



September 18, 2019

Via email: gina.wilson@canada.ca; catrina.tapley@cic.gc.ca

Gina Wilson
Deputy Minister
Public Safety Canada
269 Laurier Avenue West
Ottawa, ON K1A 0P8

Catrina Tapley
Deputy Minister
Immigration, Refugees and Citizenship Canada
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Ms. Wilson and Ms. Tapley:

Re: Administrative deferral of removal for applicants in the “Spouse/Common-law Partner in Canada” class and applicants for permanent residence on H&C grounds

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to recommend an amendment to Immigration, Refugees and Citizenship Canada and the Canada Border Services Agency’s policy on administrative deferral of removals (ADR) for inadmissible applicants in the Spouse/Common-law Partner in Canada (SCLPC) class (SCLPC Policy).¹ We propose changes to the SCLPC Policy to defer removals until there has been an initial determination on the merits of the case. We also recommend introducing a similar ADR policy for inadmissible individuals who apply for permanent residence in Canada on humanitarian and compassionate (H&C) grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section is comprised of over 1,000 lawyers, practicing in all aspects of immigration law and delivering professional advice and representation in the Canadian immigration system to clients in Canada and abroad.

Current Policies and Practices

Removal of inadmissible individuals from Canada is governed by a regulatory scheme. Section 48 of IRPA requires that immigration officers execute enforceable removal orders as soon as possible. Statutory, regulatory and judicial stays of removals are available under section 50 of IRPA and sections 230-234 of the *Immigration and Refugee Protection Regulations*. Section 233 of the Regulations authorizes stays on H&C grounds or based on public-policy considerations pursuant to section 25 of IRPA for foreign nationals who have applied for permanent residence.

¹ IRCC, [*Policy under A25\(1\) of IRPA to Facilitate Processing in Accordance with the Regulations of the Spouse or Common-law Partner in Canada Class*](#).

IRCC and CBSA apply section 233 to stay removal for an inadmissible in-Canada H&C applicant whose application has received Stage 1 approval on the merits, also known as approval in principle or step-one approval.² Stage 1 approval means there has been a determination that the applicant's circumstances warrant granting an exemption on H&C grounds. IRCC and CBSA have also relied on the public policy aspect of section 233 of the Regulations to stay removals for inadmissible applicants in the SCLPC class as per the SCLPC Policy. A regulatory stay takes effect once a positive Stage 1 decision is made on the SCLPC application (i.e., once IRCC “has received an application which contains evidence that the applicant is married or in a common-law relationship with an eligible sponsor, is living with that sponsor and that the sponsorship submitted is a valid one”).³ The SCLPC Policy also authorizes CBSA to grant a temporary ADR of 60 days for applicants without valid status in Canada who meet certain criteria before a Stage 1 determination on their application.⁴

The CBA Section would support granting ADR for 60 days if Stage 1 decisions were made within 60 days and regulatory stays under section 233 of the Regulations followed immediately. However, for many years, IRCC has not rendered Stage 1 decisions in 60 days. We have experienced wait times of over 12 months before a Stage 1 determination on an SCLPC application. If Stage 1 decisions take more than 60 days, a 60-day deferral does not offer meaningful relief to applicants and their families in Canada. Often IRCC fails to communicate Stage 1 decisions to applicants or their representatives and CBSA in a timely manner. CBSA and IRCC should work together to make a decision within the deferral time granted. Current practices needlessly subject applicants and their families to the emotional and financial hardship of impending separation. Removal steps, deferral requests and stay applications also put an unnecessary strain on the limited resources of the CBSA and Federal Court.

For in-Canada applications for permanent residence on H&C grounds, there are many reports of CBSA refusing to defer removal for inadmissible applicants awaiting Stage 1 determination. CBSA has relied on the H&C processing times posted on IRCC's website – upwards of 30 months⁵ – to argue that a deferral for that long would be contrary to the enforcement officers' mandate under section 48 of IRPA to effect removal “as soon as possible”. CBSA has been reluctant or unwilling to accept first-hand evidence from applicants' counsel and IRCC's own statistical data that Stage 1 decisions on H&C applications are often made within 4-18 months and that the processing times posted on IRCC's website do not differentiate between Stage 1 and final determinations.⁶ Applicants facing removal in these cases, who have meritorious applications in process, are left with only one option—seeking a stay of removal in Federal Court. This process is stressful, costly, and has a low likelihood of success.

Consequences of Removal

In theory, SCLPC and H&C applicants who are removed from Canada before Stage 1 determination may be permitted to return to Canada once there is Stage 1 approval of their case. However, IRCC does not guarantee the Authorization to Return to Canada under section 52 of IRPA (ARC), and takes the position it is not required to re-admit applicants with a positive Stage 1 decision.⁷ According to IRCC data, from 2013-2018, inland H&C applications had an approval rate of 40-60% for applicants who had not been removed

² ENF 10, p. 31; also IRCC's policy on [Humanitarian and compassionate consideration in Canada](#), at Positive Stage 1 assessment approval in principle.

