hungary's Jobbik party to Hitler's rise in popularity. Roma come to Canada from various countries including England, Hungary, and the Czech Republic.

[90] According to Ms. Beaudoin, Roma may have been living in Canada as far back as the 1500s to 1700s. Roma were in Canada by the 1800s. By the end of 1957, more than 37 000 Hungarians had been accepted into Canada. In 1996, large numbers of Czech Romani refugees began to apply for refugee status in Canada, soon followed in the late 1990s and early 2000s by Hungarians. Although Canada does not release the ethnic background of refugee claimants, only their nationality, it is estimated that Roma from these two countries made most of the claims between 1996 and 2008.

[91] In the fourth chapter of her thesis Ms. Beaudoin reviews the media landscape of Canadian coverage of the Roma. Much of this chapter and subsequent chapters discuss the themes of how Romani refugee claimants are bogus claimants and queue jumping "Gypsies". According to Ms. Beaudoin, these ideas are played out through conceptions and structures in our immigration system, and the erroneous belief that inland refugee claimants are queue-jumpers is a view perpetuated by government officials who describe rejected, abandoned, and withdrawn refugee claims as fraudulent cases.

[92] Ms. Beaudoin reports that individuals have been contacted after reporting sympathetic stories about the Roma by various officials including then Minister of Citizenship and Immigration, Jason Kenney, and that the government attempts to control the narrative and public information through intimidation. She says the media also plays its part though, since fear sells, and the media is quick to spread news on criminality, especially about Roma.

[93] In a sample of 235 news articles from 2012 which specifically referenced the terms "Roma" and "Gypsy", Ms. Beaudoin found 95 articles also included the term "bogus". Almost half of the articles also referenced European countries in some way as "safe". Like these bogus articles, there were some critical discussions of the DCO list describing the EU as wholly safe and as a non-refugee producing area. Only 12

headlines explicitly drew attention to issues like intolerance or hatred, persecution, or other harsh conditions the Roma face, while 15 story headlines specifically addressed various day-to-day issues the Roma face in Canada.

[94] Ms. Beaudoin describes how Romani have tried to advocate in Canada. One of the focuses has been on improving educational opportunities, but the faster turnaround for deportations means that some programs which are created cannot be fully utilized. In response to the fear of deportation, Ms. Beaudoin describes how some Roma leave fearing they will be denied and deported and are leaving Canada and heading to other countries before they have a chance to make their case before the I.R.B.

[95] Ms. Beaudoin also discusses how statistics were used to create the DCO list, and how these statistics could be used or explained in different ways to create different outcomes. Factors such as the ability to afford a lawyer or the translator used in a hearing may not be captured in statistics, and these factors have a great impact on a claimant's success in receiving protection but are seldom measured.

(b) *No Refuge: Hungarian Romani Refugee Claimants in Canada*

[96] This paper authored by Sean Rehaag, Julianna Beaudoin, and Jennifer Danch consists of a qualitative and quantitative study of Hungarian Romani refugee claims to address what the authors call an evidentiary vacuum in assessing the 2012 changes effected by the PCISA. The article explores the experiences of Hungarian Roma within Canada's refugee determination system between 2008 and 2012. It concludes by focusing on findings from the study, including the impact of anti-refugee rhetoric, institutional bias, inconsistent decision-making, and problems related to quality of counsel.

[97] The first part of this paper covers topics such as the history of persecution of the Roma, and the Canadian legal landscape and immigration policies towards the Roma. The second part analyses how Hungarian refugee claimants were treated from 2008 to 2012. One conclusion in the paper is that, while it is incorrect to make blanket statements about Hungarian claims being bogus, it is fair to say that, in a large majority of Hungarian refugee claims finalized between 2008 and 2012, the claimants did not obtain refugee protection.

[98] The paper also examines different reasons why claimants were found not to be refugees, such as the availability of state protection, discrimination versus persecution, and general negative credibility findings. It looks at the abandoned and withdrawal rates of Hungarian claimants. A large proportion (52.5 percent) of the 7 669 Hungarian refugee claims finalized between 2008 and 2012 were withdrawn or abandoned. Explanations for this included despair, a high proportion of counsel found to engage in professional misconduct, and other reasons such as culture shock, other family members being deported creating a chain reaction, and the need to return to Hungary to care for ill family members or attend a funeral. The paper concludes that, although there were higher abandonment and withdrawal rates (but not as high as statistics used by

Minister Kenney), there were reasons other than bogus refugees to create these higher rates.

(11) Cynthia Levine-Rasky

[99] Cynthia Levine-Rasky is an Associate Professor in the Department of Sociology at Queen's University. Her research has focused on Romani studies since 2011. Her book entitled *Writing the Roma: Histories, Policies, and Communities in Canada* [Halifax: Fernwood Publishing] was published in 2016. She has also authored various journal articles, including "Designating Safety, Denying Persecution: Implications for Roma Refugee Claimants in Canada" [(2018), 16 *Journal of Immigrant & Refugee Studies* 313] and "They didn't treat me as a Gypsy: Romani Refugees in Toronto" [(2016), 32 *Refugee* 54]. These articles and Professor Levine-Rasky's book are attached as exhibits to her affidavit.

(a) *Writing the Roma*

[100] *Writing the Roma* covers the history of the Roma, past and present persecution, and the Canadian immigration system's treatment of Roma. In a chapter entitled "The Canadian Refugee System and the Roma" Professor Levine-Rasky examines how statistics are used to prove a political point in the case of Roma refugee applicants. In another chapter entitled "Reforms to the System and Designated Countries of Origin" she explains the principle of the DCO regime and its effects on Roma refugee claimants. Professor Levine-Rasky describes how the increased wait time before accessing a PRRA from 12 months to 36 months was part of a policy to expedite failed claimants' repatriation. She finds the method of designating a country problematic, stating that:

> … the likelihood of a country's "safe" designation rose with the number of people seeking asylum from it. Equally troubling was that withdrawn and abandoned claims were used in the formula to calculate safety …. The effect of this was to hold extraneous circumstances against claimants, circumstances that were sufficiently poor to lead them to abandon or withdraw their claims.

[101] According to Professor Levine-Rasky, racism as well as economic concerns played into the creation of the DCO regime. While visas were used in the past to limit refugee claimants, this was a blunt instrument which had the indirect effect of limiting trade, so the DCO list was created. Professor Levine-Rasky rhetorically asks:

> How does international trade affect national refugee policy? In a nutshell, the value of trade and the desire to nurture political relations conducive to sustaining the globalization of trade works as an incentive for overlooking a trading partner's violation of human rights. To facilitate free trade and diplomatic relations, social conditions for national minorities are frequently denied or dismissed as a domestic concern. As a result, the persecution of minorities is expunged from the political dialogue.

(b) *Designating Safety, Denying Persecution: Implications for Roma Refugee Claimants in Canada*

[102] Professor Levine-Rasky's thesis in this article is that by rejecting Romani refugee claimants, Canadian refugee policy not only relies on racist policies but also reconstitutes the Gypsy myth of imminent (and immanent) nomadism. She outlines how unsafe conditions in Hungary are corroborated by first-person accounts recorded in ethnographic research; yet a discourse of designated safety works to deny their significance. Denial of persecution is reiterated in the discourse of former Minister of Citizenship and Immigration, Jason Kenney. Denial continues in the refugee determination system where the interpretation of persecution often falls short of meeting Convention thresholds.

(12) Janet Mosher

[103] Janet Mosher is an Associate Professor of Law at Osgoode Hall Law School, York University. She connects her work to perceptions of welfare recipients to how that stigmatization was used to delegitimize DCO refugee applicants as bogus. Her research indicates that welfare recipients are deemed as lazy loafers and are "criminalized" (in the sense that they are questioned by their neighbours and assumed to be defrauding the system by their mere use of the social support network which Canada provides). This conception is juxtaposed with individuals charged with tax fraud who are instead conceptualized as entrepreneurial hard-working Canadian citizens (who have been accused of defrauding or stripping resources from the Canadian tax system). According to Professor Mosher, the creation of the DCO list deepens, solidifies, and perpetuates the stereotype of individuals not requiring refugee protection since they come from a safe country, but these individuals are being pushed out by the system itself.

[104] She attaches as exhibits to her affidavit speaking notes of former Minister of Citizenship and Immigration, Jason Kenney, a speech by former Minister of Citizenship and Immigration, Chris Alexander, and a 2012 press release announcing changes in the PCISA.

B. *The Respondent's Affidavit Evidence*

(1) Kay Hailbronner

[105] Kay Hailbronner is a Professor Emeritus of Public Law, Public International Law and European Law at the University of Konstanz, Germany. He has 40 years of experience in the study and practice of German, European and international immigration and refugee law, and related public international law governing migration and refugee protection.

[106] Professor Hailbronner explains the safe country of origin (SCO) concepts used in Europe and provides a comparative survey on the national and European legal framework in which SCO concepts operate. He sets out how the basic concept arose and describes how it operates within the EU. He describes in detail the national SCO regimes in Germany, the United Kingdom, France, Belgium, and Austria.

[107] Professor Hailbronner notes that each EU member state generates its own list of safe countries. Claimants from an SCO cannot secure asylum unless they rebut the presumption of safety and there are typically procedural consequences as well, such as accelerated timelines. Article 39 of the EU's Procedures *Directive 2013/32/EU* [*of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, [2013] O.J. L 180/60] ensures that an asylum claimant must have reasonable access to an effective remedy if their claim is refused, but member states have considerable discretion when deciding whether a claimant can stay in the country pending the outcome of their claim. Typically, accelerated timelines have been accepted so long as claimants practically have enough time to prepare and bring an effective action to court.

[108] Professor Hailbronner further notes that the Union Citizens *Directive 2004/38EC* [*of the European Parliament and of the Council of 29 April 2004*, [2004] O.J. L 588/77] sets out the details of the right of free movement. He explains that while the right of residence for up to three months is not dependent upon conditions other than a valid identity document, the right of residence for more than three months is subject to conditions so that EU citizens do not become a burden on the social services of the host member state. What a burden on the social system means is not precisely defined, Professor Hailbronner says, but the European Court of Justice has repeatedly made clear that an expulsion measure must not be an automatic consequence of recourse to the social assistance system. Once a member state citizen has spent five years in another EU member state, they enjoy a right of permanent residence.

[109] Professor Hailbronner goes on to note that if an individual is deported from one country, that does not impact their general mobility rights within the rest of the EU. According to Professor Hailbronner, the overall number of deportations of EU citizens is very small compared to the large number of EU citizens moving freely within the Union. He points out, for example, in Germany in 2016, 38 Hungarians were expelled while 58 096 persons moved to Germany. A notable exception seems to be the widely publicised incident of removal of EU citizens of Roma origin from France to Romania in 2010. However, since 2010 Professor Hailbronner says steps have been taken to enhance the integration of Roma on political, social and economic levels, and a task force has been set up to monitor and submit annual reports on Roma inclusion.

[110] Professor Hailbronner discusses the free movement rights of EU nationals as an alternative to seeking protection abroad. According to Professor Hailbronner, the existence of a safe third country willing to accept an asylum-seeker is an established ground for refusing them in most major receiving countries. Within the EU, however, a connection by way of a previous stay or other criteria with the safe third country has been requested as a condition for applying a safe third country concept.

[111] Professor Hailbronner states that: "Normally, a protection alternative in the form of a third state in which the asylum seeker had not stayed before applying in a different state would not arise since third states are, in the absence of a previous stay or residence, usually unwilling to accept asylum seekers. The situation however is different with regard to Union citizens who … enjoy as part of their fundamental status free

movement rights”. He goes on to state: “even if some kind of a connection criterion is maintained for reasons of national law or policy, in order to refer an asylum seeker to a safe third state, Union citizenship may qualify as a link which justifies the attribution of a primary responsibility of EU Member States to take care of Union citizens who claim a danger of persecution or serious harm in their home state … Under international law requirements however the non-*refoulement* obligations of States would not stand in the way of referring asylum seekers to their free movement rights within the European Union”.

[112] Professor Hailbronner notes that access of EU applicants to asylum procedures within the EU are limited under the Aznar Protocol. He further notes that an EU asylum application will be declared inadmissible and will not be considered unless there are exceptional circumstances which require the application to be admitted for full consideration.

[113] Professor Hailbronner concludes his affidavit by stating that his review of documentation on country conditions in Hungary shows that Hungary meets EU values and complies with principles of the rule of law, that Hungarian law does not allow discrimination based on ethnic origin, and that the Hungarian government does not advocate, support or tolerate racial discrimination. He notes that although the Aznar Protocol has not resulted in an automatic exclusion of Hungarian nationals from asylum procedures, the recognition rate comes close to zero. According to Professor Hailbronner, the explanation for these extremely low numbers is that EU nationals have free movement rights. He notes that between 2010 and 2013 the number of Hungarians living in Germany increased from 68 890 to 132 477; and while it is not possible to determine the ethnicities of these migrants, it is safe to assume that a large percentage of the individuals from Hungary are ethnic minorities.

(2) Teny Dikranian

[114] Teny Dikranian is, and has been since 2015, the Director of Citizenship Legislation and Program Policy in the Citizenship Branch of IRCC (formerly Citizenship and Immigration Canada (CIC)). Prior to then, she was the Manager of Asylum Policy in the Asylum Policy and Programs Division, in the Refugee Affairs Branch of CIC.

[115] In her affidavit she states that in her role with the Refugee Affairs Branch she worked on the legislative reforms to Canada’s refugee determination system, including the BRRA and the PCISA. She provides three reasons why the system was reformed: (1) the I.R.B.’s resources were strained with a backlog of over 60 000 unheard refugee claims when the BRRA was introduced, and this backlog meant that there was about a 19-month waiting time between a person’s claim for refugee protection and when they received a decision by the RPD; (2) there were multiple layers of recourse available to refugee claimants and no limits on the number of H&C applications or PRRAs, and it would take an average of four and a half years to remove a failed refugee claimant; and (3) making the system timelier was necessary to address the growing backlog, to deter non-genuine claims, and to provide for timelier protection to those who need it.

