Federal Court | Cour fédérale

PRACTICE GUIDELINES – IMMIGRATION AND REFUGEE PROCEEDINGS

URGENT STAY MOTIONS FOR REMOVALS FROM CANADA

February 18, 2021

Preamble

These practice guidelines are intended to address two concerns. The first is the failure of some applicants to bring motions for stays of removal as soon as possible. The second is with the form and content of stay motions.

These practice guidelines have been developed by the Court following input from its constituent stakeholders and are intended to clarify the best practices in conduct of urgent stays of removal.

Pursuant to Rule 362(1) of the *Federal Courts Rules*, motions are to be served and filed at least three days before the date set out in the notice for the hearing of the motion. Pursuant to Rule 362(2), the Court may hear a motion on less than three days' notice if all parties consent or if the moving party satisfies the Court of the urgency of the motion. Rule 35(2) permits informal requests for the scheduling of special hearing time and dates for motions.

The Court recognizes that in immigration matters there are circumstances where an applicant has no alternative but to bring a last minute, or urgent, motion to stay their removal from Canada. Such unavoidable urgent stay motions may be necessary, for example, when a direction to report for removal is issued for an imminent removal date, leaving an applicant with little time to retain and instruct counsel and to bring a stay motion.

The Court considers such circumstances to be distinct from those where removal has been anticipated for some time and/or there is sufficient time between the service of a direction to report and the scheduled removal date to permit a stay motion to be set down to be heard on a non-urgent basis. These matters are not inherently urgent because they could be set down to be heard in accordance with Rule 362(1). These may be avoidable last minute stay motions.

Avoidable last minute motions are discouraged. For the reasons this Court has previously indicated, they are not in the interests of justice (see, for example, *Beros v. Canada (Citizenship and Immigration)*, 2019 FC 325; *Khan v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1275 ("*Khan*"); *Ocaya v Canada (Citizenship and Immigration)*, 2019 Canlii 8561 (FC); *Miranda v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1057).

Accordingly, the Court may refuse to hear last-minute stay applications where there is no explanation for the delay in bringing the matter forward (*Khan* at para 11).

Similarly, the filing of extremely voluminous materials in support of an urgent stay or, conversely, materials that do not address the legal test for a stay, may also be contrary to the interests of justice. This is because these practices adversely impact the Court's ability to efficiently conduct the required analysis within the time constraints pertaining to an urgent stay of removal motion.

1. Motions seeking stays of removal should be filed as early as possible

Whenever the circumstances permit, motions are to be served and filed at least three days before the date set out in the notice for the hearing of the motion, in accordance with Rule 362(1) of the *Federal Courts Rules*. This will prevent avoidable urgent stay motions.

In circumstances where a motion for a stay of removal cannot reasonably be brought on at least three days notice, the Court and the respondent shall be alerted, by way of letter from the applicant, of the anticipated urgent motion as soon as the decision to bring a motion is made. That letter shall request a special hearing date pursuant to Rule 35(2), and provide a satisfactory explanation for any delay in bringing on the motion justifying the need for urgency. In addition, the letter must identify the applicant, the date they were informed of their intended removal, the removal date/time, the underlying application for judicial review, the date and time that the motion record will be filed, the proposed hearing dates and times, and any other relevant information.

Failure to provide a satisfactory explanation for the need to file a last minute urgent motion may result in the Court declining to hear the matter.

Duty counsel for the Department of Justice are typically available only until 9:00 p.m. Accordingly, urgent motions filed after 9:00 p.m. for removal early the next day are, in effect, brought on an *ex parte* basis. This practice is strongly discouraged. It should not be expected that the Court will hear such motions in the absence of compelling and unavoidable circumstances. Given the "ex parte" practical nature of such motions, an elevated duty of full and frank disclosure will apply.

The Court recognizes that applicants sometimes make a timely request to the Canada Border Services Agency ("CBSA") seeking to have their scheduled removal deferred, but do not receive a response to their request before they begin to run out of time to access the Court. In such circumstances, an application for judicial review together with a related urgent stay motion premised on an anticipated negative decision will be accepted for filing at all Registries of the Federal Court. Based on past experience, the requested deferral decision is usually received prior to the hearing of the stay motion. However, it is open to applicants to include, in the underlying application for leave and judicial review and the

motion, a summary request for an alternative remedy of *mandamus* in the event that the deferral decision is not issued by CBSA prior to the hearing of the urgent stay motion.

2. Form and Content of Stay Motions

a. The form and content of the notice of motion and the motion record must be in conformity with *Federal Courts Rules.*

b. Related and relevant prior immigration decisions should be provided by the applicant within their motion record (for example, RPD, RAD, PRRA or H&C decisions and past requests for deferral of removal). If such related decisions are not provided, an explanation must be given for the failure to do so.

c. Each party must clearly address the tripartite test (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311; *R. v. Canadian Broadcasting Corp*., 2018 SCC 5) in the context of the alleged facts and their own circumstances. Written submissions must be focused. Irrelevant boilerplate or outdated submissions should be avoided.

d. When bringing an urgent stay, the motion should be considered as a standalone proceeding. As such, everything required by the Court to make its decision should be included in the Motion Record. The Motion Record must also be succinct and sufficiently condensed to permit the motion to be dealt with on an urgent basis. The Motion Record should include only those portions of the application record or other documents that are necessary to support the stay motion, such as specific pages of a country condition document. It is not acceptable to simply state, for example, that the country conditions documents are found at pages 100-250 of the motion record. The Court recognizes that each case is distinct and that, on occasion, the circumstances may be such that it may be necessary to include a larger number of documents in the Motion Record to support the motion of a stay of removal. However, situations in which more than one hundred pages of materials may be required to support a motion for a stay of removal should be considered to be exceptional.

e. A party's written representations submitted in an urgent stay motion should include pinpoint references to the materials in the Motion Record(s) relied on by that party, including by providing relevant page and paragraph numbers.

f. The Court has seen instances where applicants fail to meaningfully address one or more branches of the tripartite test. This includes instances where applicants simply state that they are relying on the submissions made and materials filed in the underlying application for judicial review. In such circumstances, an accompanying affidavit in the stay motion sometimes attaches as an exhibit the whole of the application record, which is often voluminous. The Court has also seen instances

where lengthy and detailed written representations are made which reference a voluminous underlying application record(s) or related proceedings. Such practices do not align with this guideline and are discouraged.

g. The parties should not request the Registry to copy and bring to the Court's attention related files or motions. The Motion Record as filed in the urgent stay motion must speak for itself.

h. The parties should refrain from filing extensive books of authorities in support of an urgent stay. The case law upon which a party relies should be identified in the written representations, which in turn should provide paragraph number citations, hyperlinked if possible. Referenced authorities which are included in the Common List of Authorities found on the Court website shall be deemed to be included in the book of authorities (see Amended Notice and List - Volume 1: Immigration & Refugee Law).

i. While the above guidelines are specific to urgent stays, they are also generally applicable to stay of removal motions that are not made on an urgent basis.