³ *Ibid.*

⁴ [SCLPC Policy](#), at “5(F): “Administrative deferral of removal”.

⁵ The current processing times are stated to be at 32 months: IRCC, [Check Processing Times](#).

⁶ For example, Appendix 1 to this letter shows timelines for Stage 1 decisions released by IRCC in February 2019 in response to an access to information request by Robin Seligman, an immigration lawyer in Toronto.

⁷ IRCC, [Guidelines on processing SCLPC applications](#) at “Applicants who leave Canada before a final decision is made on their application for permanent residence”.

IRCC, [Guidelines on processing H&C applications](#).

from Canada and only 0.6-3.8% for applicants who were removed while their application was pending.⁸ The data suggests that removal before a Stage 1 determination prejudices individuals with inland H&C applications and dramatically reduces their chance of success. Removal from Canada prior to a Stage 1 decision also seriously jeopardizes pending SCLPC applications. These applicants automatically face refusal because they are no longer cohabiting with their spouses in Canada, as required under sections 72(1)(d) and 124(a) of the Regulations.⁹ With their attachment to Canada physically severed by removal, H&C applicants can no longer rely on establishment in Canada as a strong, favourable factor in their application. Once individuals have been removed, it is also more difficult for them to retain counsel in Canada and keep them apprised of their current circumstances and hardships from overseas.

Removal can have enduring and potentially irreversible human and social costs even if a permanent residence application is pending. Spouses and children separated for years face financial, emotional and physical hardships. For example, spousal relationships can disintegrate, and children can lose touch with their parents. Both SCLPC and H&C applicants would need to apply for and obtain an ARC. Processing and adjudicating ARC applications puts an administrative burden on Canadian visa offices abroad and requires resources that would not otherwise be needed.

Recommendation

The CBA Section recommends amending the current SCLPC Policy and establishing new policies pursuant to section 233 of the Regulations specifically to grant an ADR until Stage 1 determination to inadmissible individuals with pending SCLPC and in-Canada H&C applications. We recommend the amended and new policies include the following terms:

- Applicants must give proof of having submitted the SCLPC or H&C application, which could include receipts for application fees, copies of the requisite application forms, or proof of having mailed the application on a particular date.
- Whether the applicant is “removal-ready”, as per CBSA’s determination, does not preclude the applicant’s eligibility.
- Whether the applicant is entitled to a pre-removal risk assessment does not affect their eligibility.
- CBSA is to ascertain with the responsible IRCC office whether the application has received the Stage 1 determination.
- Deferral will not necessarily be granted to applicants who:
 - are inadmissible for security (A34), human or international rights violations (A35), organized criminality (A37), misrepresentation (A40), and criminality defined as “serious” for the purposes of A64(2);¹⁰
 - are excluded by the Refugee Protection Division under Article F of the Geneva Convention;
 - have already benefited from an ADR emanating from an H&C or a SCLPC application, unless the applicant’s circumstances have changed substantially to justify a new deferral;
 - have a warrant outstanding for removal and have not surrendered themselves to CBSA voluntarily after being advised by IRCC that there is a warrant outstanding and they should attend at CBSA to address the warrant; and

⁸ H&C Application Decisions: 2013-2018, access to information request by Richard Kurland, immigration lawyer in Vancouver, available in *Lexbase*, vol. 30, issue 6 June 2019.

⁹ *Supra* note 7. IRCC expressly acknowledges such risk of refusal in its policy regarding SCLPC applications.

¹⁰ See *IRPA* sections 64(1) and 64(2). Definition of “serious criminality” in section 64(2) of IRPA is appropriate, readily available, and fair to apply in the context of removal deferral. If such convictions remove the right of appeal from permanent residents, they are similarly applicable to deny the remedy of deferral to those with in-Canada applications for permanent residence.

- have been previously deported from Canada and have not obtained permission to return.
- The exclusions from “lack of status” under the SCLPC Policy, other than ineligibilities enumerated above, do not apply.¹¹

Our proposal to revise the policy to defer removals for SCLPC and H&C applicants until Stage 1 determination will allow IRCC and CBSA to more effectively allocate resources now used to handle deferral requests, litigate stay motions and applications for judicial review and process ARC applications. Our proposal is also consistent with the IRPA objectives of family reunification, realization of Canada's humanitarian ideals, and attainment of immigration goals through efficient and prompt processing.¹²

The CBA Section appreciates the opportunity to comment on ADRs for SCLPC and H&C applicants with the goal of developing policies that are viable, fair and efficient. We would be pleased to participate in further discussions and offer additional insights.

Yours truly,

(original letter signed by Nadia Sayed for Ravi Jain)

Ravi Jain
Chair, CBA Immigration Law Section

¹¹ [SCLPC Policy](#) at “3. Policy” (“Lack of status”).