[116] Ms. Dikranian says the DCO regime was one of the most significant changes introduced to respond to these needs. She states that some countries do not normally produce refugees and one of the principal reasons for the DCO regime was to "deter abuse of our refugee system by people who come from countries generally considered safe and 'non-refugee producing', while preserving the right of every eligible refugee claimant to have a fair hearing before the IRB".

[117] She explains how a country is designated as a DCO. There are two different ways for a country to be triggered for potential designation: quantitatively or qualitatively. Even when a country can be qualitatively or quantitatively triggered to be placed on the DCO list, further analysis against nine criteria is provided to the Minister in order to assist with making the decision. These criteria are as follows: (1) democratic governance; (2) protection of right to liberty and security of the person; (3) freedom of opinion and expression; (4) freedom of religion and association; (5) freedom from discrimination and protection of rights for groups at risk; (6) protection from non-state actors; (7) access to impartial investigations; (8) access to an independent judiciary system; and (9) access to redress which includes constitutional and legal provisions. The Minister has the final discretion as to whether a country is designated as a DCO.

[118] The quantitative triggers apply only to countries where at least 30 claimants received their final I.R.B. determination (including abandonment or withdrawal decisions) in the three years prior to the potential designation. Ms. Dikranian says a low number of claims from nationals of a particular country could be indicative that the country does not normally produce refugees. She notes that paragraph 109.1(1)(b) of the IRPA provides three areas countries must meet to be considered for potential designation: (i) there is an independent judicial system; (ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed; and (iii) civil society organizations exist.

[119] The quantitative triggers are: a combined rejected, abandoned or withdrawal rate of 75 percent or more; or, a combined abandoned or withdrawn rate of 60 percent or more before a decision is made by the RPD during a consecutive 12-month period. To ensure these rates are stable, the analysis examines several consecutive 12-month periods; for example, by starting in January and the 11 months preceding, starting in February and the 11 months preceding, and so on.

[120] Since November 2014, Ms. Dikranian says there has been ongoing monitoring of countries on the DCO list using the nine criteria noted above to identify when and if there are any significant deterioration in country conditions from the time of designation. To date, no country has been de-designated.

[121] Ms. Dikranian notes that Hungary was designated as a DCO in December 2012, along with all member states of the EU other than Romania and Bulgaria. Romania was quantitatively triggered afterwards and designated in October 2014. To date, Bulgaria has not met either the quantitative or qualitative thresholds. Ms. Dikranian says Bulgaria has exceeded the 30 finalizations required to be subject to the quantitative trigger; but

the combined rejection, abandonment and withdrawal rate has not met or exceeded the 75 percent quantitative threshold.

[122] Ms. Dikranian states that the DCO policy was effective in deterring unfounded claims as overall acceptance rates increased from 42 percent in 2012 to 66 percent in 2014. It has also reduced the number of PRRA applications from 7 682 in 2007 to 2 059 in 2016.

[123] Ms. Dikranian explains that the DCO regime introduced a different procedure for failed DCO claimants, in that they must wait three years to apply for a PRRA, unlike non-DCO claimants who must wait for only one year. The justification for this difference, Ms. Dikranian says, is that DCO countries are not normally refugee-producing and generally respect human rights and are expected to be more stable. Ms. Dikranian states that: “The longer PRRA bar is essentially a longer period of validity of a decision at the IRB. Because these countries are generally stable, the timeframe in which there is a low likelihood of something changing is longer”.

[124] Ms. Dikranian also states that there are “safeguards” in place to ensure a claimant can receive a PRRA in the event something has changed since their previous negative I.R.B. or PRRA decision. Foreign nationals facing a late-developing risk concern may ask an enforcement officer for a deferral of removal to facilitate access to the PRRA process by a waiver of the bar. Also, subsection 112(2.1) of the IRPA allows the Minister to exempt nationals or former habitual residents of a country or a part of a country, or a class of nationals or former habitual residents of a country, from the PRRA bar. Ms. Dikranian notes that since 2012 there have been 19 exemptions (some countries have been exempted twice) to the 12-month PRRA bar. There have been no exemptions made for DCOs, which she says is “indicative that DCO countries are stable states having solid institutions (e.g. judiciary), no state-sponsored political violence, high levels of freedom to express their opinions without fear, and no civil wars”.

(3) Aldina Saude

[125] Aldina Saude is an inland enforcement officer at CBSA. She has worked in several units including the Failed Refugees Protect (FRP) unit for about a year. She describes her experiences working in the FRP and in the Deferrals Unit, a unit which processes the formalized written request for deferrals.

[126] In the FRP unit, she first conducted a pre-removal interview. At this interview, she would deliver the negative PRRA decision and advise the failed refugee claimant that they would shortly be removed from Canada. If a failed claimant had a valid travel document and there were no known impediments for the removal, departure from Canada would be scheduled within three to four weeks. Aside from any statutory or regulatory impediments to removal, if the failed claimant presented a valid reason to delay the removal, she would often adjust their removal date accordingly. Ms. Saude says she delayed many removals for failed claimants to allow them to attend a medical appointment, complete a school year, or to attend an in-person interview with CIC to assess an in-Canada spousal sponsorship application.

[127] According to Ms. Saude, there are no prescribed timelines for the submission of requests to defer removal. Some failed refugees submit a request for deferral as soon as they receive the call and notice advising them of their upcoming pre-removal interview; these requests are deemed premature because removal has yet to be scheduled. Most requests, however, are submitted after removal dates have been set, and Ms. Saude says it is not uncommon for foreign nationals to submit a request to defer removal less than five business days before the scheduled departure date despite having had several weeks' notice of the removal. When a deferral request is made verbally, these are assessed verbally in the course of the interaction. Written requests for a deferral are processed according to operational priority, in that those who are closest to deportation have their requests processed before those whose removal is less imminent.

[128] There is no limit to the number of requests for deferral of removal a failed claimant may make. Ms. Saude says failed claimants may request a deferral on the same basis several times; for example, once informally, once in writing, and again in writing through a legal representative. They may then request a deferral on different grounds. Ms. Saude states that a deferral is: "a measure available to mitigate an exceptional circumstance, increasingly, it appears that foreign nationals are submitting these written requests as a matter of routine. We rely on the guidance provided in the Enforcement Manual 10 Removals relating to an officer's consideration of new allegations of risk at the deferral of removal stage". According to Ms. Saude, the enactment of legislation limiting eligibility for application to the PRRA program has resulted in a surge of requests to defer removal based on an alleged risk that foreign nationals may face in their countries of destination.

[129] Ms. Saude states that requests to defer removal are granted in order to mitigate the exceptional circumstance presented, and then only as a temporary measure—there is still a statutory duty to execute enforceable removal orders. If new evidence of risk is presented, she says assessing this is not a simple task because an inland enforcement officer's limited discretion to defer removal does not confer the delegated authority to issue a risk assessment akin to a PRRA. Ms. Saude concludes her affidavit by stating that an inland enforcement officer's role is limited to determining whether the evidence of risk presented is new and compelling; and if it is removal will be deferred for a risk assessment by a competent tribunal.

[130] In view of the foregoing summary of the evidence, it is appropriate now to consider whether some of the affidavits or portions of them should be struck.

VII. Should the Impugned Affidavits be Struck Out in Whole or in Part?

[131] As noted above, the case management Judge dismissed the respondent's motion to strike some of the affidavits or portions of them in an order dated February 1, 2018. This order provided that the respondent's motion could be brought before the applications judge in due course, and that all the existing affidavits filed in the record remain until such time as the applications judge otherwise determined. It is necessary,

therefore, to address the respondent's motion which was renewed on the first day of the hearing of this matter.

A. *The Respondent's Submissions*

[132] The respondent contends that the applicants have filed improper affidavits which fail to comply with the *Federal Courts Rules*, SOR/98-106, as amended, regarding the admissibility of expert affidavits. In the respondent's view, the affidavits are irrelevant to the issues raised by these judicial review applications, are unnecessary to assist the trier of fact, and include inappropriate content. Admission of these affidavits has the potential, the respondent claims, to distort the facts and distract the parties from the relevant issues.

[133] The respondent does not object to the affidavits of the individual applicants since they contain details of their personal experiences. The respondent does object, however, to the admission into evidence of eight affidavits or portions of them filed by the applicants as proposed expert witnesses. These affiants are: Sean Rehaag, Aadil Mangalji, Audrey Macklin, Janet Mosher, Christopher Anderson, Cynthia Levine-Rasky, Juliana Beaudoin, and Lisa Andermann.

[134] The respondent notes that the Supreme Court has emphasized the "gatekeeper" role of the judge and that trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. According to the respondent, long-standing jurisprudence holds that expert witnesses should not be permitted to usurp the function of a trier of fact by providing opinions on domestic law. The courts are the experts in matters of law and its interpretation and, therefore, expert affidavits containing opinions on domestic law are inadmissible.

[135] The respondent says the admission of expert evidence depends on the application of the four factors emanating from the Supreme Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9, (1994), 114 D.L.R. (4th) 419 (*Mohan*), at paragraphs 17 to 21: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert. The respondent points to the two-stage analysis designed to facilitate the application of the *Mohan* criteria developed by the Ontario Court of Appeal in *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301 (*Abbey*), at paragraphs 76 and 77, 82 to 85. At the first stage, the proffering party must satisfy the court that the proposed evidence meets the threshold criteria of admissibility. With respect to relevance, the court must be satisfied that the proposed evidence is logically relevant, in that it tends to make the existence or non-existence of a fact in issue more or less likely. At the second stage, the court undertakes a case-specific, cost-benefit analysis to determine whether the expert evidence is sufficiently probative to outweigh any prejudicial impact that admission will have.

[136] The respondent claims the Rehaag affidavit lacks impartiality and contains inappropriate opinion evidence. In the respondent's view, this affidavit fails the *Abbey* cost-benefit analysis. In determining probative value, the respondent says the Court must consider whether the proposed evidence is impugned by reliability concerns,

including alleged impartiality. According to the respondent, Professor Rehaag lacks impartiality because he has been a consistent advocate against the DCO provisions and has advocated that the DCO regime is not Charter compliant. The role of an expert is not to advocate, the respondent states, but to assist the Court by providing an independent and unbiased opinion about matters within the expertise of the witness. The respondent insists that Professor Rehaag's assertions should be viewed through the lens of his partiality and, if his affidavit is not struck, it should at the very least be weighed accordingly.

[137] The respondent contends that the Mangalji affidavit contains inappropriate opinion evidence. The respondent notes Mr. Mangalji indicates that he was asked to provide an affidavit on the legal, policy and practical differences between the PRRA process and the deferral request process. The respondent says it is not necessary for Mr. Mangalji to use his expertise to point out the various provisions in the IRPA and the Regulations of which the Court is already aware. According to the respondent, expert opinion on domestic legislation and on the proper interpretation of the law usurp the role of the Court and is not admissible. Mr. Mangalji does not purport to provide a scientific or other contextual opinion outside of the purview of the Court's expertise. Rather, in his capacity as a lawyer, he puts forward legal information and opinion. This, the respondent says, is not admissible expert evidence and this affidavit should be struck.

[138] With respect to the Macklin affidavit, the respondent says it contains inappropriate opinion evidence. The respondent notes it contains as an exhibit a book chapter she wrote entitled "A safe country to emulate? Canada and the European refugee". In the respondent's view, this affidavit otherwise has no content, provides no context for this document, and is therefore completely unnecessary. The respondent claims the attached exhibit includes opinion evidence on matters of Canadian immigration law and the DCO provisions and, therefore, is inadmissible expert evidence.

[139] The respondent says paragraphs 11 to 50 of the Mosher affidavit should be struck for lack of relevance. The bulk of her affidavit (paragraphs 11 to 39) deals with stereotyping and stigma faced by recipients of social assistance and, according to the respondent, this is not relevant to either immigration law and policy or the specific issue in this litigation. The respondent notes Professor Mosher attempts to equate the political labeling of some refugee claimants from DCO countries as bogus, to the labelling of some social assistance recipients as lazy or deceitful. In the respondent's view, it is not clear how this comparison can assist the Court in determining the constitutionality of paragraph 112(2)(b.1) of the IRPA.

[140] In the respondent's view, the bulk of the Anderson affidavit provides a selective review of Canadian immigration history and policy but makes no reference to the current DCO provisions. The respondent says this affidavit is neither relevant nor necessary, and because it fails the *Abbey* cost-benefit analysis, it should be struck. In particular, the respondent maintains that paragraphs 2 to 48 of the Anderson affidavit are neither relevant nor necessary.

[141] The respondent notes that, while the Anderson affidavit focuses on historical policies which attempted to exclude certain groups of asylum seekers based on race, ethnicity, religion, or nationality, paragraph 112(2)(b.1) does not draw distinctions on these bases. This affidavit purports to provide a general context within which to understand recent Canadian immigration policies, but the respondent faults the affidavit because it does not provide any historical context relevant to the constitutionality of paragraph 112(2)(b.1). Even if certain portions of this affidavit are found to be relevant, the respondent says they should be excluded if: their probative value is overborne by the prejudicial effect; they involve an inordinate amount of time which is not commensurate with their value; or they are misleading in the sense that their effect on the trier of fact is out of proportion to their reliability.

[142] According to the respondent, the Anderson affidavit fails the *Abbey* cost-benefit analysis. In the respondent's view, this evidence would unnecessarily broaden the scope of this litigation, potentially making it an attack on the Canadian immigration and refugee system since Confederation. The limited probative value of this evidence is outweighed by the inordinate amount of time and expense associated with cross-examination and the potential of submitting expert evidence to rebut Professor Anderson's conclusions, which would then be subject to cross-examination by the applicants.

[143] The respondent submits that the Anderson affidavit is not necessary to assist the Court. The respondent says the Court is likely aware of the general historical policies discussed in this affidavit, and there is nothing unique or conceptually difficult about these policies that requires expert explanation. In the respondent's view, the Court can understand the general historical context of Canadian immigration policy without the expert evidence of Professor Anderson. According to the respondent, this affidavit has the potential, if not struck, to distort the fact-finding process because Professor Anderson's opinions, drawn from his selective summary of exclusionary immigration and refugee policies, have no bearing on whether paragraph 112(2)(b.1) is constitutional.

[144] The respondent says the Levine-Rasky affidavit attaches as exhibits her book as well as two articles she has written. In the respondent's view, this affidavit otherwise has no content and provides no context for these documents. This affidavit, the respondent says, is completely unnecessary since the sources attached as exhibits could simply be cited in the applicants' memorandum, and it should be struck on that basis.

[145] The respondent remarks that the Beaudoin affidavit indicates that she prepared it for the purpose of challenging the legality of paragraph 112(2)(b.1) of the IRPA. However, in the respondent's view, her affidavit mainly discusses the portrayal of Roma in the Canadian media and public attitudes towards persons of Roma ethnicity and these topics have no relevance to the issue at hand. The bulk of this affidavit is simply not relevant to the central issue in this litigation and, according to the respondent, paragraphs 7 to 18 should be struck.

[146] The respondent says Professor Andermann's affidavit should be struck in its entirety because it is neither relevant nor necessary. In the respondent's view, her opinion on the psychological or psychiatric effects of uncertain procedures and timelines on refugee claimants is not relevant to the issue of the constitutionality of paragraph 112(2)(b.1). According to the respondent, the Court does not require this opinion evidence to appreciate that some refugee claimants may suffer from post-traumatic symptoms arising from their experiences. There is nothing complicated, technical, or conceptually difficult about these conclusions that requires expert explanation.

B. *The Applicants' Submissions*

[147] At the hearing of this matter, the applicants argued that the respondent's motion to strike was not properly before the Court and the timing of the motion prejudiced them. According to the applicants, the order of Justice Elliott, the case management Judge, dismissing the motion to strike was clear that the respondent had to file another free-standing motion. The applicants also complained that they heard for the first time at the hearing allegations of impartiality about Professors Macklin and Beaudoin, and that these allegations were not made in the previous motion to strike.

[148] The applicants further argued that the opportunity to address the new allegations about the expert evidence had been lost because the respondent waited so long to revive his motion, leaving them to respond without notice to lengthy submissions on the spot, and that this was essentially an ambush. The applicants asserted at the hearing there had been ample time for the respondent to bring an appropriate motion to the Court, and the failure to do so basically relinquished the respondent's right to do so now.

[149] In their written submissions, the applicants note the respondent does not dispute the qualifications of the applicants' seven experts but, rather, disputes the relevance of certain evidence provided by those affiants. According to the applicants, for purposes of the first stage admissibility assessment, relevance means logical relevance, and to be logically relevant the expert evidence must have the tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence.

[150] As for the second stage of the admissibility assessment, the applicants acknowledge that, while all trial judges assume a gatekeeper function in the context of expert evidence, this role is significantly more pronounced in trials and, particularly, jury trials. This function is significantly attenuated in the context of an application for judicial review where there is no *viva voce* evidence and no jury.

[151] The applicants note that in *Abbey* the gatekeeper function was described in terms of a cost-benefit analysis regarding the admissibility of expert evidence. The "benefit" side of this evaluation entails a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. The "cost" side of the analysis includes concerns that a fact-finder faced with a well-presented expert opinion may abdicate its fact-finding role, and that expert opinion evidence may

compromise the trial process by unduly protracting and complicating proceedings, providing an advantage to the party with the most resources.

[152] According to the applicants, the cost or prejudice concerns are not present in this matter because: (1) there is no risk that admission of the expert evidence will unduly protract or complicate the proceeding and hearing of the applications can proceed based on a complete evidentiary record with no additional or unforeseen delay; and (2) in the absence of a jury, there is no risk the Court would be overwhelmed by the evidence and abdicate its fact-finding duties.

[153] In the applicants' view, the respondent's arguments about the Rehaag, Anderson, and Beaudoin affidavits are barred by issue estoppel or are otherwise a collateral attack and an abuse of process. The applicants in *Y.Z.* filed expert affidavits from various affiants, including Sean Rehaag, Christopher Anderson, and Julianna Beaudoin. The applicants note that, in the present applications, Professor Rehaag attaches and relies upon his affidavit from the *Y.Z.* litigation, and both Professor Anderson and Ms. Beaudoin provide substantially similar evidence in these applications as they did in *Y.Z.* The applicants rely on these affidavits for the same reasons advanced in *Y.Z.*: to establish that legislative distinctions drawn between the procedural advantages bestowed to non-DCO refugee claimants and the disadvantages suffered by DCO refugee claimants are discriminatory and serve to further marginalize, prejudice, and stereotype DCO claimants.

[154] CARL says it meets all the criteria necessary to estop the respondent from attempting to strike the Rehaag, Anderson and Beaudoin affidavits. These affidavits are similar to those in *Y.Z.* They have been tendered to demonstrate that the procedural disadvantages imposed on DCO nationals under the IRPA are discriminatory under subsection 15(1) of the Charter. The respondent in *Y.Z.*—the same respondent as in this case—discontinued his appeal of that judgment. In these circumstances, CARL maintains that the conditions precedent for issue estoppel are met and none of the discretionary bases for not applying issue estoppel arises in this case. CARL acknowledges that the other applicants in these applications were not parties in *Y.Z.* Other common law doctrines, however, such as collateral attack and abuse of process, are still available to prevent the waste and potential abuse inherent in the respondent's attempt to re-litigate the admissibility of the Rehaag, Anderson and Beaudoin affidavits.

[155] In the applicants' view, the respondent's motion to strike is without merit and, if granted, would prevent the Court from assessing the constitutional validity of the impugned legislation based on a full record. The applicants rely upon this evidence to establish the legislative and social facts necessary to argue that Parliament's drawing of distinctions between DCO and non-DCO nationals was based on hurtful, prejudicial, and inaccurate stereotypes about the merits of DCO nationals' claims.

[156] According to the applicants, the respondent's argument that Professor Rehaag lacks impartiality lacks foundation. It is not enough, they say, to assert that Professor Rehaag is not impartial. The moving party bears the burden of establishing such an allegation when requesting the exceptional remedy of striking an affidavit at this stage of

the proceeding. The respondent has provided no basis whatsoever for a finding of partiality. With respect to the general allegation that the Rehaag affidavit amounts to a legal opinion on the merits of the DCO provisions, the applicants say this mischaracterizes the purpose of this evidence. The Rehaag affidavit provides statistical analysis of the quantitative trigger permitting designation of a DCO along with his expert opinion regarding the reliability of statistical information compiled by the I.R.B. about refugee claim outcomes.

[157] The applicants also note that the respondent has failed to identify any specific paragraphs or sections of the Rehaag affidavit that allegedly constitute an impermissible legal opinion. A general allegation that an expert affiant provides unreliable or inadmissible opinion evidence, without any specific evidence of partiality or examples of impermissible opinion, cannot possibly meet the threshold required to strike all or part of an affidavit.

[158] With respect to Mr. Mangalji's affidavit, contrary to the respondent's argument, the applicants have not claimed that Mr. Mangalji is an expert witness. Mr. Mangalji has not provided a certificate concerning the Code of Conduct for Expert Witnesses. His affidavit contains relevant information as well as his own personal knowledge about the legal, policy and practical differences between the PRRA process and the deferral request process. In the applicants' view, Mr. Mangalji merely attests to facts within his knowledge as a result of his professional activities.

[159] The applicants say the Mangalji affidavit is relevant to their subsection 15(1) argument concerning the differential treatment of DCO nationals with respect to presenting new evidence of risk, avoiding *refoulement*, and obtaining protection in Canada after a refused claim for protection. The applicants note that, when assessing Charter violations, the threat of harm and the potential for Charter violations are relevant. According to the applicants, reasonable hypotheticals, such as the examples of other claimants' experiences in the Mangalji affidavit, are relevant to the question of whether the DCO regime is consistent with the Charter. Because it is often difficult to draw a bright line distinguishing inadmissible lay opinion from admissible evidence, the preferable approach, the applicants say, is to admit the evidence and to assess its weight considering the totality of the evidence before the Court.

[160] In the applicants' view, the respondent's assertion, that the expert evidence of Professor Macklin is unnecessary, has no content and provides no context, ignores her clear statement that the book chapter attached as an exhibit to her affidavit reflects her expert opinion on matters relevant to this litigation. The applicants note the Macklin book chapter addresses the creation and adoption of the DCO regime in the context of the Canadian government's historical attempts to limit Roma asylum seekers from Hungary and the Czech Republic. This evidence is relevant, the applicants say, to their argument that refugee claimants from these countries are historically disadvantaged and that the DCO regime perpetuates a stereotype which reinforces this disadvantage.

[161] According to the applicants, the respondent mischaracterizes those portions of the Mosher affidavit which address matters of stereotyping and stigma for social

assistance recipients. This affidavit, the applicants note, addresses the specific issue of stereotyping and stigma for social assistance recipients in order to illustrate the broader potential for the law to reflect and perpetuate stereotypes of groups. In the applicants' view, expert evidence regarding the potential for legislation to reflect and perpetuate stereotypes of groups is relevant to a subsection 15(1) Charter argument. While Professor Mosher's research area of expertise concerns recipients of social assistance, the applicants point out that her affidavit specifically addresses whether the DCO regime is similarly capable of reflecting or embedding stereotypes of DCO refugee claimants.

[162] As to the respondent's argument that the Anderson affidavit is not relevant, the applicants do not allege that paragraph 112(2)(b.l) of the IRPA, in isolation, draws a distinction based on nationality. However, when read in connection with the DCO designation provision in section 109.1, they maintain that the provisions intrinsically rely on this very distinction. The applicants note that one of the specific issues the Court must assess in this case is whether immigrants and refugees are historically disadvantaged groups, and whether such groups have been prejudiced by negative stereotyping based on their national origin. In the applicants' view, the review of Canadian immigration history and policy provided by Professor Anderson is highly relevant.

[163] Contrary to the respondent's argument about the expert evidence of Professor Levine-Rasky, the applicants counter that her affidavit is necessary, has content, and provides context. The applicants say her evidence is relevant as it contains specific chapters in her book pertaining to conditions for Roma in Europe and the DCO regime.

[164] The applicants say the impugned paragraphs of the Beaudoin affidavit are obviously relevant to their subsection 15(1) Charter argument. The respondent's bare assertion, that these topics have no relevance to the issue at the heart of this litigation, ignores the relevance of matters such as historical disadvantage, stereotyping, and the perpetuation of discrimination in the overall subsection 15(1) analysis.

[165] The applicants say the respondent's motion to strike the Andermann affidavit in its entirety—because it contains no reference to the DCO provisions or the three-year PRRA bar and no discussion of the susceptibility of DCO claimants to adverse psychological effects—fails to acknowledge that the relevance of evidence must be determined in the context of the claim before the Court. According to the applicants, when considering a constitutional question, broader contextual evidence is often essential in proving the case that a legislative provision is Charter-infringing. The applicants maintain that Dr. Andermann's opinion is relevant because refused DCO claimants, when compared with refused non-DCO claimants, are subject to increased procedural and temporal uncertainty following a negative refugee determination.

C. *Analysis*

[166] It is well established that a motion to strike all or part of an affidavit should not be routinely made (*Gravel v. Telus Communications Inc.*, 2011 FCA 14, 218 A.C.W.S. (3d)

478, at paragraph 5), especially where the question is one of relevancy. Only in exceptional cases, where prejudice is demonstrated and the evidence is obviously irrelevant, will such a motion be justified (*Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, 2005 FCA 50, 331 N.R. 337, at paragraph 13; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013, 412 D.L.R. (4th) 336, at paragraph 40).

[167] These applications for judicial review were case-managed. Justice Elliott was familiar with the matter and could have determined the motion on the merits if she thought it was clearly warranted (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, at paragraphs 11 and 12). She did not. Rather, she dismissed the motion with the proviso that it could be brought before the applications judge in due course.

[168] I find no prejudice to the respondent at this point of the proceeding by denying his motion in its entirety. The respondent cross-examined all the affiants whose affidavits he now impugns and the transcripts of these examinations are part of the extensive record before the Court. I am not convinced the respondent has suffered any material prejudice by virtue of the voluminous record compiled by the applicants.

[169] The affidavits or portions thereof which the respondent challenges are not so clearly irrelevant to the constitutional issue raised by these applications that they should be struck from the record. This is not a case where striking the impugned affidavits or portions of them would improve the orderly hearing of these applications. It is unnecessary to go through each affidavit line-by-line and state which portions are relevant and which are not. In this regard, I agree with the applicants that my role as a gatekeeper is significantly attenuated in the context of an application for judicial review where there is no *viva voce* evidence and no jury.

[170] The Supreme Court established a two-part test for expert opinion evidence in *Mohan* and restated the test in *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 S.C.R. 182, (*White*), at paragraphs 23 and 24. More recently, the Supreme Court stated in *R. v. Bingley,* 2017 SCC 12, [2017] 1 S.C.R. 170 [at paragraphs 14–17], that:

> The expert evidence analysis is divided into two stages. First, the evidence must meet the four *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White Burgess*, at para. 24.
>
> If at the first stage, the evidence does not meet the threshold *Mohan* requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: [citations omitted]. It must be necessary "to enable the trier of fact to appreciate the matters in issue" by providing information outside of the experience and knowledge of the trier of fact: [citations omitted]. Opinion evidence that otherwise meets the *Mohan* requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25. The opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25. In the case of an opinion that is based on a novel scientific theory or technique, a basic threshold of reliability of the underlying science must also be established: [citations omitted].

> At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: [citations omitted].
>
> The expert opinion admissibility analysis cannot be "conducted in a vacuum": *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized: [citations omitted]

[171] The respondent faults Professor Anderson's affidavit because it does not provide any historical context relevant to the constitutionality of paragraph 112(2)(b.1) of the IRPA. The question to ask in assessing whether this affidavit should be struck is: "whether the expert will provide information which is likely to be outside the ordinary experience and knowledge of the trier of fact" (*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at paragraph 21; *White*, at paragraph 21).

[172] Some of the instances of discrimination described in Professor Anderson's affidavit are notorious, but the overall history of discriminatory immigration laws and policies he describes is more detailed than that which would be within the "ordinary experience and knowledge" of a reasonably informed Canadian. I am not convinced that I could take judicial notice of everything he states or of his opinion about historical trends. This affidavit will not be struck.