¹² [IRPA](#) s. 3 “Objectives – Immigration”; [SCLPC Policy](#) at “1. Purpose”.



Access to Information and Privacy Division
360 Laurier Avenue West
Immigration, Refugees and Citizenship
Ottawa, Ontario
K1A 1L1

FEB 01 2019

A-2018-62154 / BM

Robin L. Seligman
Robin L. Seligman Professional Corp.
603 - 65 St. Clair Avenue East
Toronto, Ontario M4T 2Y3

Dear Robin L. Seligman:

This is further to your request under the *Access to Information Act*, which was received on January 17, 2019, for the following records:

"Please provide the following statistical information from IRCC applications: Processing times for stage 1 approval of humanitarian and compassionate applications processed inside Canada between 2015 and 2018."

The attached records are the closest available in terms of relevance to your request.

Please be advised that the specific information you have requested is excluded from access under the *Access to Information Act* as expressed by s.68(a) of the Act - "published material or material available for purchase by the public" (<http://laws-lois.justice.gc.ca/eng/acts/a-1/page-10.html>).

In our duty to assist, we wish to inform you of another mechanism in place, should you wish to receive immigration data. Regulation 314 of the *Immigration and Refugee Protection Regulations* (<https://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/page-63.html>) allows for the production of customized reports for immigration statistical data that have not been published by the Department. For further information regarding the costs that may be associated with the production of a customized report, as well as the availability of the information you are seeking, please email your request to the following address: statistics-statistiques@cic.gc.ca.

Further information about the *Access to Information Act* can be found at the following web page: <http://laws-lois.justice.gc.ca/eng/acts/a-1/>

Please be advised that you are entitled to submit a complaint regarding the processing of your request to the Information Commissioner within sixty days of the receipt of this notice. The complaint form can be retrieved at: <http://www.oic-ci.gc.ca/eng/lc-cj-logde-complaint-deposer-plainte.aspx>



Immigration, Refugees
and Citizenship Canada

Immigration, Réfugiés
et Citoyenneté Canada

Should you have any questions, please do not hesitate to contact Bruce McDonald by email at the following address: bruce.mcdonald@cic.gc.ca.

Sincerely,

Michelle Dunn
Assistant Director, CSI

PLEASE QUOTE OUR FILE NUMBER IN ANY FOLLOWING CORRESPONDENCE

Humanitarian and Compassionate Eligibility Processing Times* and Average Processing Time from for Applicants

Approved				
Calendar Year	Primary Office**	80th percentile	50th percentile	
2015	Backlog Reduction Office Niagara Falls	12	5	
	Backlog Reduction Office Vancouver	19	5	
	Etobicoke	92	64	
	Montréal BRO	19	10	
	Montreal Immigration	51	34	
	Total	19	7	
2016	Backlog Reduction Office Niagara Falls	12	8	
	Backlog Reduction Office Vancouver	11	6	
	Montréal BRO	17	11	
	Total	14	9	
2017	Backlog Reduction Office Niagara Falls	26	14	
	Backlog Reduction Office Vancouver	X 12	9	
	Montréal BRO	20	11	
	Total	20	10	

Refused				
2015	Backlog Reduction Office Niagara Falls	11	7	
	Backlog Reduction Office Vancouver	9	4	
	Etobicoke	7	5	
	Montréal BRO	19	11	
	Toronto BRO	8	4	
	Total	14	6	
2016	Backlog Reduction Office Niagara Falls	15	11	
	Backlog Reduction Office Vancouver	10	7	
	Etobicoke	10	8	
	Montréal BRO	16	11	
	Toronto BRO	10	7	
	Total	13	8	
2017	Backlog Reduction Office Niagara Falls	25	16	
	Backlog Reduction Office Vancouver	X 12	9	
	Etobicoke	X 12	10	
	Montréal BRO	18	11	
	Toronto BRO	X 13	10	
	Total	14	10	

*Processing times refer to the number of months in which x% of applications were finalized by IRCC for a given year
 **Please note that primary office with less than 10 eligibility decisions rendered are excluded from calculation

Requestor: Statistics
 Data source: CICEDW (EDW) as of May 29, 2018
 Data compiled by: OPP-DART(2018-1087)

Applying from Within Canada (Principal Applicant Country of Residence) 2015 to 2017 (in Months)

Average Processing Time** Approved			
Primary Office**	2015	2016	2017
Backlog Reduction Office Niagara Falls	11	13	23
Backlog Reduction Office Vancouver	17	11	14
Etobicoke	72		
Montréal BRO	15		
Montreal Immigration	35		
Grand Total	15	14	17

Average Processing Time** Refused			
Primary Office**	2015	2016	2017
Backlog Reduction Office Niagara Falls	9	14	22
Backlog Reduction Office Vancouver	9	11	12
Etobicoke	11	11	10
Montréal BRO	14	14	14
Toronto BRO	9	11	14
Grand Total	11	12	14