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

[174] With respect to the respondent's arguments about the applicants' other affiants, suffice it to say that I am cognizant of the respondent's objections in this regard. Even if, as the respondent claims, some of the affidavits may contain inappropriate opinion evidence, this does require that whole affidavits should be struck. Rather, any such evidence can be dealt with by assigning it little or no weight. I have not deferred to the opinions or inferences drawn by any of the affiants.

[175] The respondent's motion to strike is dismissed in its entirety. I will now consider the appropriate standard of review.

VIII. <u>What is the Standard of Review?</u>

[176] Because this case concerns the constitutional validity of paragraph 112(2)(b.1) of the IRPA insofar as it pertains to DCO nationals, the applicants say the standard of review is correctness. They note that, in *Atawnah*, Justice Mactavish applied the

correctness review in considering whether the 36-month PRRA bar was an unjustified infringement of section 7 of the Charter and that, on appeal, the Federal Court of Appeal held that she had selected the correct standard of review and applied it correctly (*Atawnah*, at paragraph 7).

[177] The respondent agrees with the applicants that constitutional question is subject to the correctness standard of review.

[178] I agree with the parties that the standard of review to assess whether paragraph 112(2)(b.1) is inconsistent with subsection 15(1) of the Charter is correctness. As the Supreme Court noted in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 58: “correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*…. Such questions, as well as other constitutional issues, are necessarily subject to correctness review”.

[179] Having determined that correctness is the appropriate standard of review, I will now move on to the question of whether paragraph 112(2)(b.1) of the IRPA is inconsistent with subsection 15(1) of the Charter.

IX. Is Paragraph 112(2)(b.1) of the IRPA, insofar as it Pertains to DCO nationals, Inconsistent with Subsection 15(1) of the Charter?

A. *The Applicants’ Submissions*

[180] According to the applicants, Parliament chose not to treat all unsuccessful refugee claimants alike in granting access to a PRRA by treating a class of unsuccessful refugee claimants (namely, nationals from a DCO) differently and more punitively based solely on their nationality. They note that members of this already disadvantaged group may be deported without a PRRA if the deportation occurs within three years of determination of their refugee claim; whereas all other unsuccessful refugee claimants have the right to have their risk reviewed by a PRRA officer prior to removal after only one year has passed from final denial of their claim. The applicants maintain that this differential treatment is discriminatory, contrary to subsection 15(1) of the Charter.

[181] The applicants reference the Supreme Court’s decision in *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522 (*Centrale des syndicats*), where Justice Abella (speaking for the majority) explained [at paragraph 22]:

> When assessing a claim under s. 15(1), this Court’s jurisprudence establishes a two-step approach: Does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground, and, if so, does it impose “burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating … disadvantage”, including “historical” disadvantage? [Citations omitted.]

(1) Paragraph 112(2)(b.1) of the IRPA creates a distinction based on national origin

[182] According to the applicants, the first step of a subsection 15(1) analysis requires them to demonstrate that the state action creates a distinction based on an enumerated or analogous ground. In their view, the distinction at issue in this case is clear and explicit: national origin. This is specified in paragraph 112(2)(b.1), which provides:

> Pre-removal Risk Assessment
>
> Protection
>
> **Application for protection**
>
> **112 (1)** A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).
>
> **Exception**
>
> **(2)** Despite subsection (1), a person may not apply for protection if
>
> …
>
> **(b.1)** subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division; [Emphasis added.]

[183] The applicants say that, while the IRPA generally guarantees the right to a relatively timely PRRA to anyone for whom more than a year has passed since rejection of their refugee claim, paragraph 112(2)(b.1) denies a class of persons that right by virtue of their nationality. This class of persons will only enjoy the right to a statutorily mandated risk assessment if three years have passed since their refugee claim was rejected. According to the applicants, while the ground of distinction is nationality, discrimination based on nationality has from early times been an inseparable companion of discrimination because of race and national or ethnic origin. In this case, the nationality-based discrimination is intimately connected with discrimination based on the ethnicity of the Roma applicants who are affected.

[184] The applicants note this Court has determined in *Canadian Doctors* and in *Y.Z.* that the differential treatment of DCO nationals constitutes a distinction based on national original for the purposes of subsection 15(1) of the Charter. They further note the respondent commenced and then withdrew appeals of these two judgments in the Federal Court of Appeal. The judgments in these two cases on this point of law should, the applicants say, attract comity from this Court; the question should be considered decided absent intervention by an appellate court.

(2) Paragraph 112(2)(b.1) of the IRPA is discriminatory

[185] According to the applicants, the second step in a subsection 15(1) analysis asks whether the differential treatment is discriminatory. In answering this question, they note the Supreme Court has repeatedly instructed lower courts to adopt a purposive approach, one that underscores section 15's promise of substantive equality and anti-discrimination. The applicants say, in view of *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paragraph 319, that the purpose of the equality provision and anti-discrimination law in general is "to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available". They further note the Supreme Court has stated that the question of whether the purpose of a law challenged under section 15 of the Charter was reasonable or justifiable is to be considered under section 1 of the Charter.

[186] In the applicants' view, paragraph 112(2)(b.1) of the IRPA imposes burdens and denies benefits to DCO nationals vis-à-vis non-DCO nationals. They say the 36-month PRRA bar imposes clear burdens and denies clear benefits to DCO nationals. They note that, for the first 12 months following a final rejection, withdrawal, or abandonment of a refugee claim by the I.R.B., all unsuccessful claimants are similarly barred from submitting a PRRA application. However, after this 12-month period elapses, the uniform or equal treatment of unsuccessful claimants ends. The applicants contend that the purpose and effect of paragraph 112(2)(b.1) is to single out all DCO nationals—based solely on their nationality—from the pool of unsuccessful claimants and deny them access to a PRRA for a further 24 months. They claim this clearly denies DCO nationals a benefit under the law.

[187] The applicants observe that, although subsection 112(2.1) of the IRPA permits the Minister to exempt classes of unsuccessful claimants from the operation of the 12-month or the 36-month PRRA bar (including, potentially, DCO nationals), since this provision was enacted in 2012 the Minister has never exercised it in favour of exempting any DCO nationals from either PRRA bar. According to the applicants, unless the Minister exempted all DCO nationals, subsection 112(2.1) could not cure the clear denial of a statutory benefit because anything less than a complete blanket exemption would still leave behind some DCO nationals who are denied access to a PRRA for a further 24 months based solely on their nationality.

[188] In the applicants' view, paragraph 112(2)(b.1) imposes additional burdens on a DCO national vis-à-vis their non-DCO counterpart. According to the applicants, these burdens are most apparent when CBSA chooses to remove an unsuccessful refugee claimant between the 12-month and 36-month anniversary of their I.R.B. decision, and where the individual has new risk evidence. The applicants contrast the position of DCO nationals with non-DCO nationals in the removal process as follows:

Non-DCO National	DCO National
A non-DCO national has a statutory right to submit a PRRA application under section 112 of	A DCO national is only entitled to submit a request to defer removal. The deferral request

Non-DCO National	DCO National
the *IRPA*. Under section 160 of the Regulations, the applicant must be served with a PRRA application by CBSA. If the non-DCO national is detained, a CBSA officer will visit the applicant in detention to serve the application.	regime is not established in the *IRPA* or the *Regulations*. The request must be self-initiated and there is no requirement for CBSA to advise a claimant of the right to submit such a request. If the DCO national is detained, a CBSA Officer will not visit the claimant in detention to initiate the deferral process.
A non-DCO national has a minimum regulatory mandated period of 30 days in which to prepare a PRRA application, including retaining counsel, applying for legal aid coverage, gathering evidence and submitting their application (*Regulations*, section 162). The non-DCO national's removal order remains stayed throughout the period while the PRRA application remains pending, which can often be for several months or even longer (*Regulations*, section 232). A PRRA application can be updated throughout this period. Only if the PRRA is refused will removal arrangements be booked.	A DCO national can only submit a deferral request after removal arrangements have been made. There is no legal minimum notice period between when removal arrangements are booked and when removal takes place. In some cases, it can be a matter of days. During this brief period, the DCO national must retain counsel, apply for legal aid coverage, gather evidence and submit their request. Since removal has already been scheduled, the claimant must do this while also doing such things as quitting their job, ending their residential lease, de-enrolling their children from school and packing-up their life in Canada.
A non-DCO national is entitled to a work permit under paragraph 206(b) of the *Regulations* while awaiting a PRRA decision.	A DCO national is not entitled to a work permit while awaiting a deferral decision.
A non-DCO national is guaranteed a decision on the PRRA application prior to any removal taking place since the applicant benefits from a stay of removal until the decision is made.	A DCO national is not guaranteed a decision on a deferral request prior to any removal taking place since the requestor does not benefit from a stay of removal until the decision is made. While CBSA attempts to decide all deferral decisions prior to removal, the Federal Court has stated that individuals awaiting such decisions may have to undertake the cost and complexity of bringing an application for mandamus to ensure a decision is made prior to their removal taking place. Some DCO nationals will only receive their decision while at the airport awaiting their deportation.
A non-DCO national need only show more than a mere possibility that their removal would expose them to persecution or risk in order to be successful on a PRRA application. If successful, the applicant will benefit from refugee protection and gain eligibility to apply for permanent residence.	A DCO national needs to show on a balance of probabilities that removal would expose the claimant to death, extreme sanction or inhumane treatment in order to be successful on a deferral request. If successful, the claimant does not benefit from refugee protection nor does the claimant gain eligibility to apply for permanent residence. Instead, the request is then forwarded to the Minister to ascertain whether the claimant

Non-DCO National	DCO National
	should be granted access to a PRRA - i.e., the statutory benefit which a non-DCO national enjoyed all along.

[189] In the applicants' view, the additional burdens imposed on DCO nationals who are scheduled for removal between the 12-month and 36-month anniversary of their I.R.B. decision—vis-à-vis non-DCO nationals - are evident in the applications before the Court.

[190] For example, the applicants note Mr. Sebok was in immigration detention when he was served with his removal arrangements and told he would be deported to Hungary on February 10, 2016. Because he was barred from submitting a PRRA application, he had only 14 days in which to: (i) retain counsel; (ii) prepare and submit a deferral request; (iii) file an application for leave and for judicial review in this Court; and (iv) prepare, file and argue a motion to stay his removal before an enforcement officer could consider his new evidence of risk. In describing the time when his deferral request was still pending, Mr. Sebok states: "One day officers came to transfer me to another jail in Toronto so that I would be closer to the airport. I do not remember exactly when, but I believe it was the day before my removal date. I refused to leave my cell because I was so terrified". CBSA denied Mr. Sebok's deferral request later that day and the motion to stay his removal was heard the next day on the date of his scheduled removal. This Court stayed Mr. Sebok's removal only hours before his removal was to occur.

[191] The applicants further note that Ms. Serban, like Mr. Sebok, was also in immigration detention when CBSA served her with the removal arrangements. Since she was barred from submitting a PRRA application, she, like Mr. Sebok, had only 14 days in which to undergo the same procedure Mr. Sebok underwent. This Court stayed her removal four days prior to the scheduled removal date.

[192] In contrast, the applicants say a non-DCO national in identical circumstances to those of Mr. Sebok and Ms. Serban would have been served with a PRRA application as of right; would have received 30 days in which to submit the application; would likely have waited months for a decision in which they could update their application; and would not have been scheduled for removal until a PRRA decision had been served on them.

[193] According to the applicants, the additional burden the deferral regime imposes on non-detained DCO nationals is equally onerous. After CBSA denied his deferral request, Mr. Feher, like Mr. Sebok, only received a stay order from this Court mere hours before his scheduled deportation. As a result, he had already packed up his life in Canada and gone through the psychologically distressing process of saying goodbye to his family members who, as Convention refugees from Hungary, could not visit him in Hungary following deportation. By contrast, a non-DCO national in identical

circumstances would not be scheduled for removal until after a PRRA officer had considered his risk.

[194] By denying DCO nationals access to the PRRA regime for 24 months more than non-DCO nationals, the applicants say paragraph 112(2)(b.1) of the IRPA not only denies a statutory benefit but imposes onerous and additional burdens on DCO nationals vis-à-vis non-DCO nationals. They note that non-DCO nationals have access to both the PRRA regime and, if unsuccessful, to the deferral regime. Under the present regime, the applicants claim that non-DCO nationals enjoy two opportunities following denial of their refugee claim to present new evidence of risk; whereas DCO nationals only enjoy one.

(3) Paragraph 112(2)(b.1) of the IRPA denies benefits and imposes burdens in a manner that reinforces, perpetuates or exacerbates disadvantage

[195] While the question of whether a law reinforces, perpetuates or exacerbates disadvantage is the ultimate section 15 inquiry, the Supreme Court has stated that two reliable indicators, if present, likely indicate a law that runs afoul of the Charter's equality guarantee: whether its impact burdens a historically disadvantaged group or whether it relies on stereotyping.

[196] In view of Professor Anderson's affidavit evidence, the applicants say the history of Canada's immigration system is one plagued by discriminatory treatment of migrants based on their national and ethnic origin, leading to historical disadvantage for these groups. According to the applicants, until the 1970s Canada's immigration policy explicitly favoured immigrants from majority-white former British colonies and from France, with all other immigrants being treated in law and in practice as less desirable. The applicants note that, while these overtly racist laws have been repealed, the shadow they cast over Canada's immigration system and their impact on the groups disadvantaged under them persists.

[197] In the applicants' view, the DCO regime targets a particularly vulnerable group of individuals for discrimination based on nationality: refugee claimants. They claim there have always been classes of refugee claimants singled out by the Canadian government as especially undesirable. In the past these classes included Sikh refugees from India and Jewish refugees from Europe. Now, the applicants contend, the DCO regime targets largely European refugees, marking their claims as being presumptively without merit and bogus.

[198] According to the applicants, by targeting Hungarian asylum seekers, the DCO-regime impacts a uniquely vulnerable and disadvantaged population within that group: the Roma. The applicants say the Roma constitute most refugee claimants from Hungary, and that by targeting Hungarian asylum seekers based on their nationality, the DCO regime, by proxy, targets asylum seekers based on their ethnicity. They point to the history of disadvantage suffered by the Roma, both in Europe and Canada, noting that to the extent the DCO regime perpetuates a racist view of Roma refugees as being

motivated by social benefits available in Canada rather than fear in making claims, it perpetuates that disadvantage. According to Professor Levine-Rasky:

> Today, the Gypsy thief-vagrant-welfare-dependent is transmogrified into the bogus refugee. Perceived to threaten the security and property of the masses the Roma are recast as menacing figures who require aggressive management. In Europe, public safety, residential and educational segregation, policing and punitive justice are among the measures taken to ensure the differentiation of the Roma from dominant groups resulting in a unique "Romaphobia" or "Gypsyism".

[199] The applicants maintain that the DCO regime targets a historically disadvantaged group, namely Hungarian asylum seekers and, by proxy, Roma. By denying benefits and imposing additional burdens on this group, the DCO regime has, in the applicants' view, the effect of reinforcing, perpetuating, and exacerbating that disadvantage and in doing so it violates the equality guarantee under subsection 15(1) of the Charter.

[200] The applicants claim the DCO regime also runs afoul of subsection 15(1) based on its reliance on harmful stereotyping. They note that when the DCO regime was introduced in 2012, the Minister of Citizenship and Immigration was abundantly clear about the government's purpose in imposing more restrictive measures on DCO nationals. According to the Minister, claimants from such countries tended to advance bogus claims and were more motivated by Canada's social services than by any real fear.

[201] At a news conference in February 2012 [Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism, at a news conference following the tabling of Bill C-31, *Protecting Canada's Immigration System Act*, Ottawa, February 16, 2012], announcing the introduction of the PCISA, the Minister stated that:

> Our government is very concerned about the recent increase in refugee claims from democratic countries that respect human rights. Our asylum system is already overwhelmed by a large backlog of cases. The growing number of bogus claims from European Union democracies is only exacerbating the problem. Too many tax dollars are spent on people who do not need our protection. In fact, about 90 per cent of all claims from the European Union have been determined by our system, and mainly by the decisions of those asylum claimants themselves, to be unfounded, either by those individuals withdrawing and abandoning their own claims, or by their claims being examined and rejected by our fair and independent Immigration and Refugee Board.
>
> On top of this, there are too many ways failed claimants can delay their removal from Canada after their claim has been fairly decided by the IRB. Currently, it takes an average of 4.5 years from an initial claim to remove a failed refugee claimant from the country. Some cases have taken more than ten years. The result is an overburdened system and a waste of taxpayers' money.
>
> …
>
> The measures I am announcing today build on the reforms passed in the *Balanced*

> *Refugee Reform Act*. These new measures will further accelerate the processing of refugee claims for nationals from designated countries that generally do not produce refugees. They will also reduce the options available to bogus claimants to delay their removal from Canada, which sometimes takes years and years. In fact, it takes at least 4.5 years on average for bogus refugee claimants to have run the course in all of the various appeals that they have. And then it takes us quite a lot longer to actually remove them from Canada, which is virtually an encouragement for people who want to come and abuse our generosity.

[202] The applicants contend that this blanket tarring of DCO nationals as being frauds and cheats had a punishing impact on the dignity of the individual applicants in this case. As stated by Mr. Feher in an affidavit submitted in support of his deferral request:

> I have heard and read many news articles in which the Canadian government has justified this extended PRRA bar for DCO nationals on the basis that we are bogus refugees and looking only to exploit Canada's social services. In fact, many of those stories referred directly to Hungarian Roma like myself. This rhetoric has been incredibly damaging and degrading to people like me. It is the type of rhetoric I left Hungary to escape and it was the last thing I expected to encounter in Canada. It is also completely opposite to my family's personal experiences. To recall, four different RPD Members in four different hearings have all concluded that my family are real and not bogus refugees.

[203] The applicants note that when the PCISA received Royal Assent in June 2012, the Minister continued to state publicly that the government had enacted the DCO regime "to demonstrate to Canadians and the vast majority of immigrants who are law-abiding that we will not tolerate those who seek to abuse our generosity, including bogus asylum claimants, human smugglers and those who might represent a risk to Canadian security and safety". He went on to state:

> The vast majority—over 90%—of those European claimants abandon or withdraw their own claims, choosing of their own volition not to seek Canada's protection, but virtually all of them enroll in Canada's generous welfare social income, health care, subsidized housing and other social support programs. That's why we had to take additional measures in this bill, C-31, to deter bogus asylum claimants from abusing Canada's generosity, to stop them from clogging up the system which makes it slower moving for the bona fide refugees to whom we want to grant protection and certainty as soon as possible.

[204] In the applicants' view, the Minister's statements in February and June 2012 conflated the concern with bogus European claimants with those who abandoned or withdrew their claims. They say the 36-month PRRA bar for DCO nationals was not limited to those specific classes of unsuccessful claimants but, rather, applied to all DCO refugee claimants who had pursued their claims to a hearing and had been rejected on the merits. They further say the 36-month PRRA bar was not limited to DCO claims rejected for having no credible basis or for being manifestly unfounded under subsection 107(2) and section 107.1 of the IRPA, respectively. According to the applicants, the government's punitive response to alleged bogus refugee claims applied to all DCO claimants, such that any DCO claim rejected on the merits triggered the 36-month PRRA bar regardless of whether the I.R.B. had found a claimant's story to be credible or not.

[205] The applicants note that Hungary was among the first 27 countries designated by the Minister as a DCO in December 2012. In his statement [Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism, at a news conference to announce the initial list of Designated Countries of Origin, whose citizens will have their asylum claims expedited for processing because they do not normally produce refugees, Ottawa, December 14, 2012] announcing the first list of DCOs, the Minister specifically and extensively cited “abuse” by Hungarian claimants as motivating the new DCO regime and placed considerable emphasis on the allegation that Hungarian claimants overwhelmingly withdrew or abandoned their claims:

> Hungary was Canada’s top source of asylum claims last year. In fact, of all of the asylum claims made by Hungarian citizens all around the world, 98% of them, 98%, were made in Canada, even though those same Hungarian citizens have unrestricted mobility rights within the 27 democracies of the European Union and have access - visa-free access - to dozens of other countries around the world. What’s more, virtually all EU claimants either withdraw or abandon their claims. I repeat, withdraw or abandon their claims. That is a decision that they make, that they do not need our protection following their claim, or they go on to have their claims rejected by the fair and independent Immigration and Refugee Board of Canada.
>
> Of the total number of asylum claims filed by EU nationals around the world, over 80% were filed in Canada, even though EU nationals again have mobility rights within 27-member states and visa-free access to dozens of countries around the world, and yet, for some peculiar reason, 80% came to Canada. I understand fewer than one percent went, for example, to Australia and the United States, countries in which they have visa-free access and which, of course, have their own robust traditions of asylum.
>
> The majority of EU claimants do not appear for their hearing at the Immigration and Refugee Board, as they withdraw or abandon their own claims. In fact, well over 90% of all EU asylum claimants were rejected last year, and since we granted Hungary its visa exemption in the spring of 2008, we’ve seen some 6,000 Hungarian asylum claims finalized, of which about 62% were abandoned or withdrawn by the claimants themselves, and about 33% of which were rejected by the fair Immigration and Refugee Board, meaning that we get 98% of the worldwide claims from that one country and virtually none of them tum out to be well-founded.

[206] The applicants say Hungarian nationals whose claims are rejected on the merits can now be deported without a PRRA even if almost three years have passed since the I.R.B. last assessed their risk. This is so, according to the applicants, even though nationals from countries with lower refugee acceptance rates receive their PRRA assessment after only 12 months. The applicants point out that, in 2014, I.R.B. members approved 57.3 percent of Hungarian claims. That acceptance rate was higher than that for non-DCO countries such as Angola (44.4 percent), Burundi (54.2 percent), China (52.7 percent), Democratic Republic of the Congo (46.7 percent), Haiti (47.4 percent), Jamaica (54.1 percent), Lebanon (47.6 percent), Nigeria (54.3 percent), and Sierra Leone (50 percent).

[207] In the applicants’ view, it is evident that the 36-month PRRA bar in paragraph 112(2)(b.1) of the IRPA was explicitly based on stereotypes about the merits of claims

by DCO nationals and their motivations. Instead of using a surgical tool to target non-meritorious claims, such as an extended PRRA bar for refugee claims found to be manifestly unfounded or having no credible basis, Parliament instead chose to use nationality as a substitute. And, in doing so, the applicants say it denied a benefit and imposed additional burdens on a whole group based on their supposed national traits as opposed to the merits of their claims. According to the applicants, Parliament cannot do this without running afoul of the protection of subsection 15(1) of the Charter.

[208] In summary, the applicants state that the 36-month PRRA bar for DCO nationals: (i) had the effect of targeting an already vulnerable and historically disadvantaged group; (ii) employed stereotypical and prejudicial assumptions about the merits of DCO claims and why they were unsuccessful; and (iii) resulted in the differential treatment of DCO nationals in a manner that denied them a statutory benefit and imposed additional and onerous burdens on them. In the applicants' view, this bar is discriminatory, and the second step of the subsection 15(1) analysis is satisfied.

[209] The applicants say the Court need not reach this determination on its own. They reference *Canadian Doctors* and *Y.Z.*, where this Court concluded that the differential treatment of DCO nationals in Canada's refugee system was discriminatory and, thus, in breach of subsection 15(1) of the Charter. They say the analysis in these judgments applies equally to the continued denial of a timely PRRA for a DCO national based solely on their nationality where more than a year has elapsed since refusal of their claim by the I.R.B.

[210] According to the applicants, the underlying principle set out in *Y.Z.* and *Canadian Doctors* is that Parliament's decision to treat DCO nationals differently from all other claimants was arbitrary, hurtful, and prejudicial. In the applicants' view, this is no less so in the PRRA context. Deporting DCO nationals without a further risk assessment until after 36 months have passed, when non-DCO nationals are entitled to a further risk assessment after only 12 months, is, the applicants conclude, discriminatory and an infringement of subsection 15(1) of the Charter.

B. *The Respondent's Submissions*

[211] Contrary to the applicants' assertions, the respondent maintains that paragraph 112(2)(b.1) of the IRPA does not draw a distinction based on nationality but, rather, on the conditions existing in a given country. According to the respondent, such a distinction is not prohibited and does not perpetuate prejudice or stereotyping on the grounds prescribed in subsection 15(1) of the Charter. The cases relied upon by the applicants to demonstrate otherwise are not dispositive.

[212] The respondent says the test under section 15 asks whether the impugned provision draws distinctions on prohibited grounds; and if so, whether those distinctions are substantively discriminatory by perpetuating prejudice or stereotyping. According to the respondent, the applicants must establish, on a balance of probabilities, that: (a) the law creates a distinction based on an enumerated or analogous ground: and (b) the effect of the distinction is discriminatory.

[213] The focus of the section 15 test is, in the respondent's view, on the effect of a provision on the prohibited grounds. The respondent says that, while Ministerial statements as to the motivation behind a provision may inform the background, they are not determinative of the existence of discrimination. According to the respondent, the same is true of other examples of historical discrimination and each Charter challenge must be assessed on its own merits.

(1) Designation criteria based on country conditions are neither enumerated nor analogous grounds

[214] The respondent says DCOs are countries that respect human rights, offer state protection, and normally do not produce refugees. According to the respondent, the quantitative triggers to designate a DCO turn on a statistical evaluation of how claims from those countries are assessed, while the qualitative triggers examine whether the country has an independent judicial system, affords democratic rights and freedoms guaranteed by mechanisms for redress, and that civil society organizations exist.

[215] Once a country has met either trigger, the respondent notes that IRCC undertakes a thorough review to assess the country's human rights record, state protection, and recourse mechanisms. The respondent further notes that a DCO designation attaches to a country and not specifically to ethnic groups in various regions of different countries. According to the respondent, neither the qualitative nor quantitative criteria for designation consider, let alone turn on, the ground of national origin, and the country condition factors considered in assessing the designation do not turn on the ground of national origin.

[216] In the respondent's view, the applicants fail to demonstrate that the DCO regime is designed to exclude Roma claimants. The respondent says Hungarians are treated identically to all other nationals of DCOs based on sound qualitative and quantitative evidence and data. Although the Roma of Hungary are subject to the rules governing DCOs along with all other DCO nationals, the respondent notes there are other nations with Roma populations which are not DCOs and the distinction these claimants face is not a result of being Roma.

[217] The respondent contends that the applicants presume that national origin includes nationality, and that they have not established any connection between the DCO designation scheme and national origin. According to the respondent, the distinction between DCO and non-DCO nations is not nationality but, rather, the country conditions that exist at any point in time. No country is ineligible in principle from being designated as a DCO, the respondent says, and no country is immune from losing DCO status.

[218] In the respondent's view, everything turns on country conditions, not nationality. According to the respondent, the jurisprudence supports the position that this type of distinction is not one made on an enumerated or analogous ground. The respondent references *Pawar v. Canada*, 1999 CanLII 8760,169 F.T.R. 152, 67 C.R.R. (2d) 284 (F.C.A.), at paragraphs 3 and 4, where this Court held that the government could

provide different levels of old age security benefits to pensioners of different nationalities where the public pension schemes in their nations could be co-ordinated with Canada's; and also *R. v. Finta* (1989), 69 O.R. (2d) 557, 44 C.R.R. 23, 61 D.L.R. (4th) 85, at paragraph 84, where the Ontario High Court noted that distinctions based on geographic loci (i.e. the prevailing conditions in specific locations) are not based on national origin or on any personal characteristics or attributes.

[219] In the respondent's view, the applicants cannot rely on *Y.Z.* and *Canadian Doctors* to assert that these judgments should attract comity from this Court concerning the analysis under the section 15 framework. The respondent says the findings in these decisions that the DCO provisions draw distinctions based on national origin cannot carry much weight. *Y.Z.* did not independently assess the issue but adopted the analysis in *Canadian Doctors*. In *Canadian Doctors*, while Justice Mactavish relied on the prohibition against discrimination based on country of origin in Article 3 of the Convention [*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (Refugee Convention)], she did not consider how this prohibition has been adapted in light of accepted international refugee law concerning SCO regimes which distinguish between claimants based on the type of state protection available in their country.

[220] The respondent says the section 15 analysis in the present applications is different than that in *Y.Z.* and *Canadian Doctors*. According to the respondent, the identification of a DCO is based on the type and quality of state protection in the country, and a longer waiting period for a PRRA strongly corresponds to better state protection in a DCO refugee claimant's country of origin. In the respondent's view, these different contexts change the landscape of the section 15 analysis required in this matter. According to the respondent, the courts have acknowledged that a section 15 analysis is highly contextual, and that each case turns on consideration of the circumstances of the claimant group and the impact of the statutory scheme at issue on them.

(2) <u>No discrimination caused by a 36-month PRRA waiting period</u>

[221] If the Court finds a distinction based on an enumerated or analogous ground, then the respondent submits that a 36-month PRRA waiting period does not perpetuate prejudice or stereotyping. The respondent notes that section 109.1 and paragraph 112(2)(b.1) of the IRPA make no statement regarding claimants based on national origin, and that the only statement these provisions make is concerning objective country conditions vis-à-vis state protection in DCOs. In the respondent's view, when the contextual factors described in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, (1999), 170 D.L.R. (4th) 1, at paragraph 88, are assessed, it is evident these legislative provisions do not have the effect of reinforcing prejudice or stereotypes.

(a) *Degree of correspondence*

[222] According to the respondent, section 109.1 of the IRPA permits, as an initial threshold, the designation of a country based on measurable, well-identified criteria relating to outcomes of claims before the RPD. A high percentage of RPD refusals, or a high rate of claimant withdrawals and abandonments from a given country, is indicative that many claims from that country are non-genuine and not well-founded. The respondent notes that DCO designations are based on objective triggers, followed by thorough country conditions reviews, and the legislation is premised upon informed assessments of objective criteria, not prejudice or stereotypes.

(b) *No perpetuation of pre-existing disadvantage*

[223] The respondent maintains that the regime for DCO designation does not perpetuate any historical disadvantage. According to the respondent, nationals of countries which are not generally considered to produce refugees do not suffer from any historical disadvantage within the meaning of subsection 15(1) of the Charter. A DCO country is selected on the conditions of protection in the country, the respondent says, and those conditions are not a historical marker of discrimination.

[224] The respondent claims that the means chosen to streamline the refugee determination system corresponds to the needs of those affected. The respondent says the system limits access to a post-claim risk assessment based on a thorough and objective assessment of the domestic protection available in the country of origin, while maintaining avenues to access an individualized assessment of risk if need be.

[225] In the respondent's view, the applicants' comparison between DCO and non-DCO nationals is faulty. Their analysis of comparative disadvantage narrowly considers two different processes: the PRRA and the deferral processes. According to the respondent, a DCO claimant's removal from Canada during the 36-month waiting period is comparable to a non-DCO claimant's removal from Canada during the 12-month waiting period. Comparatively, the respondent claims, there is no disadvantage to a DCO claimant.

[226] The respondent says the applicants' argument, that non-DCO nationals are advantaged by having access to both a PRRA and a request for deferral, is not valid because it is based on an incorrect assumption about the purpose of a PRRA and the basis for the PRRA waiting period. According to the respondent, the purpose of a PRRA is to assess only new risk developments which have occurred since rejection of the refugee claim when the passage of time may require a fresh assessment. In the respondent's view, a PRRA application cannot, and must not, be used as an appeal or reconsideration of an I.R.B. decision rejecting a refugee claim. The respondent contends that access to a PRRA should be predicated on the sufficiency of state protection available in the country of reference, and that the timing of the next risk assessment should be based on access to state protection for the claimant involved.

[227] The individual applicants are not, in the respondent's view, disadvantaged by having the deferral process as their only recourse to a risk assessment before expiration of the 36-month waiting period. According to the respondent, the deferral process is not designed to be equivalent to a PRRA but to provide an avenue of access to an updated risk assessment when one is required. In this case, the respondent notes the option of a deferral request was clearly not disadvantageous as all the individual applicants made extensive and voluminous requests to defer and then sought judicial review of their negative deferral decisions to obtain a stay of removal.

[228] The respondent claims the applicants have not demonstrated that the standard of proof used by inland enforcement officers, in determining whether there is risk, is incorrect. The respondent says a balance of probabilities standard is the default standard of proof and that standard also applies under sections 96 and 97 of the IRPA. According to the respondent, the need for access to a PRRA can be accommodated by a waiver of the PRRA waiting period, and DCO nationals can also seek a stay of their removal from the Federal Court.

[229] The respondent maintains that the equality guarantee is not about an assessment of relative advantages but inquiring as to whether any disadvantage perpetuates discrimination. The respondent says denial of a benefit does not always cause comparative disadvantage, and in certain instances distinctions in the law and its effect do not always amount to discrimination. Parity of access is not required, the respondent claims, when distinctions require different treatment, and claimants from countries with well-honed state protection such as DCOs do not require access to a subsequent risk assessment as early as those from non-DCOs.

[230] In the respondent's view, the applicants incorrectly allege that the DCO designation and the 36-month PRRA waiting period create a presumption that claimants from DCO countries are making unfounded claims and that such a presumption disadvantages them. According to the respondent, the objective triggers used for designation are unrelated to any specific ethnic group or national origin grounds and are based on an assessment of the state protection apparatus of each country involved, followed by a more comprehensive assessment of the prevailing human rights conditions in these countries. None of this, the respondent says, turns on any prejudice or stereotype related to a country or ethnicity. The respondent further says the applicants have not established that the lack of access to a PRRA for 36 months has a disproportionate effect on any group of refugee claimants.

(c) *Roma claimants are not historically disadvantaged within the Canadian asylum system*

[231] The respondent claims there is no evidence to support the contention that Hungarian or Roma asylum seekers are disadvantaged compared to other asylum seekers in Canada. The applicants' contentions are inconsistent with the facts, according to the respondent, and the evidence shows that Canada has assessed thousands of claims made by Roma asylum seekers. The respondent says these claims

were assessed on their merits and many claims were accepted as well-founded claims for protection.

[232] According to the respondent, DCO nationals and Roma claimants do not suffer from any historic or pre-existing disadvantage compared to other failed refugee claimants. The respondent says a DCO designation, and the application of the 36-month PRRA waiting period, is premised on country conditions, namely whether the country is safe and does not normally produce refugees. In the respondent's view, nationals of countries that have robust mechanisms for domestic state protection do not suffer from any historical disadvantage within the meaning of section 15 of the Charter.

[233] The applicants have failed, the respondent says, to produce any evidence of any historical disadvantage or prejudice to Roma or Hungarian claimants within the Canadian asylum system. In contrast, the respondent notes that the evidence shows Europeans have historically been among the favoured groups for immigration to Canada, and the DCO list of countries is dominated by European countries which are generally not considered to be refugee-producing countries.

[234] In the respondent's view, the applicants' assertion, that the DCO scheme was designed to specifically target Roma claimants and prevent them from entering Canada, lacks merit. The Roma have diverse nationalities, the respondent notes, and they come to Canada from all parts of the world. The respondent also notes that many countries with large Roma populations are not on the DCO list because they do not meet the triggering criteria. The respondent says the objective qualitative and quantitative triggers utilized in the designation of DCOs does not target Roma claimants.

(d) *Nature of interest affected*

[235] According to the respondent, the interest affected must consider the whole statutory scheme. In the respondent's view, paragraph 112(2)(b.1) of the IRPA draws distinctions based on informed assessments of objective criteria and does not create any disadvantage.

[236] All DCO claimants have an opportunity for a full hearing on the merits of their claim before the RPD, the respondent notes, and they can also access the RAD to have the merits of their claim reassessed, with a possibility of another oral hearing. Any error arising before the RPD or RAD can also be raised, the respondent further notes, on judicial review before this Court. The respondent says DCO claimants who are removed prior to being eligible for a PRRA can have evidence of risk assessed before removal through the deferral process. In the respondent's view, the applicants ignore or minimize the fact that enforcement officers may assess and evaluate the sufficiency of any new evidence of risk and, if warranted, grant a temporary deferral to determine whether an exemption from the 36-month PRRA waiting period should be granted.

[237] The respondent concludes by stating that paragraph 112(2)(b.1) of the IRPA draws no distinction based on national origin or any other prohibited ground, and that even if it did, consideration of the sufficiency of state protection in the country of origin

on which such distinctions are drawn does not reinforce any prejudice or stereotype on the basis of national origin.

C. *Analysis*

(1) Introduction

[238] Section 15 of the Charter provides as follows:

> Equality before and under law and equal protection and benefit of law
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> Affirmative action programs
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[239] It is instructive at the outset of considering whether paragraph 112(2)(b.1) is inconsistent with subsection 15(1) of the Charter to look to the Supreme Court's recent jurisprudence concerning this subsection.

[240] In *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 (*Alliance*), Justice Abella (speaking for the majority) stated [at paragraph 25] that:

> Since *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court has emphasized substantive equality as the engine for the s. 15 analysis [citations omitted]. The test for a *prima facie* violation of s. 15 proceeds in two stages: Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? If so, does the law impose "burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating … disadvantage" (*Taypotat*, at paras. 19-20).

[241] She then observed [at paragraph 26] that:

> The first step of the s. 15(1) analysis is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases. Rather, its purpose is to ensure that s. 15(1) of the *Charter* is accessible to those whom it was designed to protect. The "distinction" stage of the analysis should only bar claims that are not "intended to be prohibited by the *Charter*" because they are not based on enumerated or analogous grounds — which are "constant markers of suspect decision making or potential discrimination" [citations omitted]. The purpose, in other words, is to exclude claims that have "nothing to do with substantive equality" (*Taypotat*, at para. 19, quoting Lynn Smith and William Black, "The Equality Rights" (2013), 62 *S.C.L.R.* (2d) 301, at p. 336). For that reason it is not appropriate, at the first step, to require consideration of other factors — including discriminatory impact, which should be addressed squarely at the second stage of the analysis. The focus must remain on the *grounds* of the distinction.

[242] Justice Abella further observed [at paragraph 28] that:

> At the second step of the s. 15(1) test, as this Court said in *Kapp* (at paras. 23-24) and *Withler* (at para. 66), it is not necessary or desirable to apply a step-by-step consideration of the factors set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, and no case since *Kapp* has applied one. The focus is not on "whether a discriminatory attitude exists", or on whether a distinction "perpetuates negative attitudes" about a disadvantaged group, but rather on the discriminatory *impact* of the distinction (*Quebec v. A*, at paras. 327 and 330 (emphasis deleted)).

[243] In view of this guidance, I now turn to consider whether the applicants have established that paragraph 112(2)(b.1) of the IRPA infringes subsection 15(1) of the Charter.

(2) Does paragraph 112(2)(b.1) create a distinction based on an enumerated or analogous ground?

[244] The first question is whether the differential treatment as to when a DCO claimant and a non-DCO claimant can apply for a PRRA constitutes a distinction based on an enumerated or analogous ground of discrimination.

[245] This Court has previously determined in *Canadian Doctors* and *Y.Z.* that the differential treatment of DCO nationals vis-à-vis non-DCO nationals constitutes a distinction based on national origin for the purposes of subsection 15(1) of the Charter. I agree with the interpretation of the words "'national origin'" adopted in *Canadian Doctors*, where Justice Mactavish stated that the reference to "'national origin'" in subsection 15(1) encompasses: "a prohibition on discrimination between classes of non-citizens based upon their country of origin … that is also consistent with the provisions of the Refugee Convention, Article 3 of which prohibits discrimination against refugees based upon their country of origin" (paragraph 768).

[246] This differential treatment in paragraph 112(2)(b.1) is clearly a distinction based on the national origin of a refugee claimant. If the claimant comes from one of the countries designated under subsection 109.1(1) of the IRPA, he or she will be without the potential benefit of a PRRA until 36 months have passed since their claim for refugee protection was last rejected or determined to be withdrawn or abandoned by the I.R.B. In contrast, claimants from non-DCO countries must wait only 12 months. (Parenthetically, it warrants note that a 12-month PRRA bar for all claimants, regardless of their country of origin, was contained in the BRRA in 2010, and was in effect from June 28, 2012, until December 14, 2012, when paragraph 112(2)(b.1) became operative.)

[247] The respondent's argument that the distinction between DCO and non-DCO nations is not nationality but, rather, the country conditions that exist at any point in time, is not persuasive for two reasons.

[248] First, it is not persuasive that the DCO regime is a proxy for safety. In 2014, 57.3 percent of Hungarian claims were accepted at the RPD level; that acceptance rate was

higher than that for non-DCO (i.e., non-safe) countries such as Angola (44.4 percent), Burundi (54.2 percent), China (52.7 percent), Democratic Republic of the Congo (46.7 percent), Haiti (47.4 percent), Jamaica (54.1 percent), Lebanon (47.6 percent), Nigeria (54.3 percent), and Sierra Leone (50 percent). If the DCO regime was a proxy for safe country conditions, then the rate of acceptance would presumably be lower than non-safe countries.

[249] Second, it is not persuasive because whatever qualities any country has when assessing whether it should be designated, the reason a DCO claimant is treated differently is due to the country from which such a claimant originates. This distinction is made without regard to a claimant's personal characteristics or whether that country is in fact safe for *them*.

[250] The fact that a country could conceivably be removed from the list of designated countries in the future does not make a claimant's national origin mutable. All that means is that the Minister could stop drawing distinctions based on national origin in the future, and claimants have no control over when that might be. That is no comfort to claimants affected by that distinction now.

[251] In my view, therefore, the first aspect of the substantive equality test is satisfied by the very wording of paragraph 112(2)(b.1) itself. This paragraph creates two classes of refugee claimants based solely on national origin: those foreign nationals from a DCO who must wait 36 months to access a PRRA, versus those who are not from a DCO who must wait only 12 months. In both cases, as noted above, the months are calculated from when the claim for refugee protection was last rejected or determined to be withdrawn or abandoned by the I.R.B.

(3) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[252] The respondent maintains that a 36-month PRRA waiting period does not perpetuate prejudice or stereotyping, and that section 109.1 and paragraph 112(2)(b.1) of the IRPA make no statement about claimants based on national origin. In the respondent's view, when the contextual factors are assessed it is evident that these legislative provisions do not have the effect of reinforcing prejudice or stereotypes.

[253] I disagree with the respondent in this regard. One of the main aims of the DCO regime, according to Ms. Dikranian, "is to deter abuse of our refugee system by people who come from countries generally considered safe and 'non-refugee producing', while preserving the right of every eligible refugee claimant to have a fair hearing before the IRB". On cross-examination, Ms. Dikranian acknowledged that deterring abuse of the system and "non-genuine claims" was one of the main objectives of the creation of the DCO regime.

[254] The distinction drawn between non-DCO and DCO refugee claimants in paragraph 112(2)(b.1) of the IRPA is discriminatory on its face. In view of the record before the Court (most notably Professor Anderson's affidavit evidence), this distinction,

in my view, serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and “non-refugee producing”. It perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or bogus claimants who only come here to take advantage of Canada’s refugee system and its generosity. The persons directly affected by paragraph 112(2)(b.1) undoubtedly include many claimants who are not abusing the system or making bogus claims.

[255] In *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 (*Withler*), at paragraph 2, the Supreme Court stated that: “The central s. 15(1) concern is substantive, not formal, equality.… At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?”.

[256] In my view, paragraph 112(2)(b.1) of the IRPA deprives refugee claimants from DCO countries of substantive equality vis-à-vis those from non-DCO countries with respect to their access to a PRRA. Expressly imposing a disadvantage based on national origin alone constitutes discrimination (*Withler*, at paragraph 29). This distinction perpetuates the historical disadvantage of undesirable refugee claimants and the stereotype that their fears of persecution or discrimination are less worthy of attention.

[257] In short, I find that paragraph 112(2)(b.1) of the IRPA, insofar as it pertains to DCO nationals, is inconsistent with subsection 15(1) of the Charter. The distinction is apparent on the face of the legislation (*Fraser v. Canada (Attorney General)*, 2018 FCA 223, 299 A.C.W.S. (3d) 536, at paragraph 40). This paragraph draws a clear and discriminatory distinction between refugee claimants from DCO countries and those from non-DCO countries, by denying the former a right to a PRRA until 36 months have elapsed from rejection of their claim, while allowing the latter to apply for a PRRA after only 12 months have so elapsed. This is a denial of substantive equality to claimants from DCO countries based upon the national origin of such claimants.

[258] Lastly, it should be noted before leaving this issue, that no party suggested that the distinction between DCO and non-DCO claimants under paragraph 112(2)(b.1) of the IRPA is ameliorative under subsection 15(2) of the Charter. This aspect of section 15 is not at issue in these applications.

X. If Paragraph 112(2)(b.1) of the IRPA is Inconsistent with Subsection 15(1), Can it be Justified by Section 1 of the Charter?

A. *The Respondent’s Submissions*

[259] The respondent maintains that subsection 15(1) of the Charter has not been breached. But should the Court conclude otherwise, the respondent argues that any infringement is demonstrably justified under section 1 of the Charter.

[260] According to the respondent, a limitation of a Charter right is justified where the infringing provision has a pressing and substantial objective and the means used to

achieve it are proportionate to the limitation or infringement. To satisfy the requirements of proportionality, the respondent says the state must demonstrate that: (a) the means chosen is rationally connected to the objective; (b) the means minimally impair Charter protected rights; and (c) there must be proportionality: the deleterious effects of the measure must not outweigh the public benefit of the measure.

[261] In the respondent's view, section 1 must be applied in a flexible manner having regard to the policy considerations inherent in the factual and social context of each case; and when complex social and economic policy is at stake, deference is warranted in assessing Parliament's choices.

[262] The respondent says section 1 does not demand that the limit on the right be perfectly calibrated, when judged in hindsight, but only that it be "reasonable" and "demonstrably justified". According to the respondent, when a problem can be remedied in a number of ways, and where the schemes are typically complex and reflect a multitude of overlapping and conflicting interests and legislative concerns, the courts have accepted that the primary responsibility for making the difficult choices involved in public governance falls on the legislature, and that at times it may limit constitutional rights.

(1) Any limit on subsection 15(1) rights is prescribed by law

[263] The respondent claims courts have taken a flexible approach to the "prescribed by law" requirement regarding both form and articulation of a limit on a Charter right. According to the respondent, a limit will be prescribed by law if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operation. The respondent says the DCO scheme easily meets the prescribed by law test because it is set out in legislation, regulations, ministerial orders, and policy.

(2) Legislative objective is pressing and substantial

[264] The respondent maintains that Canada has an obligation to recognize and offer refuge to asylum seekers, and in designing a system to do so it must create an efficient system of affording protection to those most in need, prevent fraud, and maintain the integrity of its border. According to the respondent, before the amendments to the IRPA introducing the DCO regime, analysis of the refugee system demonstrated that there were a number of challenges putting the system at risk: there were long delays before a claim was determined; failed refugee claimants were not removed quickly; and there was duplication in the system since PRRA applications reviewed many of the same risk factors as the RPD.

[265] The 36-month PRRA waiting period was put in place, the respondent says, to help the government meet its pressing and substantial objective of an efficient refugee determination system consistent with Canada's responsibility to maintain the integrity of the system and deter potential abuse. According to the respondent, a longer waiting period for a further risk assessment for persons from democratic countries considered

to be generally non-refugee producing ensures genuine refugee claims are heard more quickly and, ultimately, reduces the application backlog. In the respondent's view, Canada's goals to recognize and offer refuge to asylum seekers, employ an efficient system for affording protection to those most in need, and to deter abuse of the system, are pressing and substantial objectives.

(3) Means used are rationally connected to the objective

[266] According to the respondent, the government needs to demonstrate only that it is reasonable to suppose the limit or prohibition may further the goal of the impugned provision, not that it will do so. In the respondent's view, there is a rational connection between the objective of a timely, effective refugee system and a waiting period before a person becomes eligible for a subsequent assessment of risk; and for nationals of countries with favourable country conditions, a longer waiting period is rationally connected to the objective of affording protection to those who need it most, including those who may be more likely to face an emerging risk of *refoulement* on return.

(4) DCO regime minimally impairs

[267] The respondent says any limit on the rights in issue is reasonably tailored to the pressing and substantial goal advanced to justify the limit. According to the respondent, where the legislature has engaged in mediating between competing social interests, the courts have generally accorded a high level of deference to the legislation. In streamlining the refugee system, the government ensured that there is minimal impairment of DCO refugee claimants' rights. The respondent notes that, although the hearings for DCO claimants are scheduled on a more expedited timeline, they can seek adjournments, request additional time to file evidence, and request re-openings if necessary.

[268] The respondent claims any risk arising from the lack of access to a PRRA for 36 months is mitigated because DCO claimants may apply for an appeal of their claim to the RAD or for leave for judicial review by this Court if that appeal is denied. If they are scheduled for removal while their application for judicial review is pending, DCO claimants may file a motion for a stay of removal, in which the Court considers any alleged error made by the RPD or the RAD and any allegation of irreparable harm upon removal. They may also request a deferral of their removal, in which any new risk may be assessed. The respondent also notes that the Minister may on his own initiative provide early access to a PRRA where circumstances warrant, and that "safeguards" against non-*refoulement* have been developed such that access may be permitted to a PRRA where recent events place all or some of the nationals of a DCO at risk.

[269] While DCO claimants are barred from filing a PRRA application for three years from the date of their last risk assessment, the respondent contends that the effect of this waiting period is minimal. According to the respondent, the DCO regime, like the

SCO policies in Europe, seeks to accelerate the determination of claims from countries with generally recognized human rights standards and the obligation to grant protection in accordance with the Refugee Convention. The respondent notes that free and democratic societies like Germany, the U.K., France, Belgium, Austria and Switzerland have adopted various forms of a SCO policy, and in determining whether a scheme is reasonably minimally impairing, the Court may look to what other countries are doing. In the respondent's view, the DCO scheme falls within a range of reasonable options and the government has met its objective in a way that is minimally impairing.

(5) The means are proportional

[270] In the respondent's view, there is proportionality between the effects of the 36-month PRRA waiting period and the objective of paragraph 112(2)(b.1). The respondent notes that all DCO refugee claimants continue to have their claims fairly and thoroughly assessed by the I.R.B. According to the respondent, paragraph 112(2)(b.1) has the salutary effect of creating an efficient system that affords protection to those most in need in a timely manner while deterring abuse of the system. The respondent says the effect of claimants from generally safe countries having to wait 36 months before a subsequent risk assessment is intended to make the refugee system become more efficient and is proportional.

B. *The Applicants' Submissions*

[271] The applicants say the respondent bears the burden of demonstrating that a law which infringes subsection 15(1) of the Charter is justified under section 1. Even if the respondent can demonstrate a pressing and substantial objective for the discriminatory PRRA bar for DCO claimants, the applicants contend that the discriminatory impact cannot meet the proportionality test under section 1 of the Charter and the minimal impairment branch of the test. According to the applicants, paragraph 112(2)(b.1) of the IRPA, insofar as it singles out DCO nationals for differential, discriminatory treatment, is not a reasonable limit on the right to equality and is not justified in a free and democratic society.

[272] In the applicants' view, the inquiry must focus on the impugned provision alone—the differential PRRA bar for DCO nationals. According to the applicants, justifications and pressing objectives underpinning refugee reform, the DCO regime, or the existence of a PRRA bar in general, are not relevant. The question is whether subjecting DCO nationals to a discriminatory 36-month PRRA bar, rather than the 12-month PRRA bar faced by all other nationals, is demonstrably justified. The applicants reference *Alliance*, where Justice Abella (for the majority) explained [at paragraph 45]:

> ….Where a court finds that a specific legislative provision infringes a *Charter* right, the state's burden is to justify *that limitation*, not the whole legislative scheme. Thus, the "objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144; *R. v. K.R.J.*, [2016] 1 S.C.R. 906, at para. 62). [Emphasis in original.]

(1) Pressing and substantial objectives

[273] The applicants dissect the respondent's claim that: "Canada's goals to recognize and offer refuge to asylum seekers, employ an efficient system for affording protection to those that are most in need, and to deter abuse of the system are pressing and substantial objectives". In the applicants' view, the objective of offering refuge to asylum seekers is too broad and lacks enough precision for section 1 justification purposes. The applicants argue that, while Canada may have had a pressing and substantial objective in enacting the BRRA and PCISA reforms, these must be separated from the objective of the specific provision in question. The applicants say offering refuge to asylum seekers is an objective underlying the IRPA, but this is clearly not the objective of denying nationals from DCOs access to a PRRA for two years more than non-DCO nationals.

[274] According to the applicants, the second stated objective—administrative efficiency—is generally not a sufficiently pressing and substantial objective to justify the violation of a Charter right. As to the third stated objective—deterring abuse—the applicants concede that, while this is a pressing and substantial objective generally, there is no rational connection between this objective and the differential PRRA bar DCO nationals face.

(2) No rational connection

[275] The applicants contend that there is no rational connection between any of the three objectives as stated by the respondent and the differential PRRA bar. It is important to note, the applicants say, that the question before the Court does not concern whether the 12-month PRRA bar, to which all unsuccessful refugee claimants are subject, is rationally connected to the government's aims; rather, it concerns whether imposing an additional and discriminatory 24-month bar on only DCO nationals is rationally connected. The applicants acknowledge that, while some of the objectives stated by the respondent could in theory be rationally connected to the 12-month PRRA bar, there is no similar logical connection with an extended PRRA bar solely for DCO nationals.

[276] Even if offering refuge to asylum seekers were to be accepted as an appropriate objective for the differential PRRA bar, the applicants say the respondent has not demonstrated how denying a subsequent risk assessment to any failed claimant, let alone DCO nationals, is rationally connected to the objective of recognizing and offering refuge to asylum seekers. According to the applicants, it works in precisely the opposite direction and would rationally warrant unlimited risk assessments rather than the denial of one to a specific group. In the applicants' view, there is no rational connection between the differential access to a PRRA and the efficiencies which the respondent contends result from this discriminatory measure.

[277] As to the respondent's claim that requiring DCO nationals to wait longer for a subsequent risk assessment ensures that genuine refugee claims are heard more quickly and reduces the application backlog, the applicants retort that differential access

to a PRRA assessment has absolutely no bearing whatsoever on—and therefore no rational connection to—whether genuine refugee claims are heard more quickly by the RPD at the front end. According to the applicants, the differential PRRA bar has no impact on any backlog associated with the adjudication of PRRA applications and denying DCO nationals access to a PRRA for 36 months, as opposed to 12 months, is entirely unnecessary—and therefore not rationally connected—to ensure efficient removals and the reduction of any PRRA backlog.

[278] The applicants say there is also no rational connection between deterring abuse and the differential PRRA bar. They note that the respondent has led no evidence whatsoever to establish that the inability to submit a PRRA application between 12 and 36 months after a negative refugee claim was serving as a pull factor for DCO nationals to come to Canada to advance fraudulent claims or to deter others from doing so.

[279] In the applicants' view, the 36-month PRRA bar—in a context where all failed refugee claimants are already subject to a 12-month bar—is not needed to ensure the efficient removal of DCO nationals; it does not impact the adjudication of claims by the I.R.B., does not deter abuse, and has no impact on a backlog of PRRA applications. According to the applicants, there is no rational basis on which to infer that the differential PRRA bar deters abuse any more than a non-discriminatory, general 12-month bar would.

(3) The impairment is not minimal

[280] The applicants claim the respondent's attempt to justify the government's violation of the equality rights of DCO nationals fails at the minimal impairment stage of the section 1 analysis. In the applicants' view, there is no basis for bestowing a measure of deference to the government's choice of measures. The applicants say the decision to impose a discriminatory 36-month PRRA bar was not rooted in complex social science evidence, nor did it reflect a difficult balancing exercise best left to the legislature.

[281] Even accepting for the purpose of argument the objectives asserted by the respondent, the applicants contend there were significantly less rights-impairing alternatives available to achieve those objectives. According to the applicants, if the government was interested in deterring abuse from fraudulent claimants by delaying access to a further risk assessment, it could have relied on existing provisions to target such claimants in a surgical manner. The applicants say this objective could have been achieved by restricting the extended PRRA bar to those claimants whose claims are found to have no credible basis or to be manifestly unfounded, without the need to differentiate between claimants based on nationality.

[282] The respondent's reasoning that the discriminatory impact of the differential PRRA bar is somehow mitigated by alternative remedies available to DCO nationals at risk, namely deferrals and stay motions, are, in the applicants' view, procedurally, financially, and psychologically more taxing on DCO nationals and provide less certain protection against *refoulement* for genuine claimants. According to the applicants, the

possibility of a Ministerial exemption from the PRRA bar is illusory; it has never been used in relation to a DCO claimant, and since it is available with respect to any country it does nothing to reduce the discriminatory impact of the differential PRRA bar.

(4) Proportionality

[283] In the applicants' view, there is no evidence before the Court to demonstrate the alleged salutary benefits of the differential PRRA bar. The applicants say the only evidence concerns the difference in PRRA applications between the period when all failed claimants had an automatic right to a PRRA and the subsequent imposition of PRRA time bars for all failed claimants. According to the applicants, there is no disaggregated evidence to establish a saving or efficiency or deterrence of abuse caused by imposing an additional 24-month PRRA bar on only DCO nationals.

[284] The applicants say the government in this case has failed to put forward any evidence directly connecting the differential PRRA bar to any salutary benefit, and therefore the respondent's section 1 arguments must fail.

C. *Analysis*

[285] Section 1 of the Charter provides that:

> Rights and freedoms in Canada
>
> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[286] The test to determine whether a Charter infringement can be demonstrably justified emanates from the Supreme Court's seminal decision in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 (QL) (*Oakes*), where Chief Justice Dickson [as he then was], speaking for the Court, stated that [at pages 138–139 of S.C.R; paragraphs 69–70 of QL]:

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

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

[287] More recently, in *Frank v. Canada (Attorney General)*, 2019 SCC 1, 428 D.L.R. (4th) 451, the Supreme Court had occasion to reiterate the *Oakes* test. Speaking for the majority, Chief Justice Wagner stated [at paragraphs 38–39] that:

> Two central criteria must be met for a limit on a *Charter* right to be justified under s. 1. First, the objective of the measure must be pressing and substantial in order to justify a limit on a *Charter* right. This is a threshold requirement, which is analyzed without considering the scope of the infringement, the means employed or the effects of the measure [citation omitted]. Second, the means by which the objective is furthered must be proportionate. The proportionality inquiry comprises three components: (i) rational connection to the objective, (ii) minimal impairment of the right and (iii) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective [citations omitted]. The proportionality inquiry is both normative and contextual, and requires that courts balance the interests of society with those of individuals and groups [citations omitted].
>
> The onus in the s. 1 inquiry is on the party seeking to uphold the limit, that is, in the case at bar, the AGC (*Oakes*, at pp. 136-37). To discharge this burden, the AGC must satisfy the civil standard of proof on a balance of probabilities [citations omitted].

[288] Thus, the central question is whether the impact of paragraph 112(2)(b.1) of the IRPA on the rights of DCO claimants vis-à-vis non-DCO claimants is proportionate to the pressing and substantial objectives of this paragraph.

[289] I agree with the respondent that denial of a PRRA for a DCO claimant until 36 months have passed since final determination of their refugee claim, as embodied in paragraph 112(2)(b.1), is "prescribed by law" and, therefore, section 1 of the Charter is engaged.

[290] I also agree with the respondent that Canada had a pressing and substantial objective in effecting the reforms in the BRRA and the PCISA. When the BRRA was introduced, the I.R.B.'s resources were strained and overburdened, according to Ms. Dikranian, with a backlog of over 60 000 unheard refugee claims; this backlog meant there was about a 19-month waiting time between a person's claim for refugee protection and when they received a decision by the RPD. Since the DCO regime was put into place, Ms. Dikranian says the overall number of claims from DCO countries has been reduced. She claims the DCO policy has been effective in deterring unfounded claims, since overall acceptance rates have increased from 42 percent in 2012 to 66 percent in 2014; and it has reduced the number of PRRA applications from 7 682 in 2007 to 2 059 in 2016.

[291] That said, the “objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified” (emphasis in original) (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, (1995), 127 D.L.R. (4th) 1, at paragraph 144). The objective of paragraph 112(2)(b.1) is part of the overall objectives of the reforms effected by the BRRA and the PCISA. According to Ms. Dikranian:

> 5. There was a significant backlog of refugee claims and it was taking too long for refugee claimants to have their claims scheduled and heard by the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board (“IRB”). It was also taking too long for failed refugee claimants to be removed from Canada.
>
> 6. The system was strained and over-burdened. For many years, there had been a “backlog” at the IRB consisting of refugee claims that had been found eligible and thus referred to the IRB but were awaiting RPD hearings. In 2009, before the *Balanced Refugee Reform Act* (BRRA) was introduced, the IRB had a “backlog” of over 60,000 unheard refugee claims. Prior to the reforms, the average waiting time between when a person’s claim for refugee protection in Canada was received and a decision by the Refugee Protection Division (“RPD”) of the IRB was about 19 months. …
>
> 7. Prior to the reforms, failed refugee claimants had access to multiple layers of recourse, in addition to judicial review, available to them prolonging their stay in Canada such as submitting PRRA and Humanitarian and Compassionate applications. The result was delays in removal where it took, on average, 4.5 years from the initial claim until removal of a failed asylum claimant….
>
> 8. Long processing times and delays in removal made the asylum system vulnerable to misuse by those seeking to gain access to Canada. Long processing times also delay providing protection to those who need it. Making the system timelier was necessary to help address the growing backlog and deter non-genuine claims.
>
> 9. … one of the main goals of these reforms was to shorten the entire process, from the making of a refugee claim, to either: (a) a positive refugee decision granting protection in Canada, or (b) a negative refugee decision leading to removal.
>
> 10.One of the objectives of the reforms was to speed up the processing of all claimants, with expedited processing for nationals of DCOs. A faster process deters the making of unfounded claims to remain in Canada and provides for timelier protection to those who need it.

[292] Even if it may have been reasonable to suppose that denying a PRRA to a DCO national for 24 months more than a non-DCO national might further these objectives and be rationally connected to them, it cannot be said that paragraph 112(2)(b.1) is minimally impairing.

[293] It is true that every failed refugee claimant is entitled to a PRAA. It is also true that subsection 112(2.1) of the IRPA and section 160.1 of the Regulations permit the Minister to exempt nationals of a country or a part of a country, or a class of nationals from the PRRA bar, if a sudden and significant change could substantially increase personalized risk to a specific population of people. According to the respondent, foreign nationals facing a late-developing risk concern may also request a deferral of

removal. These "safeguards" cannot, however, justify the fact that some failed refugee claimants can, and others cannot, apply for a PRRA after 12 months have elapsed since their last risk assessment. I disagree with the respondent that any risk of *refoulement* from the delayed access to a PRRA for DCO nationals is mitigated by these avenues open to DCO claimants.

[294] Assessing whether an impugned law minimally impairs a Charter right requires the Court to ask whether Parliament could have designed a law that infringes rights to a lesser extent and consider if there are reasonable alternatives (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paragraph 126). The Supreme Court has noted that, in making this assessment, "the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at paragraph 53).

[295] In my view, the respondent has not proven, on a balance of probabilities, that denying a PRRA to a DCO national for 24 months more than a non-DCO national is the least drastic means by which the government could satisfy its objectives. Inasmuch as one of the goals of the reforms effected by the BRRA and the PCISA was to deter abusive or unfounded claims, this could have been achieved, in my view, by restricting the 36-month PRRA bar to any claimant, regardless of the country of origin, whose claim is determined to be manifestly unfounded under section 107.1 of the IRPA or where there is no credible basis for the claim under subsection 107(2).

[296] The respondent has supplied no evidence to prove that paragraph 112(2)(b.1) has any additional deterrent effect. It was not necessary, in my view, for Parliament to differentiate between DCO and non-DCO claimants when imposing a restriction on when a failed refugee claimant could access a PRRA. Timely access to a PRRA is a significant benefit for failed refugee claimants and delaying this access to some claimants based on their country of origin impairs their right to equality. Those DCO nationals targeted for the delay created by paragraph 112(2)(b.1) suffer the effects of discrimination for the period of the delay (see *Centrale des syndicats*, at paragraph 31).

[297] Denying nationals from DCOs access to a PRRA for 24 months longer than non-DCO nationals is not, in my view, proportional to the government's objectives. This is an inequality that is disproportionate and overbroad and cannot be saved by section 1 of the Charter.

XI. If Paragraph 110(2)(d.1) of the IRPA is Unconstitutional, what is an Appropriate Remedy?

[298] The applicants request that these applications for judicial review be granted.

[299] However, because all the individual applicants have since become PRRA-eligible following commencement of this litigation, they do not request an order remitting their underlying deferral decisions for redetermination. Instead, they are requesting a

declaration pursuant to section 52 of the *Constitution Act, 1982*, that paragraph 112(2)(b.1) of the IRPA, insofar as it explicitly pertains to DCO nationals, namely the clause “or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months”, is of no force and effect, being contrary to the requirements of subsection 15(1) of the Charter.

[300] The applicants say it is within the Court’s discretion to issue a declaration as a remedy on an application for judicial review as opposed to an action. They reference the Supreme Court’s decision in *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, where Justice Wagner (as he then was) remarked [at paragraph 81] that:

> A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available: [citations omitted]. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: [citations omitted].

[301] For the reasons set forth above, I will issue the requested declaration. In particular, the Court declares pursuant to subsection 52(1) of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], that:

- paragraph 112(2)(b.1) of the IRPA is inconsistent with subsection 15(1) of the Charter insofar as it concerns nationals of countries designated under subsection 109.1(1) of the IRPA; and the following words—“or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months”, —in paragraph 112(2)(b.1) shall have no force or effect with respect to such nationals.

[302] At the hearing of these applications, the respondent requested that if the Court were to issue a declaration that paragraph 112(2)(b.1) infringes subsection 15(2) of the Charter insofar as it concerns DCO nationals, that its effect be suspended as was the case in *Canadian Doctors*.

[303] I refuse to grant the respondent’s request that the effect of the declaration as stated above be suspended.

[304] In *Schachter v. Canada*, [1992] 2 S.C.R. 679, (1992), 93 D.L.R. (4th) 1 (*Schachter*), at page 719, the Supreme Court suggested that suspending a declaration of invalidity is appropriate when an immediate declaration would pose a danger to the public, threaten the rule of law, or deprive deserving individuals of benefits without helping the people whose rights were violated. None of those criteria apply in this case.

[305] In *Canadian Doctors*, the declaration of invalidity was suspended for four months because a legislative and policy void and a certain degree of administrative disruption would result from the decision, and the Court was concerned that this disruption could potentially exacerbate the harm suffered by those seeking protection.

[306] Occasionally though, the Supreme Court has suspended a declaration of invalidity where the *Schachter* conditions were arguably not present in order to give the legislature time to design an appropriate remedy (see, e.g., *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, (1999),173 D.L.R. (4th) 1, at paragraphs 116–121; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Vol. 2 (Toronto: Thomson/Carswell, 2007) (loose-leaf updated to 2014), c. 40, at section 40.1(d)). That rationale is most persuasive, however, when there are many ways the legislature could conceivably fix the problem. That is not the case here.

[307] In this case, an immediate declaration of invalidity means only that DCO nationals would now have access to a PRRA on the same basis as non-DCO nationals. Every day that paragraph 112(2)(b.1) is in force is a day that claimants from DCOs are not “equal before and under the law” and will be deprived of their right “to the equal protection and equal benefit of the law without discrimination”. In my view, rectifying this inequality as soon as possible outweighs any administrative burdens to the government.

XII. What Questions Should Be Certified?

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

[309] The applicants proposed the following question be certified:

> Does subsection 112(2) (b.1) of the *IRPA* infringe s.15(1) of the *Charter* in a manner that is not justified under s.1 and, if so, what relief should the Court give therefor?

[310] The respondent suggested the following question should be certified:

> Does paragraph 112(2) (b.1) of the Immigration and Refugee Protection Act, SC 2001, c 27 infringe subsection 15(1) of the 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], in a manner that is not justified under section 1 of the Charter and, if so, what relief should the Court give therefor?

[311] In *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674, 419 D.L.R. (4th) 566, the Federal Court of Appeal reiterated the test for certification of a question pursuant to paragraph 74(d) of the IRPA [at paragraph 46]:

> This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229, at paragraph 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211, at paragraph 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186, at

paragraphs 15, 35).

[312] It is appropriate to certify a question in this case. However, the questions as proposed by the parties are somewhat overbroad, in that they do not restrict the infringement of subsection 15(1) by paragraph 112(2)(b.1) insofar as it concerns DCO nationals.

[313] Accordingly, the following questions are certified pursuant to paragraph 74(d) of the IRPA:

1. Is paragraph 112(2)(b.1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, inconsistent with subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (*Charter*), insofar as this paragraph pertains to nationals of countries designated under subsection 109.1(1) of the *Immigration and Refugee Protection Act*?

2. If so, is paragraph 112(2)(b.1) a reasonable limit prescribed by law that can be demonstrably justified under section 1 of the Charter?

XIII. Conclusion

[314] In the result, the applicants' applications for judicial review are granted.

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

JUDGMENT in IMM-3855-15, IMM-3838-15,

IMM-591-16, IMM-3515-16 and IMM-1552-17

THIS COURT'S JUDGMENT is that:

1. the applications for judicial review are granted;

2. paragraph 112(2)(b.1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is declared to be inconsistent with subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], insofar as it concerns nationals of countries designated pursuant to subsection 109.1(1) of the *Immigration and Refugee Protection Act*; and the following words—"or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months",—in paragraph 112(2)(b.1) shall have no force or effect with respect to such nationals;

3. there shall be no award of costs; and

4. the following questions are certified pursuant to paragraph 74(d) of the *Immigration and Refugee Protection Act*:

   i. Is paragraph 112(2)(b.1) of the *Immigration and Refugee Protection Act* inconsistent with subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (*Charter*), insofar as this paragraph pertains to nationals of countries designated under subsection 109.1(1) of the *Immigration and Refugee Protection Act*?

   ii. If so, is paragraph 112(2)(b.1) a reasonable limit prescribed by law that can be demonstrably justified under section 1 of the Charter?